Post colonialism: A court order that attempts to cure the ills of the past in South Africa

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Abstract

South Africa, a country that was once colonized, had deliberate and hateful laws pre-democracy, which discriminated against, and segregated races with the intention to divide and conquer territories through marginalization. A case study emerges within this context, which exposes the racial prejudice that still persists, more than 20 years post-democracy. The article is important because it illustrates the historical injustices that exist based on gender imbalances between men and women. It makes a case for racial prejudice that racial inequalities foster resentment that ultimately prevents social cohesion. The article postulates averments such as, whether the description made in the return of service amounts to unfair discrimination on the basis of race, gender and infringement to dignity. This article critically analyses a South African court judgment in which the presiding Judge made several punitive orders against three deputy-sheriffs acting in their public capacity. It will be argued in the circumstances that this was a bold, brazen and a triumphant decision in addressing the colonial ills of the past in South Africa presenting a cure for the indifference and segregation on the basis of race.

KEYWORDS: South Africa; post-colonialism; dignity; unfair discrimination

Introduction

A case study emerged in South Africa that exposes the conduct of the sheriff's of the court by the description in a return of service, which amounted to racial prejudice (1989, p. 375). This description caused unfair discrimination and infringement of dignity upon the indigenous women that were served with legal documents. This article postulates the aforementioned description in the return of service of the indigenous women, which violates the constitutional principles and ethos by the deliberate differentiation between races. A Judge attempts to remedy this injustice by granting a punitive costs order against the sheriffs for the racial prejudice and the sheriff's conduct that caused indirect harm upon the recipients of the legal documents, on the basis that as this conduct amounts to activating the painful injustices of the past discriminatory laws and practices.

Problem context

The problem context surrounds a case study, which was deliberated by a Judge in South Africa in the High Court. The case dealt with an application for service on the respective

Applicant in relation to a substantive matter before the court. The court did not deal with the merits of the application. Instead, the court, analysed the service of the documents to the recipients, and in particular whether service was proper, and raised an objection with the description of the return of service, which is a document that is printed by the sheriff attesting to the manner of service to the recipient of the application. In lieu of the applicant being absent at the service address of the applicant, it is served on a person 16 years of age that is able to receive the document, and is known as the recipient. The issue is whether the description of the return of service amounted to unfair discrimination and whether the dignity of the recipient/s was impaired. It is the assumption that the description of the return of service was racially prejudicial, given the South African context of abolished racial segregation laws, and the impact of those laws on emotionally affected non-white people, as the non-white races still struggle to obtain equality at the table of privilege, as is clear from the judgment, and that racial prejudice is thus alive and prevalent in the country.

Facts of the case

In *Standard Bank of SA Ltd v Caster Transport CC; In Re: Absa Bank Ltd v Marshman; In Re: Absa Bank Ltd v Zuma* (4 June 2014), Makgoka J delivered a judgment that arose from his discontent regarding the contents of the sheriffs' returns of service in three applications brought before him in the Gauteng Division of the High Court, Pretoria on 22 May 2014. In *Standard Bank of SA Ltd v Caster Transport CC* the relevant return of service stated that service was effected on 'Bongiwe, a domestic helper'. Similarly in *Absa Bank Ltd v Marshman* the return of service referred to 'The Domestic Faith' and in *Absa Bank Ltd v Zuma* to 'Eliza, Domestic worker'. [1] Makgoka J stated that the persons served with the applications were indigenous African women.

He observed further that the deputy-sheriffs failed to describe the women's surnames and marital status in the returns of service. Makgoka J concluded that this conduct was decidedly undignified, demeaning and in clear violation of the right to dignity as contained in section 10 of the Constitution. Makgoka J was of the opinion that the sheriffs simply did not bother to inquire from the recipients as to their surnames or marital status or alternatively that they decided to ignore these details for purposes of the returns of service. [2] This means that the positive or negative conduct by the sheriffs still discriminate unfairly against the African black women.

Makgoka J further stated that he expressed his detestation with this practice and that: 'As a nation, we emerge from a disgraceful and painful past, where an irrational system of institutionalised racism was visited upon indigenous African people, where adult African women and men were contemptuously (and still are, in some instances) referred to as "girls" and "boys". The contents of the returns of service in these matters are reminiscent of that era, and conjure up deeply painful memories for the majority of the citizens of our country. It does not help that in two of the present matters, the deputy-sheriffs who served the documents appear to be white men.' In this regard, Makgoka J also mentioned that, in the *Standard Bank* matter, for example, the same sheriff, had, during May 2013, referred in his return of service to '*Mr Caster, the husband'*. [3] The sheriffs from the different descriptions differentiated on the basis of race, which is not provided in the Sheriff's code nor the rules of court. The description, provided for the role of the person as a wife or husband, but in the case of an African home executive, they were described as their job status, with their name provided, but omitting their surname and a Miss/Mrs description. The Sheriff's conduct according to Judge Makgoka was beyond their powers in this instance and discriminated

between people on the basis of race, which is automatically unfair. Section 36 of the Constitution, is known as the limitation clause, that limits the ambit of rights, if discrimination occurs. In explaining the application of section 36, there must be a rational basis for the discrimination, for example, if there is discrimination on the basis of race, to enforce an affirmative action policy, to ensure that there is appropriate representation of all races in the workplace. This means that section 36 is applicable, because there is a rational basis for the discrimination, as it is based on policy. However, according to Judge Makgoka in this instance section 36 is not applicable because there is no rational basis or connection in law to justify this conduct.

Makgoka J went on to state that the sheriffs perform a critical task in the administration of justice, and thus have a law-abiding duty to treat everyone with dignity, irrespective of their race or social standing. He then emphasised that the sidebar (a bar for advocates that does not have an affiliation to a reputable bar) should also be conscious of its duties, and decline to accept returns of service worded in the manner referred to above. The sheriffs act on the instructions of attorneys' and for that reason, the attorneys have a duty to ensure that returns of service, are properly worded, because 'we are all enjoined to infuse a constitutional ethos'.[4]

The court stated further that it does not matter if the recipients were not aware of the manner in which they were referred to in the returns of service, based on the fact that the deputies (all sheriffs serve the same service function) who served the process on them most likely did not inquire as to their marital status and surnames, which was, in his view, itself a violation of their dignity. [5] He reiterated that this is in no way placing form above substance, nor was he being pedantic, but that 'a court of law, as a repository of the values enshrined in the Constitution, can ill-afford a supine attitude in the face of perpetuation of an injustice, which is a relic of the past'. [6]

In light of the aforementioned, the court made the following order:

(1) In case number 4444/2014 (*Absa Bank v Marshman and another*) an order is made in terms of a draft, which is dated, initialled and signed by the Court, and marked 'X';

(2) In case number 12,737/2014 (*Absa Bank v Zuma and another*) an order is made in terms of prayers 1, 2 and 5 of the application for default judgment dated 18 March 2014. Prayer 4 is postponed *sine die*.

(3) The Deputy-Sheriff Mr S Koopman, is ordered, at his cost, within 15 days of this order, to verify the marital status and surname of the person referred to as Bongiwe in his returns of service dated 7 March 2014, with reference numbers H1403/119 and H1403/120, respectively, and thereafter serve that person with a written apology for having referred to her merely as 'Bongiwe Domestic Helper' in one of the returns of service;

(4) The Deputy-Sheriff Mr M Pavkovich, is ordered, at his cost within 15 days of this order, to verify the marital status and surname of the person referred to as Faith in his returns of service dated 26 March 2014, with reference number 2014/01/05101 and 2014/02/05101, respectively, and thereafter serve that person with a written apology for having referred to her merely as 'The Domestic Faith' in the returns of service referred to above;

(5) The Deputy-Sheriff Ms N Seti, is ordered, at her cost, within 15 days of this order, to verify the marital status and surname of the person referred to as Eliza in her returns of service dated 25 February 2014, with reference numbers 533,821 and 533,822, respectively, and thereafter serve that person with a written apology for having referred to her merely as 'Eliza Domestic Worker' in the returns of service referred to above;

(6) Each of the deputy-sheriffs referred to above, shall, within 5 days after service of the written apology referred to, respectively, in paras. 3, 4 and 5 above, report to the Registrar of this court in writing as to compliance with this order;

(7) The Registrar of this court is directed to bring a copy of this judgment to the attention of the Chairperson of the South African Board for Sheriffs and to the Director: Professional Affairs, the Law Society of the Northern Provinces, who should, respectively, ensure that a copy of this judgment is circulated among their respective members.

Critical analysis

Chapter 2 of the final Constitution states explicitly that the Bill of Rights is the cornerstone of democracy in South Africa and that it affirms the values of human dignity, equality and freedom. In terms of section 8 of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights however only binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. When applying a provision of the Bill of Rights to a natural or juristic person a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right. The duty of judicial officers and their scope of power are set out in section 173 of the Constitution which states that: 'the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.' In light of the aforementioned, it is clear that the courts authority to apply the Bill of Rights in a matter before it is limited and that the courts don't possess a *carte blanche* to apply the Bill of Rights in a way not provided for by the Constitution.

The High Court is vested with inherent jurisdiction in terms of section 173 of the Constitution of the Republic of South Africa, 1996. This means that the court may determine its own process and procedure in the interests of the administration of justice in instances where the rules do not provide for, are lacking, or are ambiguous for practicality. [7]

It is important to demonstrate the jurisdiction and limitations of the court through case law, in relation to the determination of proper service, and the role of the sheriff when serving legal documents. In the case of the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* (2007) and in terms of the Uniform Rules providing for service in terms of rule 4(d) it is the duty of the sheriff to explain the nature of the affidavit and documents that are served upon the person. [8] Rule 4(10) provides that '[w]henever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as to it seems meet.' In *Neethling v MBD Securitisation* (2014) the following was held 'It remains a cornerstone of our legal system that a person is entitled to notice of any proceedings brought against him, and in the event that the defendant has not been notified the subsequent proceedings are void and any court order granted in terms thereof is without any force or effect and can be ignored without the necessity of a formal

application to set it aside.' [9] The court further stated that 'In terms of Rule 4(6) there is also a duty on the Court to inspect the return. If the Court finds that service does not comply with the requirements, then the Court should not grant any relief prayed for in default, before proper return has been obtained. This is set out in *Ritchie v Andrews* … ' [10] In *Ritchie v Andrews* (1881–1882) the court made an order that set aside the order of sequestration because the service by the sheriff was not proper. [11]

The legislation that governs court procedure is important to elucidate the jurisdiction of the court, in the determination of matters before it. In terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 provides that:

> 21. 'Persons over whom and matters in relation to which Divisions have jurisdiction. – (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power – (*c*) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

In the circumstances, the Judge had the authority to consider the impact and effect of the contents of the return of service, but within the limitation of rationality and the interest of justice read in accordance with the Sheriffs Act and Code together with the rules of court. The court was vested with the power to make any order it deemed fit in addressing the returns of service.

The controversial judgment delivered by Judge Makgoka stimulated many questions around whether the court was the correct forum to address his concern with sheriffs of the court. [12] The recipients of the application were described as 'Bongiwe, a domestic helper' and 'the domestic faith' and 'Eliza, domestic worker'. [13] Judge Makgoka expressed his concern that there was no mention of the marital status or surname of the above recipients. [14] Judge Makgoka thereafter made two assumptions on the basis of the description in the return of service, which are as follows: that the sheriff did not bother to find out the abovementioned details or just ignored the abovementioned particulars of the above recipients. The Judge concluded that the description on the return amounted to conduct that impaired the dignity of the recipients, in that the description was undignified, demeaning and in apparent violation of section 10 of the Constitution, which states that 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

However, there could also be other reasons and possibilities for the absence of the surname and marital status in the return, as there could be a language barrier in that the domestic workers did not understand the language spoken by the sheriff. Despite, the possibilities, there is one lacuna, the fact that it is apparent that a white man and the indigenous black women were described differently outside the realm of the law or the rules of court, which makes all the difference. Regardless of the reasons, there has to be consistency amongst the description of all people, irrespective of race or language barrier as the name was still obtained in the circumstances, which overcomes, any language barrier. Due to the presumption of unfair discrimination, there was no need to hear oral evidence, as the sheriffs as officers of the court, should have known better than to perpetuate indifference and colonial relics on court documents.

The High Court did have the requisite jurisdiction to pass judgment on the constitutionality of the sheriffs return when that issue was never brought to the attention of the court, as what was before the court was application proceedings. Since the sheriffs return is essential for proper service for an application to succeed. The returns of service were improper because the descriptions on the return amounted to perpetuate unfair discrimination, and it was thus defective on the face of the return of service according to Judge Makgoka.

It was evident from the facts of the case, that the sheriff referred to the recipients in the returns of service as domestic workers without fully identifying their surname and marital status. It is important to note that in a post-democratic South Africa, the Judge deemed the sheriffs' conduct to be racial discrimination, because this same sheriffs refer to African (black) domestic workers without obtaining their full details whereas a white person that is served is referred to as 'Mr Carstens, husband' and both his surname and marital status are mentioned. The Judge reasoned that the latter description is more respectful on the basis of race.

It is necessary to analyse the provisions of the Sheriffs code of conduct, to determine their conduct in accordance with the code. In terms of the Code of Conduct of the sheriff (Code of Conduct for the Sheriffs the South African Board for Sheriff has with the approval of the Minister of Justice in terms of section 16 (k) of the Sheriffs Act 90 of 1986), the gender and surname of the recipient is not required in the return of service. It is the practice of the sheriff not to provide the full description of the recipients. The checklist of the items of what needs to appear on the face of the return are as follows: case number, district of issuing, full names of the parties, address where service or execution took place, date and time of service or execution, and or dates and times of attempted services or executions and reasons for the non-services or non-executions, manner of service, which are strictly in compliance with the rules of court, specified bill of costs and signature of sheriff/deputy sheriff. [15] In these circumstances the returns addressed these requirements in form and substance. However, the Judge was perturbed by the blatant differentiation of the returns on the basis of race. This differentiation was unnecessary on the basis of race, due to racial bias because the sheriff's went beyond the scope of their powers and duties. Hence, the contents were offensive to the recipients because of the lack of identity in terms of surname and marital status, which amounted to an infringement of the dignity of the domestic workers on the basis of race.

In the case of *Nedcor Bank Ltd v Hennop and Another* (2003) a summary judgment application was before the court on review from the court a quo for specific grounds to be granted relating to the contents of the return of service. The relevant aspect of this case was that it was held that when a combined summons fails to allege the marital status of a female it does not make the combined summons defective as that requirement was archaic. Subsequently, the Matrimonial Property Act 88 of 1984 has been amended to allow for men and women to enjoy equal rights. [16] No marital status being cited in the summons does not nullify or invalidate the proceedings as that particularity was regarded as against the freedom of women's rights. However, the return of the service of the description of the white man description refers to the relic of the past injustices due to the contrasted description of black women.

Rule 4(1)(a)(ii) of the Uniform Rules of the High Court states that 'by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age. For the purposes of this paragraph when a building,

other than a hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, "residence" or "place of business" means that portion of the building occupied by the person upon whom service is to be effected;' In view of this rule, it allows the service to be undertaken upon a person of not less than 16 years of age. The Sheriffs serving the applications upon the domestic workers qualified as good service at the place of residence. [17] However, once again it is evident that the sheriffs went beyond their powers in the descriptions of non-neutrality as determined by the rules of court.

In the case of *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & Others* (2017) Justice Mogoeng stated that:

> 'The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulder rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgment call as dispassionately as the judicial affirmation or oath of office enjoins them to unflinchingly bring an impartial mind to bear on those issues, as in all other case.' [18]

Hence, it is apparent that the Chief Justice recognises the complexity and pain that confronts a person regarding racial supremacy issues. To stress the impartiality and dispassionate onus that is inferred on Judges to deal with painful relics of injustice and racial supremacy is not an easy task to overcome.

In *Harksen v Lane* (1997) the test for determining unfair discrimination was set out by the majority judgment in terms of the equality provision of the Interim Constitution. It was tabulated as follows: [19]

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then is there a violation of section 8(1). (Now known as section 9(1)) Even if it does bear a rational connection, it might nevertheless amount to discrimination.
(b) Does the differentiation amount to unfair discrimination? This requires a two-staged analysis:
    (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established, If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
    (ii) If the differentiation amounted to 'discrimination,' did it amount to 'unfair discrimination'? If it had been found to have been on a specified ground, unfairness focused primarily on the impact of the discrimination on the complainant and others in his/her situation. If the differentiation was found not to be unfair, there would be no violation of section 8(2). (Now known as section 9(2) of the Constitution)
(c) If the discrimination was found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitation clause, section 33. (Now known as section 36 of the Constitution)

When applying the discrimination test to the conduct of the sheriff's return description it is apparent that if we state that the differentiation was on the basis of race it means the presumption is then unfair discrimination. The mere fact that races, respectively, white and black were treated differently in the description of the returns is unfair. Neither the rules of court nor the Sheriffs code support this conduct of differentiation as the descriptions in the return are supposed to be gender-neutral and racially silent in terms of words that are used, specifically with the reference to adults that are above the age of 16 years old and are in control of the home at the time.

The right to dignity is set out in section 10 of the Constitution which states that: 'Everyone has inherent dignity and the right to have their dignity respected and protected'. In *Dendy v University of the Witwatersrand* (2007) the Supreme Court of Appeal held that it was not necessary to develop the common law beyond the existing precedent. As a direct consequence, a plaintiff seeking damages for a breach of his or her right to dignity, must institute an action in terms of the *actio iniuriarum* and cannot directly rely on the constitutional right to dignity. The common law position pertaining to a common law action for damages due to a breach of the right to dignity was comprehensively set out in *Delange v Costa* (1989), where the court *inter alia* held that the conduct complained of was both subjectively and objectively insulting. The purpose of the objective requirement was to prevent 'the courts from being inundated with a multiplicity of trivial actions by hypersensitive persons.'

In *Dendy v University of the Witwatersrand* (2007) the court referred with approval to the following three requirements of an action for injury due to the breach of a person's dignity as set out by Boruchowitz J in the court a quo:

> (1) An intention on the part of the offender to produce the effect of his act;
>
> (2) An overt act which the person doing it is not legally competent to do; and which at the same time is
>
> (3) An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.

If the aforementioned is applied to the matter concerned, it is clear that, even in the hypothetical event of the recipients instituting action against the relevant deputy- sheriffs, they would have had to prove that there was firstly a wrongful act, secondly, that the defendants intended to impair the dignity of the plaintiffs, and, thirdly that the objectionable behaviour was insulting from both a subjective and objective point of view.

In *Dendy v University of the Witwatersrand* (2007) at paragraph 15 the court confirmed the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) [20] [also reported at 1998 (12) BCLR 1517 (CC) – Ed]) – '[d]ignity is a difficult concept to capture in precise terms', it is clear, as was pointed out by the court *a quo* (at paragraph 14 of its judgment) that '[f]or present purposes … there is little difference between the right to dignity as it is comprehended under the Constitution and its common-law counterpart.' That is because what the appellant is claiming is an award of damages to assuage his wounded feelings arising from the insult and humiliation he suffered as a result of

the procedural irregularities of which he complains and the refusal to give him the reasons for the committee's decision and the minutes of its meeting.

In the first instance, the mere failure by a sheriff to ascertain the surname and marital status of a person served, could be seen as a wrongful act when white people are described with specific reference to marital status and surname. There is nothing in either the Sheriffs Act 90 of 1986 or the Code of Conduct for Sheriffs, framed by the South African Board for Sheriffs, that states that a sheriff should ascertain the surname and marital status of a person who is served by him or her. The sheriff went beyond the legislation that governs their conduct. The argument can of course be made that a Sheriff must be mindful of the fundamental rights as set out in the Constitution when serving someone legal documents, despite the wording of the Sheriffs Act and the Code of Conduct and should ensure the equality of persons in the description. This behaviour is classified as discriminatory in that the sheriffs treated indigenous women differently in their return of service than other white recipients.

Even if one accepts that the description in the returns of service amounted to an unlawful act, then, it is necessary to investigate the intention of the sheriffs to deliberately differentiate and discriminate on the basis of race as they perpetuate white superiority in the return. The lack of marital status and surname does not impair a person's dignity, unless you make an argument that is was meant to be disrespectful and did not recognise the family name of a person. In a multifaceted and multilingual South Africa, language and culture plays a major barrier in communication. The Sheriff is an independent contractor of the State and they are aware of the role they play in the Courts and to uphold the ethos of the Constitution as an official of the court, which conduct proved that they went beyond their mandate. In this specific instance the legislation was in place to guard against these barriers to provide and encourage for the use of neutral terms by the sheriffs', which was not used.

The test for the impairment of dignity is that the victim must have felt that the insult impaired their dignity, in a manner that is not aligned to the norms of society. The perpetrator must have the intention to infringe the dignity of the victim, which is wrongful according to society's norms and/or Constitution. [21] It must be explicitly emphasised that the sheriffs infringed the dignity of the indigenous women as it was the practice to record the names as previously mentioned, but purposefully deviated from the legislation and code. Hence, this was purposeful and intentional to cause the victim harm to their dignity. However in these circumstances, subjectively and objectively the indifference caused injury to insult (*Masiu v Dos Ramos* (2014) [22] to the above mentioned recipients. The test whether it was a norm to call a domestic worker, a domestic worker is one that does not seem to violate the norms of society as being a domestic worker is an occupation that is accepted in society. It is important to be mindful that for any recipient that is not a party to the proceedings, sheriffs do not offer full descriptions with specific reference to garnishee applications, as the garnishee's name is never stated in full or details such as marital status, surname and occupation is not required for effective service. However, it must be emphasised the intentional deviation by the sheriff's of their mandate of using terms of marital status and surname to describe a white recipient is indifferent to a black recipient. Whereas the indigenous women were described differently to emphasise the racial prejudice by the sheriffs.

It is apparent that the Judge held an inquiry in the absence of the sheriff and concluded that the sheriff had infringed the dignity of the recipients on the basis of the subjective and objective test. A decision in abstention of the sheriff's conduct in question was a violation of the constitutional right to be heard, as the matters before the Judge did not deal solely with

the issue of the sheriff's conduct but with the return of service, which was before the court. However, this infringement was justified because of the automatic infringement of the constitutional rights of the indigenous women as well as the violation of the code and rules of court committed by the sheriffs together with the veracity of the return of service, which does not require any oral evidence on the part of the sheriff to be submitted to court.

In the Code of Conduct and the Sheriffs Act that governs sheriffs, where there are instances of misconduct on the part of a sheriff an inquiry must be held and an investigation will be compiled. Section 44 and 45 of the Sheriffs Act stipulates what conduct amounts to misconduct and in this particular set of facts, the conduct of the sheriff indeed amounts to misconduct due to the infringement of dignity and unfair discrimination of the recipients. Thereafter an investigation will be undertaken in terms of sections 46 to 47 of the Sheriff Act. This is another avenue, which the court could have used to enforce the judgment that was ordered.

The principles of natural justice in England are rules of judicial impartiality and of the parties' right to be heard. [23] These are two rules of traditional natural justice that maintain its role in modern societies. [24] Similarly, these principles of natural justice are respected and upheld in South Africa. In the case of *Wile and Another v MEC, Department of Home Affairs, Gauteng et al* (2017) if the right to be heard rule is not observed it is considered to be a fatal flaw. [25] In the circumstances the sheriffs were given orders as independent contractors and officers of the court without being given a hearing. The court was within its authority to order another return of service to be amended and produced, if it was not within the rules of court, hence it was befitting that the other side was not heard because of the severity of the violations that caused harm.

The court has the power to determine a constitutional matter that is subject to the Constitutional court confirming the decision. It has been elucidated that there was a clear ignorance of the law and the rules of court by the sheriff, which is unacceptable. The sheriffs of the court are bound by the rules of court and the code and cannot violate it in causing harm to people by infringing their constitutional rights. The court has the power to make punitive cost orders in the circumstances of the parties because of the severity of the situation that disregarded the right to be heard principle was accordingly justified. Alternatively, the court could have lodged a complaint of misconduct against the sheriffs.

Conclusion

It is submitted that the unprecedented order was within the scope of the powers of the Judge. In these circumstances the rules of procedure were flouted in its entirety by the sheriffs. The Judge acted bravely, boldly and justly against the actions of the sheriffs. This punitive order attempted to cure the ills of the past caused by the painful colonial history of segregation and inhumane treatment on the basis of race. In a Post-colonialism era, it is unacceptable to differentiate between races and to lobby for white superiority on court documents, as it goes against the ethos of the Constitution. Unfair discrimination against the indigenous women and in the process impairing their dignity by describing them differently to white people is a painful past relic and has re-surfaced to the present. The disregard of constitutional principles cannot be condoned as this former sanctity is revered in the rule of law.

Notes

1. *Absa Bank Ltd v Zuma* 2014, paragraph 2.

2. *Absa Bank Ltd v Marshman* 2014, paragraph 3.

3. *Absa Bank Ltd v Marshman* 2014, paragraph 5.

4. *Absa Bank Ltd v Marshman* 2014, paragraph 6.

5. *Absa Bank Ltd v Marshman* 2014, paragraph 7.

6. *Absa Bank Ltd v Marshman* 2014, paragraph 8.

7. Loggerenberg 2018, Erasmus Commentary.

8. *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007.

9. *Neethling v MBD Securitisation*, 2014, paragraph 26.

10. *Ritchie v Andrews*, 1881–1882, paragraph 25.

11. *Ritchie v Andrews*, 1881–1882, p. 258.

12. The Law Society of the Northern Provinces, 'Newsflash and Matters before Council' Issue 4 24 June 2014 1–2

13. *Standard Bank of SA Ltd v Caster Transport CC*; In Re: *Absa Bank Ltd v Marshman*; In Re: *Absa Bank Ltd v Zuma* 2014, paragraph 2.

14. *Standard Bank of SA Ltd v Caster Transport CC*; In Re: *Absa Bank Ltd v Marshman*; In *Re: Absa Bank Ltd v Zuma* 2014, paragraph 2.

15. Code of Conduct, Schedule 3.

16. *Nedcor Bank Ltd v Hennop and Another*, 2003, p. 6

17. *Barens v Lottering* (2000).

18. *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & Others* 2017, paragraph 12.

19. *Harksen v Lane* (1997), paragraph 53.

20. *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999), paragraph 28.

21. LAWSA VIII Delict Wrongfulness, par 80.

22. *Masiu v Dos Ramos* (2014), p. 21.

23. Cappelletti, (1972–1973), p. 655.

24. Cappelletti, 1972–1973, p. 673.

25. *Wile and Another v MEC, Department of Home Affairs, Gauteng et al*. (2017), paragraph 56.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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