THE IMPACT OF TRANSFORMATIVE CONSTITUTIONALISM IN ADDRESSING THE MARGINALISATION OF DOMESTIC WORKERS IN POST-APARTHEID SOUTH AFRICA WITH SPECIFIC REFERENCE TO *MAHLANGU AND ANOTHER V MINISTER OF LABOUR AND OTHERS (COMMISSION FOR GENDER EQUALITY AND ANOTHER AS AMICI CURIAE)* [2020] JOL 48996 (CC)

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Abstract

Domestic workers play an important role in supporting the labour market and the economy, enabling economically active members of society to pursue their careers and aspirations. Sadly, despite this, domestic work remains undervalued and unrecognised and domestic workers continue to suffer as the most oppressed and exploited sector of the economy. This paper will explore domestic workers' rights in post-apartheid South Africa, as well as the reforms and measures taken to improve their employment conditions. Transformative constitutionalism will be scrutinised with reference to the case of Mahlangu and another v Minister of Labour and Others (Commission for Gender Equality and Another as amici curiae) *as a possible answer to the*

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continued marginalisation of domestic workers. Although transformative constitutionalism as a legal theory is still relevant for transformation, a large-scale cultural reform is also needed before domestic workers will finally enjoy the promise of a free and equal South Africa.

1 Introduction

The Constitutional Court in the case of *Mahlangu and Another v Minister of Labour and Others* (*Mahlangu*) was required to consider the constitutionality of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The Act in question expressly excluded domestic workers from the definition of an employee, thereby excluding them from the social benefits and compensation provided under COIDA.[1] The Court ultimately held that domestic workers should also be afforded the right to access social security in terms of COIDA and that section 1(xix)(v) of the Act was unconstitutional. Although the respondents agreed to the abolishment of section 1(xix)(v) of COIDA, the *Mahlangu* judgment is significant as it has brought to light the continued marginalisation and exploitation of domestic workers in South Africa despite the enactment of the final Constitution over 20 years ago.

This case note will be divided into four sections. Firstly, the *Mahlangu* judgment will be discussed and secondly, the implications of the case on the employers of domestic workers and the workers themselves will be analysed. The third section of this note will consider the socio-economic position of domestic workers in post-apartheid South Africa based on recent developments in the law and lastly, this note will shed light on the transformative approach to adjudication used by the Court in *Mahlangu* and will question whether the approach of transformative constitutionalism can contribute to aid the domestic profession in a way that will redress the injustices of the past.

2 Facts

Ms Mahlangu was employed as a domestic worker in a private home for 22 years in Pretoria. On the morning of 31 March 2012, she drowned in her employer's pool during the course of her work.[2] Following the incident, Ms Mahlangu's daughter and financial dependent (the first applicant) approached the Department of Labour

1 Compensation for Occupational Injuries and Diseases Act 130 of 1993 secs 1(xix)(v) & 22.

2 *Mahlangu and Another v Minister of Labour and Others (Commission for Gender Equality and Another as amici curiae)* 2021 1 BCLR 1 (CC) (*Mahlangu v Minister of Labour*) para 7.

requesting compensation for her mother's death.[3] She was subsequently denied compensation and relief under COIDA.[4]

The first applicant, assisted by The South African Domestic Service and Allied Workers Union (SADSAWU), applied to the High Court to have section 1(xix)(v) of COIDA declared unconstitutional. *Amici curiae* for the case included the Commission for Gender Equality and the Women's Legal Centre Trust.[5] Section 1(xix)(v) of COIDA defines an 'employee' as:

> … a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind -
>
> (v) But does not include a domestic employee employed as such in a private household.

2.1 Litigation before the High Court

In 2019, the Pretoria High Court declared section 1(xix)(v) invalid to the extent that it excluded domestic workers employed in private households from the definition of 'employee'.[6] The High Court further held that the declaration of invalidity must apply retrospectively in order to provide relief to domestic workers who were injured or had died at work prior to the Court's judgment and order.[7] As per section 167(5) of the Constitution, the Constitutional Court makes the final decision as to whether an Act of Parliament or a provision contained in it is in fact unconstitutional. In confirming the High Court's decision, the Constitutional Court elaborated on the reasons behind the declaration of unconstitutionality which the High Court neglected to address.[8]

2.2 Arguments presented to the Court

The applicants and *amici* submitted that the exclusion of domestic workers amounts to unfair discrimination and infringes on the fundamental dignity of domestic workers. It was argued that said discrimination operated on the basis of race and gender, as domestic workers are predominantly black women who have been historically marginalised.[9]

3 *Mahlangu v Minister of Labour* (n 2) para 8.
4 As above.
5 *Mahlangu v Minister of Labour* (n 2) para 9.
6 *Mahlangu and Another v Minister of Labour and Others* (79180/15) [2019] ZAGPPHC; *Mahlangu v Minister of Labour* (n 2) para 10.
7 *Mahlangu v Minister of Labour* (n 2) paras 10 & 13.
8 *Mahlangu v Minister of Labour* (n 2) paras 14-17.
9 *Mahlangu v Minister of Labour* (n 2) para 18.

They further contended that the exclusion of domestic workers under COIDA means that the only remedy available to them in these circumstances is the common law remedy of delict. To claim for damages one has to prove fault on the employer's part. Employees who are covered by COIDA are afforded a more accessible remedy that is available regardless of fault and independent of the financial capacity of their employer.[10] Under section 22(1) of COIDA, employees are entitled to benefits prescribed by the Act if they are injured from a workplace accident resulting in either death or disablement. This is subject to specific provisions, such as if the accident resulted from the employee's own misconduct, but even in these cases the Act still allows for compensation in the case of serious disablement or death where there is a financial dependent.[11] An accident is deemed to have occurred if it is in the course of employment.[12] In other words, merely meeting with a workplace accident would in most cases be enough to enable employees or their dependents to claim compensation in terms of the Act. In terms of delict, however, the applicant (employee or employee's dependent) will need to prove either the existence of intent or negligence on the defendant's (employer's) part.[13] It is evident that the burden of proof on the employee is increased. Section 1(xix)(v) of COIDA also precludes domestic workers from equal access to social security protection under the Constitution.[14] The applicants further argued that the exclusion cannot be justified under section 36 of the Constitution as there is no apparent legitimate governmental purpose for this exclusion.[15]

The respondents conceded that the provision is unconstitutional and stated that the Minister is drafting the amendments to COIDA in order to include domestic workers in the Act. The respondents, therefore, conceded that the provision in question should be repealed from COIDA.[16]

3 Judgment

The Court first considered section 27 of the Constitution, which affirms that everyone has the right to equal access to social security for the purposes of supporting themselves and their dependents where necessary.[17] The Court considered whether or not COIDA falls within the definition of section 27(1)(c) and whether 'compensation'

10 *Mahlangu v Minister of Labour* (n 2) para 19.
11 Compensation for Occupational Injuries and Diseases Act (n 1) sec 22(3)(a)(i-ii).
12 Compensation for Occupational Injuries and Diseases Act (n 1) sec 22(4).
13 JR Midgley *Delict Volume 15 Third Edition* (2016) at 135.
14 *Mahlangu v Minister of Labour* (n 2) para 19.
15 *Mahlangu v Minister of Labour* (n 2) para 20.
16 *Mahlangu v Minister of Labour* (n 2) paras 25-27.
17 Constitution of the Republic of South Africa, 1996 (Constitution) sec 27(1)(c).

can be construed as a type of social grant. It found that despite the use of the term 'compensation', COIDA does provide for social grants as envisioned by the Constitution.[18] This is because the benefits of COIDA serve a similar purpose to that of social grants, and a narrow interpretation of section 27 would not serve the Constitution's transformative goals.[19]

The Court, in its determination, analysed section 9 of the Constitution. It reiterated that equality is a foundational constitutional value that informs the interpretation of other rights contained in the Bill of Rights. The Court considered the direct and indirect discrimination against domestic employees in terms of section 9 and concluded that the exclusion of domestic workers from deriving benefits under COIDA limits their right to equality as well as equal protection under the law.[20] By including domestic workers under the definition of employee in COIDA, the goal of substantive equality can be achieved on a structural level and domestic workers will be further empowered, thereby bringing them closer to what the Court considers 'substantive freedom'.[21] In its enquiry, the Court also took cognisance of section 10 of the Constitution and its relationship to the right to access social security. It stated that the exclusion of domestic workers from benefits under COIDA has a discriminatory and damaging effect on the workers' inherent dignity.[22] This exclusion results in the undervaluation and disregard of domestic work and results in the impairment of domestic workers' dignity.[23]

The Court looked at section 27(2) of the Constitution which provides for an internal limitation to the right to social security. This section requires the state to take reasonable measures to realise the social security rights of section 27(1). The state's responsibility includes enabling appropriate social assistance through the enactment of reasonable legislative and other measures.[24] The fact that COIDA predates the Constitution does not automatically mean that it is an unreasonable legislative measure. The Court looked at the Act objectively and found that the obligations of the state under section 27(2) include extending the application of COIDA to domestic workers. [25]

The Court ultimately upheld the High Court's decision and concluded that the exclusion of domestic workers from the Act could

18 *Mahlangu v Minister of Labour* (n 2) paras 47, 52 & 59.
19 *Mahlangu v Minister of Labour* (n 2) para 52.
20 *Mahlangu v Minister of Labour* (n 2) paras 88 & 117-119.
21 *Mahlangu v Minister of Labour* (n 2) paras 53-55.
22 *Mahlangu v Minister of Labour* (n 2) paras 69-70.
23 *Mahlangu v Minister of Labour* (n 2) paras 48, 65 & 108.
24 Constitution (n 17) sec 27(2).
25 *Mahlangu v Minister of Labour* (n 2) paras 60 & 65-66.

not be justified, and that section 1(xix)(v) of COIDA be declared unconstitutional and invalid with immediate retrospective effect.[26]

4 Comments: Breakdown of the benefits now afforded to domestic workers

Before analysing the Court's decision in light of transformative constitutionalism, it is important to outline the effect that the judgment has had on the employer and what benefits are now afforded to domestic workers. As of 10 March 2021, new regulations have been Gazetted to bring effect to the Court's decision. All employers of domestic workers in terms of section 80 of COIDA now need to register and submit the necessary returns to the Compensation Fund.[27] In terms of The Basic Conditions of Employment Act, a 'domestic worker' is defined as:[28]

> An employee who performs domestic work in the home of his or her employer and includes —
>
> (a) a gardener;
> (b) a person employed by a household as driver of a motor vehicle; and
> (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker.

In summary, domestic workers will be afforded the same right to compensation for occupational injuries and diseases as payable to all other types of injured employees. Some of the remedies affordable to employees will include relief for temporary or total disablement, permanent disablement lump sum benefits, and pension monies for permanent disablement. Compensation payable to the dependants of employees who died because of 'on duty' circumstances includes funeral expenses, widow's lump-sum awards, widow's pension awards, child pension awards, partial dependency awards, and wholly dependency awards.[29]

Although the fund exists to aid employees, it is the employer's responsibility to register on behalf of their employees. The decision in *Mahlangu* applies retrospectively, and thus employees appointed prior to the judgment must still be registered for compensation. Employers must generally register new employees within seven days of the first day of work. However, this deadline does not apply to the current change. Employers are instead encouraged to register without

26 *Mahlangu v Minister of Labour* (n 2) paras 116-122.
27 Government Gazette 'Notice on the Registration of Domestic Worker Employers in terms of section 80 of the Compensation for Occupational Injuries and Disease Act as amended G44250 notice 106 of 2021' (accessed 09 July 2021).
28 Basic Conditions of Employment Act 75 of 1997 sec 1.
29 Compensation for Occupational Injuries and Diseases Act (n 1) sec 80; Government Gazette (n 27) 5-8.

delay. Once registered with the fund, employers are required to also register and submit a Return on Earnings (ROE) annually. As per the amendment, domestic workers are listed as Class M, subclass 2500 at an assessment rate of 1.04.[30]

4.1 Consequences of failure to register employed domestic workers with the Compensation Fund

If a domestic worker suffers workplace accident and it arises that the employer has either failed to register them with the Compensation Fund or has failed or refused to contribute to the Fund, such an employer will be liable for the employee's injuries and can face fines and other penalties determined by the Director-General.[31] Employers are further susceptible to civil claims if any injuries or illnesses arise from the place of employment. Employees can bring a case for the cost of medical aid as well as for permanent disablement, compensation for death, and even pension payments. Examples of domestic injuries that are likely to occur include injuries resulting from household equipment such as irons, vacuum cleaners, cleaning chemicals, or a situation similar to that of Ms Mahlangu.[32]

It should be noted that employers of domestic workers do not, for the most part, own businesses themselves. The change in law will therefore see an influx of new registrations with the Compensation Fund. It is submitted that statutory intervention may again be necessary in the future to monitor compliance with COIDA and the new inclusions. However, as will be discussed below, statutory intervention is often not in itself sufficient to police compliance with the law. This is especially apparent in the case of domestic workers whose work is often kept invisible and discrete.

5 The bleak prospects of domestic workers: Marginalised, undervalued, and demobilised in post-apartheid South Africa

Following the transition to democracy and the advent of constitutionalism, much effort has been made to give domestic

30 Government Gazette (n 27) 9. The classification refers to the different areas of employment while the tariff and assessment rates refer to the relative level of risk that the field of employment qualifies as. A higher tariff indicates a higher level of risk. The tariff is used to calculate the annual payments made by the employer to the fund.

31 Compensation for Occupational Injuries and Diseases Act (n 1) sec 87.

32 Government Gazette (n 27) 8.

workers access to the same rights as other employees, with the *Mahlangu* case being a prime example thereof.[33] What follows is a brief summary of some of the interventions taken to recognise domestic workers as a legitimate contribution to the labour force in post-1994 South Africa. I will use this post-apartheid legislative and socio-economic background to contextualise the implications of the *Mahlangu* case and to analyse the current position of domestic work in South Africa.

5.1 The right to organise and form trade unions

The Labour Relations Act was amended in 1995 to cover domestic workers, providing them with organisational rights and access to legal structures for dispute resolution.[34] Presently, the right of employees to associate freely is acknowledged in the Constitution as well as in the Labour Relations Act. This right allows every worker to participate in the founding and development of a trade union and further enables workers to join trade unions of their choosing.[35] For domestic workers, the South African Domestic Service and Allied Workers Union (SADSAWU) played a pivotal role in changing the landscape of domestic work in South Africa, especially during apartheid when it was arguably needed the most.[36] SADSAWU was an applicant to the *Mahlangu* case but in recent times has seen a steady decline in numbers since the enactment of the final Constitution. This is probably due to the realisation of most of its demands since constitutional democracy.[37] Despite these realisations, there were still many outstanding issues that affected domestic workers with the lack of protection under COIDA being one of the most significant and long-lasting issues.

33 S Ally 'Domestic Worker Unionisation in Post-Apartheid South Africa: Demobilisation and Depoliticization by the Democratic State' (2008) 35 *Politikon* at 2.

34 D Budlender *The introduction of a minimum wage for domestic workers in South Africa*: *Conditions of Work and Employment Series No 72* (2016) 1-3.

35 Labour Relations Act 66 of 1995 sec 4; Constitution (n 17) sec 18.

36 Ally (n 33) 6-7. The South African Domestic Workers Union (SADWU) is the predecessor of SADSAWU and was formed in 1986 with the goal of bringing more progressive efforts to unionise domestic workers during apartheid. The efforts of the women in this union set out the foundation that domestic workers would use to challenge and improve their living standards. 'SADSAWU' was formed in 2000 with the aim of giving a voice to domestic workers and ensuring that new labour laws were extended to include them. Notably, their efforts led to the inclusion of domestic workers in the Unemployment Insurance Fund for the first time in 2001.

37 Ally (n 33) 6-7.

5.2 Issues surrounding minimum wage and employment contracts

The Basic Conditions of Employment Act was amended in 1993 to provide protection to domestic workers.[38] The amendment made contracts between domestic workers and their employees mandatory.[39] Following this, the enactment of the National Minimum Wage Act in 2018 sought to address, *inter alia*, the inequalities of our society and the huge differences in income earned in South Africa.[40] Schedule 1 of the Act requires that domestic workers be paid a minimum wage of R19.09 an hour.[41] This enactment is arguably the most significant stride that South Africa has made to afford domestic workers equal rights as employees.[42]

5.3 Unemployment insurance benefits

In 1996, the Presidential of the Labour Market Commission suggested that Unemployment Insurance Contributions be paid by employers of domestic workers as a mechanism to further formalise their employment relationship.[43] Following this, the government revised the Unemployment Insurance Fund (UIF) system and in 2001, the Unemployment Insurance Fund Act was amended to cover domestic workers.[44] The fund provides for the payment of unemployment benefits to negate the harmful socio-economic consequences of unemployment.[45]

6 Comment: The continued marginalisation of domestic workers

Despite the abovementioned interventions, domestic workers are still largely undervalued in today's society.[46] In January of 2020, there were just over a million actively employed domestic workers in South Africa.[47] Domestic work plays an important role in supporting the

38 Budlender (n 34) 1; Basic Conditions of Employment Act (n 28) sec 3.
39 Basic Conditions of Employment Act (n 28) sec 29.
40 National Minimum Wage Act 9 of 2018 Preamble.
41 National Minimum Wage Act (n 40) Schedule 1 item 1.
42 As above.
43 Budlender (n 34) 22.
44 Budlender (n 34) 1.
45 Unemployment Insurance Act 63 of 2001 sec 2.
46 *Mahlangu v Minister of Labour* (n 2) para 2.
47 StatsSA 'Statistical Release P0211 Quarterly Labour Force Survey Quarter 1: 2020' 23 June 2020 https://www.statssa.gov.za/publications/P0211/P02111stQuarter 2020.pdf (accessed 05 August 2021) where 1 316 000 actively employed domestic workers were reported in the first quarter of 2020.

labour market and the economy of a country by relieving families and households of their obligations in the home.[48] What follows is an analysis of some of the struggles that domestic workers still face today.

6.1 The disregard of the vocation of domestic workers

Domestic work is still not regarded as 'real employment'. This is due to a variety of reasons and Tsoaledi Thobejane, in his 2016 study on domestic work in the Mpumalanga province, proposed that domestic work is seen as a profession for the uneducated because it does not require any training, certifications, or qualifications.[49] Additionally, the private nature of domestic work makes it difficult to be viewed as 'real work', as paid domestic work is associated with unpaid domestic work performed by a woman in the family.[50] The aim to 'professionalise' domestic work has been on the Department of Labour's agenda since 1999, however implementation of the reforms has been weak.[51] From May 2002 until March 2005 the Domestic Workers Skills Development Project was implemented and domestic workers received state-subsidised training certificates for completing skills programmes or participating in learnerships.[52] The funds allocated have, however, depleted and the programme has since collapsed. In 2014, the Skills Development Planning Unit within the Department of Labour budgeted to train 1 000 domestic workers, a substantial decrease from the 16 000 workers who completed the skills programmes during the May 2002 to March 2005 period.[53]

Therefore, it is crucial to abolish the stereotype surrounding domestic work, not only by implementing measures to regard their work as a valid profession but by also denoting the same benefits to domestic work as a vocation that is similar to other professions.[54] The disregard for the vocation of domestic workers means that they receive fewer benefits. During apartheid, domestic workers were viewed as unworthy of receiving social protection in the workplace and the social stigma surrounding the profession, unfortunately, remains largely unchanged today.[55]

48 TD Thobejane & S Khosa 'On Becoming a Domestic Worker the Case of Mpumalanga Province, South Africa' (2016) 14 *Gender and Behaviour* at 7466.
49 Thobejane & Khosa (n 48) 7475.
50 Thobejane & Khosa (n 48) 7475 & 7469.
51 Budlender (n 34) 27.
52 Budlender (n 34) 28.
53 As above.
54 Thobejane & Khosa (n 48) 7469.
55 *Mahlangu v Minister of Labour* (n 2) para 24.

6.2 The socio-economic reality of domestic workers

Many domestic workers migrate to cities for job opportunities, leaving behind their children and families. They enter the homes of their employees and are subsequently at their mercy. Oftentimes they are abused and exploited behind closed doors by employers who take advantage of their desperate situations.[56] Their desperation arises from their deplorable financial situations and from often being the sole breadwinner of the family. Workers refrain from contacting the police to report abuse or suing their employers in court. This is because, in addition to the burden of paying legal costs, the intimate nature of the relationship between domestic workers and employers may result in an end to the relationship should a legal battle arise. In effect, domestic workers cannot defend their rights without losing their jobs.[57]

It is true that legislation, such as the National Minimum Wage Act 9 of 2018, has been enacted to curb issues such as the right to adequate remuneration, but the realisation of these goals is poorly regulated by the government. As a result, cases of mistreatment go largely undetected, and the implementation of legislation remains ineffective.[58] Over and above this there is still no state-mandated pension fund established for domestic workers.[59]

The Women's Legal Centre Trust in *Mahlangu* submitted that cycles of generational poverty are often difficult to break. Women employed as domestic workers are also, in many cases, the sole breadwinners of the family and the family's hope for survival. Ms Mahlangu was one such woman.[60] Despite this, they are often treated differently than their male counterparts who work in similar professions such as gardeners or household drivers.[61] The cycle of poverty continues because there is insufficient protection guaranteed to the rights of women employed as domestic workers. Thus domestic workers' section 9 and 23 constitutional rights to equality and fair labour practices do not materialise in most cases.

56 Thobejane & Khosa (n 48) 7471.
57 Thobejane & Khosa (n 48) 7470-7471; *Mahlangu v Minister of Labour* (n 2) para 2.
58 D du Toit 'Not Work Like Any Other: Towards a Framework for the Reformulation of Domestic Workers' Rights' (2011) 32 *Industrial Law Journal* at 7.
59 *Mahlangu v Minister of Labour* (n 2) para 3; Ally (n 33) 8.
60 *Mahlangu v Minister of Labour* (n 2) para 23.
61 du Toit (n 58) 3-4; Thobejane & Khosa (n 48) 7474.

7 Comment: The courts' approach to adjudication in light of transformative constitutionalism

The Constitutional Court in *Mahlangu* adopted a transformative approach to adjudication. What follows is an analysis of transformative constitutionalism, what this adjudicative approach entails, how the Court applied it in *Mahlangu*, and whether it is capable of achieving the reform necessary to transform the legacy of South Africa's oppressive past and its continuing impact on the equality and dignity of domestic workers.

7.1 Background on transformative constitutionalism

The Constitution strives to redress past injustices in order to transform South Africa into a more equitable and value-based society.[62] This goal is outlined in the Preamble of the Constitution[63] and is reiterated throughout.[64] Constitutional transformation aims to equalise the economic playing field and to change the country's political-social institutions and power relationships towards a more 'democratic, participatory, and egalitarian' route.[65] It follows that 'transformation' is a long-term commitment and in South Africa's case, a non-violent effort.[66] It is a revolution of the mind and how we relate to each other under the new constitutional dispensation as opposed to a physical revolution. Thus, the ultimate goal of transformation would be to afford everyone the means and opportunities to exercise their rights in a meaningful way as well as to transform society across egalitarian lines through legal processes and institutions.[67] As such, it regards the law, and specifically transformative adjudication, as a powerful vehicle for social change.

7.1.1 Karl Klare's proposal for transformation

Karl Klare's paper on transformative constitutionalism has resonated in academic literature, the jurisprudence of the courts and civil society campaigns for social justice.[68] He draws heavily on ideas

62 J Meiring *South Africa's Constitution at Twenty-one* (2017) at 210.
63 Constitution (n 17) Preamble.
64 Constitution (n 17) secs 9, 28(6) & 29(2)(c).
65 T Humbly et al *Introduction to law and legal skills in South Africa* (2012) at 39; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* at 352.
66 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* at 150.
67 Klare (n 66) 153; Langa (n 65) 352.
68 S Liedenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) at 25.

introduced by Critical Legal Studies.[69] Critical Legal Studies is, in brief, an academic, legal, and economic movement originating in 1976. Its main goal is to explore legal systems, (such as institutions and legal education) and to support penetrating systems of unequal and oppressive societal constructs.[70] Gary Minda identifies the following objectives of Critical Legal Studies. Firstly, the need to demonstrate the indeterminacy of legal doctrines (i.e. the contradictions of law). Secondly, understanding the law's relationship to politics and how politics, sociology, and history impact particular interest groups, and how they benefit from legal decisions despite the indeterminacy of legal doctrine. Thirdly, exposing how legal analysis and legal culture legitimises its own outcomes. Lastly, it advocates for the inclusion of a new or otherwise disregarded social vision and aims to incorporate it into the current legal dispensation.[71]

In relation to this, Klare argues that the South African Constitution is not merely a legal document or a set of rules, but rather it is a political document committed to the social transformation of South Africa as a society.[72] In order to realise the vision of a transformed society, he argues that we need to move away from the conservative legal culture engrained in South Africa after years under an oppressive and draconian system of apartheid. A key component in this shift will be adjudication as a mechanism of law-making and social change.[73]

Klare advances his argument through three avenues. First, he argues that a reading of the Constitution should be post-liberal as it is explicitly committed to large-scale egalitarianism and social transformation.[74] A post-liberal constitution must be understood in terms of its aims, aspirations, and overall context. This is in contrast to a liberal reading in the sense that the Constitution envisions a collective self-determination parallel to promoting individual self-determination.[75] The post-liberal elements of the Constitution include the need for social, redistributive, and egalitarian reform which is least partly horizontal (i.e. also implemented on private bodies), allows for participatory governance, and is both multicultural and self-conscious about its historical setting and its transformative role and mission.[76] These post-liberal and transformative aspects thus require a different way of thinking about the law in order for it to be consistent with transformation.[77]

69 Klare (n 66) 187.
70 G Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) at 106.
71 Minda (n 70) 108.
72 Klare (n 66) 156-157.
73 Klare (n 66) 146.
74 Klare (n 66) 151.
75 Klare (n 66) 153.
76 Klare (n 66) 150.
77 Klare (n 66) 156.

Secondly, the impulse to interpret the law in a formalistic way must be scrutinised in comparison to critical conceptions of law and adjudication.[78] Formalistic reasoning regards rights as objective, value-free, and having a fixed meaning. They are removed from their social context and applied strictly without due consideration of the consequences flowing from such enforcement.[79] Formalistic reasoning draws a parallel with positivism often employed by the courts of the apartheid era. Legal positivism advances that the command of the sovereign is absolute and that there is a strict need to separate law and morality.[80] Legal interpretation is thus seen as a mechanical search for the legislature's intention which is applied rigidly once found.[81] It follows that formal equality subscribes to the traditionally liberal notion of similarity, thereby promoting the symmetrical enforcement of equality which ignores group status, race, and social conditions with the assumption that everyone is similar.

Klare argues that pursuing the political project of transformation through law is not necessarily in conflict with professional legal practice.[82] Adjudication is, by nature, constrained because judges work with rules, arguments and processes which limit the scope of possible judicial outcomes.[83] However, these constraints are not inherent, and when deconstructed it becomes apparent that they instead have a cultural and individual psychological origin.[84] Klare thus argues that there is a need for a more transparent and honest consideration for the politics of adjudication and that the mythical line between law and politics must be eroded as the two cannot be divorced from a judge's interpretive process.[85] A core issue faced by judges is balancing the idea of restraint in terms of the rule of law with the need to engage in a project of constitutionally mandated transformation.[86] He proposes that a revisited and somewhat more politicised understanding of the rule of law and adjudication is needed to mitigate this.[87]

Lastly, Klare identifies South African legal culture as conservative and notes that this culture is a barrier to transformative constitutionalism.[88] Legal culture is described as 'professional sensibilities, habits of mind, and intellectual reflexes' which shape

78 Klare (n 66) 156.
79 Liedenberg (n 68) 44.
80 J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* at 183.
81 Dugard (n 80) 186.
82 Klare (n 66) 157.
83 Klare (n 66) 159.
84 Klare (n 66) 160-161.
85 Klare (n 66) 163 &167.
86 Klare (n 66) 149.
87 Klare (n 66) 150.
88 Klare (n 66) 168 & 170.

how legal actors think and behave in a given situation.[89] He states that South African legal culture is based on a highly structured and technical interpretation of legal text and an unwillingness to exhaust legal materials, possibilities, and pliability.[90] This links with his second point that there needs to be a break away from formalistic reasoning.

7.2 The strive for substantive equality and transformation in the field of labour law

Labour law, and the reforms associated with it, aim to achieve substantive equality by taking into account the fact that employer/employee relationships are unequal by nature.[91] Substantive equality, as outlined by Klare, entails equality in the lived social and economic circumstances and opportunities needed to experience human self-realisation, including the full and equal enjoyment of all rights and freedoms.[92] The Constitutional Court has confirmed before that the wording of the equality clause in the Constitution is indicative of favouring substantive equality over formalism.[93] In *President RSA v Hugo*, Goldstone J emphasised that in order to achieve equal worth and freedom, we cannot insist on applying identical treatment in all circumstances.[94] Each individual case requires due consideration to the impact of discrimination in light of the Constitution's goals and surrounding contextual factors, such as the position of the complainants in society and their vulnerability and history, to understand the impact of the discrimination.[95]

Sandra Liedenberg suggests that substantive equality is important because it brings to the surface the theoretical understandings and values informing particular interpretations of rights. Thus, adjudication on socio-economic rights has the potential to enrich political and legal culture over the meaning and implications of rights. As a result, a responsive jurisprudence that can combat marginalisation and various forms of social and economic deprivation can be developed.[96]

The unequal relationship between employers and employees is exacerbated between domestic workers and their employers, which

89 Klare (n 66) 166.
90 Klare (n 66) 168-171.
91 du Toit (n 58) 5.
92 Klare (n 66) 154.
93 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) para 62; *S v Zuma* 1995 4 BCLR 401 (CC) para 15; *S v Makwanyane* 1995 6 BCLR 665 (CC) para 9.
94 1997 6 BCLR 708 (CC) paras 729F-G.
95 *President RSA v Hugo* (n 94) paras 729F-G & 1510E; JL Pretorius et al *Employment Equity Law* (2020) at 2-5.
96 Liedenberg (n 68) 51.

consequents an even greater need for appropriate regulation and relief afforded to the profession. The Court in *Mahlangu* evaluated the issue of domestic work despite the respondent conceding to most, if not all of the applicants' arguments. The Court did not shy away from 'doing the work' by formulating an argument and providing some guidance on the matter for future reference.

Courts should adopt this kind of approach in adjudicating matters concerning historically marginalised groups of people especially in cases where the parties are at odds because this illustrates a commitment to transformation and to investigating the real-life impact on the lives of domestic workers. The Constitution is not self-executing, it should be interpreted and applied in a transformative and progressive way.[97] It is therefore the role of the judge, and especially the Constitutional Court, to provide sound legal interpretation and to set precedent on how the judiciary can effect social change.[98]

7.3 The effect of the Constitutional Court's decision in *Mahlangu*

In analysing COIDA, the Court noted that when interpreting the rights of the Bill of Rights, international law needs to be taken into account.[99] In addressing the socio-economic rights in question, the Court also took cognisance of the transformative purpose of the Constitution and investigated substantive equality by taking into account the unique circumstances of domestic work in order to achieve equal worth and freedom.[100] The *Harksen* test[101] was thereafter applied with regards to the possible infringement on the workers' rights and looked at whether the differentiation served any rational governmental purpose.[102]

It was found that section 1(xix)(v) of COIDA failed this test. The Court not only took cognisance of the transformative purpose of the

97 Klare (n 66) 155-156.
98 Klare (n 66) 157.
99 *Mahlangu v Minister of Labour* (n 2) para 41; Constitution (n 17) sec 39(1)(b).
100 *Mahlangu v Minister of Labour* (n 2) para 55; du Toit (n 58) 15.
101 *Harksen v Lane N.O* 1997 11 BCLR 1489 (CC). In brief, the Harksen test is as follows: Firstly, the court must discern whether the provision in question differentiates between people or categories of people. If so, it must be determined whether there is a rational connection to a legitimate governmental purpose. If no such connection exists, there is a violation of section 8(1). However, even if it does bear a rational connection, it might nevertheless amount to discrimination. Whether the differentiation amounts to unfair discrimination requires a two-stage analysis. Namely, assessing whether the discrimination is on a specified ground and whether that discrimination was unfair. Lastly, if the discrimination is found to be unfair then a determination must be made as to whether the discriminatory act or provision can be justified under the limitations clause.
102 *Mahlangu v Minister of Labour* (n 2) paras 71-72; Constitution (n 17) sec 9(1).

Constitution but investigated substantive equality on a deeper level which encompassed the intersectional and indirect discrimination of domestic workers.[103] Early on in the process of determining discrimination, the *Harksen* test was employed to test the level of differentiation faced by domestic workers when compared to other employees. The Court could have left the matter there, but opted for a deeper exploration of the social structures that still uphold inequality and that influence the experience of marginalised people. The Court, therefore, exhibited how substantive equality can be used to implement transformative constitutionalism as a project to level the economic playing field.

The Court deconstructed the *status quo*. It explored section 9(3) of the Constitution and the real impact that intersectional discrimination has on domestic workers. It identified them as marginalised people who, despite their best efforts, remain in a cycle of poverty that they cannot seem to escape.[104] Further, this cycle of poverty is purported by the lack of legal protection. Understanding intersectionality will hopefully achieve the progressive realisation of South Africa's transformative constitutionalist goals.[105] In this case, the intersectional discrimination faced by domestic workers comprises mostly of black women who continue to struggle to make ends meet.[106] This approach sheds light on their experiences which are often invisible.[107] Without this interpretive approach, the burden that domestic workers carry and their experiences of racism, sexism, gender inequality, and class stigmatisation will never be sufficiently acknowledged.[108]

The Court thus took into account their lived experiences as black women, who are often stigmatised and mostly under-valued, and made a judgment that will affect some reparation to those who have been severely disadvantaged by the system. The Court held that the exclusion of domestic workers from the definition of 'employee' implies that their work is not 'real work',[109] and this connotation thus objectifies the impact of their hard labour in society and infringes on their right to human dignity.[110]

Understanding the multiple forms of discrimination of vulnerable groups is an indispensable aspect of transformative constitutionalism in present-day South Africa. It obliges judges to not only look at the

103 *Mahlangu v Minister of Labour* (n 2) para 75. The Court's investigation of substantive equality included a comparison between domestic work and other types of professions.
104 *Mahlangu v Minister of Labour* (n 2) paras 90-93.
105 *Mahlangu v Minister of Labour* (n 2) para 79.
106 *Mahlangu v Minister of Labour* (n 2) para 84.
107 *Mahlangu v Minister of Labour* (n 2) para 85.
108 *Mahlangu v Minister of Labour* (n 2) paras 85 & 90.
109 *Mahlangu v Minister of Labour* (n 2) para 108.
110 *Mahlangu v Minister of Labour* (n 2) para 112.

current situation but to also consider the historical, legal, social, and political treatment of a group of people thereby developing a legal culture of justification.[111] This means that the exercise of power should be explained and the rationale for a decision by government should be based on its logical and persuasive merits. It should not be complied with simply out of fear of punishment or out of force.[112]

7.4 Why transformative constitutionalism is still relevant today

Since the introduction of transformative constitutionalism, other jurisprudential theories have surfaced to combat South Africa's struggle against inequality. However, transformative constitutionalism is still relevant to this struggle. Continuing to develop this interpretive approach innovatively will result in remedies aimed at resolving the challenges faced in socio-economic rights litigation.[113] This includes developing a substantive account for the structures underpinning various socio-economic rights in the Bill of Rights. Transformative constitutionalism allows judges to elaborate on the implications of these rights on historically marginalised groups.[114]

Liedenberg proposes that this approach can help to reform the legal system in a way that is more responsive to the claims of the impoverished. Of course, transformative constitutionalism is not without its limits, but disregard for the doctrine and its potential will lead to missed opportunities to improve the lives of the poor and keep the constitutional vision alive.[115]

8 Conclusion

The Constitutional Court in *Mahlangu* adopted a transformative approach to the adjudication of domestic workers' rights. It not only analysed the relevant section of COIDA but also took to analysing domestic work in itself by considering the history and the intersectional avenues of discrimination experienced by domestic workers during apartheid and today. The Court aims, with this judgment, to repair the pain and indignity suffered by domestic workers and their families.[116] Although the judgment is certainly welcomed and encompassed the transformative goals of the Constitution, the exploitation of domestic workers is still

111 *Mahlangu v Minister of Labour* (n 2) para 95; Klare (n 66) 166.
112 Klare (n 66) 147; E Mureinik 'A Bridge to Where - Introducing the Interim Bill of Rights' (1994) 31 *South African Journal on Human Rights* at 32.
113 Liedenberg (n 68) 77.
114 Liedenberg (n 68) 51.
115 Liedenberg (n 68) 78.
116 *Mahlangu v Minister of Labour* (n 2) para 120.

commonplace in South Africa.[117] Due to the general lack of regulation afforded to domestic work, it is highly possible that, despite the gazetted regulations and the judgment, claims for compensation will be swept under the rug and forgotten. For this reason, it is submitted that transformative constitutionalism is not merely a legal theory simply adopted by judges and politicians, but is also a cultural evolution and mindset change that should resonate in everyone's hearts. Only once South Africans themselves realise this will we relish in the Constitution's vision for a free and equal South Africa.

117 Ally (n 33) 8.