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'Swartman': Racial Descriptor or Racial Slur? *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC)

JOANNA BOTHA

ABSTRACT: This article uses speech theory to assess the harm constituted by the speech acts in two Constitutional Court cases, namely *Rustenburg Platinum Mine v SAEWA obo Bester and Others* and *Duncanmec (Pty) Ltd v Gaylard NO and Others*. I argue that racist speech should be treated as a subordinating and oppressive speech act, with illocutionary force, where the speaker enacts harm through the words used. In the context of the factual matrix in *Rustenburg Platinum Mine* and with reference to the racial descriptor, 'swartman', I show that such speech can perpetuate structural inequality, and has the capacity to perpetuate unjust social hierarchies. In comparison, the struggle song at issue in *Duncanmec (Pty) Ltd Gaylard NO and Others*, when assessed in context and with reference to the hierarchy of the actors involved, did not have the ability to enact subordination. The analysis demonstrates that an appreciation of the illocutionary force of racist speech and its capacity to enact identity-oppression enhances the balancing of the benefits of the promotion of free speech against the need to regulate and censor harmful speech.

KEYWORDS: equality, hate speech, racist speech, speech theory, subordination

AUTHOR: Associate Professor, Public Law, Nelson Mandela University, South Africa. Email: Joanna.Botha@mandela.ac.za

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I INTRODUCTION

In 2018 the Constitutional Court delivered two judgments in which it was required to engage with the problem of 'hate speech' on the grounds of race, often also called 'racist speech'.[1] The first, *Rustenburg Platinum Mine v SAEWA obo Bester and Others*,[2] addressed the issue of whether a racial descriptor, 'swartman' (translated to mean 'black man')[3] could constitute racist and derogatory speech, warranting a dismissal from employment. The second, *Duncanmec (Pty) Ltd v Gaylard NO and Others*,[4] concerned the problem of whether the singing of a struggle song, containing the lyrics 'tell them that my mother is rejoicing when we hit the boer',[5] amounted to racially offensive conduct and justified the dismissal of striking workers.

The Constitutional Court was not required to test the legitimacy of the speech in issue in either case; nor to label the speech used as hate speech. It was merely asked to assess the reasonableness of the respective arbitrators' awards in the arbitration proceedings — in *Rustenburg Platinum Mine,* that the use of 'swartman' was 'racially innocuous';[6] and in *Duncanmec* that the song was racially offensive and that the employees should be dismissed.[7] Despite this, the Court used the opportunities afforded by the issues in *Rustenburg Platinum Mine* and *Duncanmec* to assert its leading role in the elimination of racism and inequality from South African society.[8] Whilst this is commendable, the analysis in both judgments is unhelpfully vague and generic, with the Court resorting to its now familiar tropes about its

1 The term hate speech is used with full knowledge of the variety of phenomena it describes. See, for example, A Brown 'What is Hate Speech? Part 1: The Myth of Hate Speech' (2017) 36 *Law and Philosophy* 491 and A Brown 'What is Hate Speech? Part 2: Family Resemblances' (2017) 36 *Law and Philosophy* 561, 571, who argues that legal scholars and legislators incorrectly use a wide variety of speech forms under the 'hate speech' label. There are many forms of speech acts deserving of legal censure, even though they should not be categorised as 'hate speech'. The terms 'unjust speech', 'dangerous speech', 'ill-considered speech', and 'harmful speech' are all equally acceptable, although 'hate speech' does capture the essence of inter-group 'hatred'. For South African work on a similar theme, see J Botha & A Govindjee 'The Regulation of Racially Derogatory Speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2016) *South African Journal on Human Rights* 293; J Botha 'Towards a South African Free-Speech Model' (2017) *South African Law Journal* 778.

2 [2018] ZACC 13; 2018 (5) SA 78 (CC) (*Rustenburg Platinum Mine*).

3 The Constitutional Court leaves space between 'swart' and 'man'. The correct spelling in Afrikaans is 'swartman' and is used throughout this article. Both the Labour Court and the Labour Appeal Court correctly used 'swartman', as one word.

4 [2018] ZACC 29; 2018 (6) SA 335 (CC) (*Duncanmec*).

5 Translated into English from the isiZulu. Boer, according to the *Duncanmec* Court at para 37, means either farmer or white person. See too *Afri-Forum & Another v Malema &Others* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC), where the Equality Court held that a similar song qualified as hate speech in terms of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

6 *Rustenburg Platinum Mine* (note 2 above) at para 1.

7 *Duncanmec* (note 4 above) at para 1.

8 *Duncanmec* ibid at para 7; *Rustenburg Platinum Mine* (note 2 above) at para 37, the Court holding that: 'In addition, this Court is obliged, as a custodian of the Constitution, to ensure that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism. Our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which as a nation we strive to achieve. As this Court aptly held "[t]he Constitution is the conscience of the nation".' The Court echoed the judgment of the Chief Justice in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & Others* [2016] ZACC 38; 2017 (1) SA 549 (CC) at para 9.

obligation to uphold the Constitution, and the need to promote the constitutional values of equality, dignity and non-racialism.[9]

In this article I shall demonstrate, with particular reference to the decision in *Rustenburg Platinum Mine,* that the Court's fixation on the meaning of the speaker's words, and the perceived need to test the legitimacy of such words by way of an objective test, resulted in a conflation of the harmful content of the speech and the harm constituted by the speech act. [10] I shall use a linguistic approach to assess the harm of the impugned speech act. My aim is to demonstrate that the reason why certain racist speech acts should not be tolerated is because, in addition to causing harm, racist speech plays a critical role in the perpetuation of structural inequality and racist attitudes.[11] I shall argue that the Court missed the opportunity to account substantively for the inherent power of speech to enact social hierarchies and harm.

The approach I take in this article is as follows: part II contains an overview of the factual scenario in *Rustenburg Platinum Mine* and an analysis of the reasoning of the Labour Court, the Labour Appeal Court and the Constitutional Court. In part III I introduce speech theory and explain how racist speech, including utterances such as 'swartman', has the potential to enact harm, regardless of the speaker's intention or awareness of the impact of the speech. Thereafter, in part IV, I deal specifically with racial slurs and analyse whether the term 'swartman' should be treated as an innocuous racial identifier. I illustrate that the use of derogatory racial identifiers in contexts such as that in *Rustenburg Platinum Mine* has the inherent potential to enact social hierarchies, causing such utterances to fall within the realm of racist speech. In part V, I contrast the speech and circumstances in *Rustenburg Platinum Mine* with the singing of the struggle song in *Duncanmec* and use speech theory to demonstrate why the speech in *Rustenburg Platinum Mine* was more objectionable. I conclude in part VI by highlighting that the Constitutional Court's treatment of racist speech through the traditional hate speech regulatory lens, through which the focus is on the meaning of the words used and the harm caused thereby, is unnecessarily restrictive. In my view, the Court's reasoning in both *Rustenburg Platinum Mine* and *Duncanmec* would have been substantially enhanced by a more nuanced understanding of the harm enacted by racial speech as a subordinating speech act.

[9] *Rustenburg Platinum Mine* (note 2 above) at para 37, and paras 52–53. In *Duncanmec* (note 4 above), see para 6. Section 1 of the Constitution of the Republic of South Africa, 1996 contains the founding constitutional values. The similarities between judgments such that of Mokgoro J in *S v Makwanyane &Another* [1995] ZACC 3, 1995 (3) SA 391 (CC) para 37 and Langa J in *S v Williams & Others* [1995] ZACC 6, 1995 (3) SA 632 (CC) para 59 are apparent. See too M Du Plessis & T Palmer 'Property Rights and Their Continued Open-Endedness — a Critical Discussion of Shoprite and the Constitutional Court's Property Clause Jurisprudence' (2018) *Stellenbosch Law Review* 73, 80–81 with reference to the meaning of s 25 of the Constitution and the decision in *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC); and S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

[10] I shall refer to the work on racist speech inspired by JL Austin's *How to Do Things with Words* (1962). See too A Fagan 'The Constitutional Court Loses its and Our Sense of Humour: *Le Roux v Dey*' (2011) 128 3 *South African Law Journal* 395, who uses speech theory to analyse the defamatory effect of the utterances in issue in that case.

[11] I acknowledge that South Africa is not alone in addressing this problem. See the work of Rae Langton, who has said that 'the relationship between speech and power is a large and daunting topic.' R Langton 'Speech Acts and Unspeakable Acts' (1993) *Philosophy and Public Affairs* 293, 298. And, as to legal regulation, Alex Brown explains that the difficulty in defining hate speech is caused by the fact that its regulation provokes 'strong moral reactions' and that legal meanings 'draw on a range of deeper values and principles about which people reasonably disagree'. See Brown 'The Myth of Hate Speech' (2017) (note 1 above) at 422.

Before starting, I stress that I am acutely aware that the incident in *Rustenburg Platinum Mine* occurred in a workplace setting, resulting in disciplinary consequences for the speaker. The Court was required to review the disciplinary procedures adopted and to assess whether the outcome of the disciplinary enquiry was one that a reasonable arbitrator could have reached. I am neither a labour lawyer, not an expert in administrative law. I therefore confine myself to the narrow, but critically important, question of whether the speech act at issue constituted racist speech worthy of censure.

II THE SPEECH AND REASONING IN *RUSTENBURG PLATINUM MINE*

The Constitutional Court commenced its unanimous judgment (per Theron J) by explaining that it had to decide whether the usage of the term 'swartman' (translated as 'black man') to refer to a colleague was racist and derogatory within the factual confines of the case and, if so, whether: a) it was appropriate for the CCMA[12] Commissioner to conduct arbitration proceedings and declare the speech harmless; and b) the dismissal of the employee was the appropriate sanction. [13]

The brief factual background was as follows: the applicant (Rustenburg Platinum Mine) dismissed Mr. Meyer Bester (a white man) for insubordination and racism because he referred to a 'colleague' (Mr. Solly Tlhomelang, employed by a sub-contractor in the mine, and a black man) as 'swartman'. The applicant alleged that this conduct breached the applicant's disciplinary rule which prohibits abusive and derogatory language and, in particular, racist remarks.[14]

The incident occurred in relation to a dispute concerning adjacent parking bays.[15] Bester was seemingly concerned that Tlhomelang's vehicle limited his reversing space (both vehicles were equally large) and that this situation could cause damage to his vehicle. Bester raised the issue with Mr. Sedumedi, the Chief Safety Officer, but without success. On the applicant's version, which the Court accepted, Bester then stormed into a meeting, and pointed his finger at Sedumedi, saying in a loud and belligerent manner, 'verwyder daardie swartman se voertuig' (translated by the Court to mean 'remove that black man's vehicle'),[16] and threatened that otherwise he (Bester) would take the matter up with management. Tlhomelang was present in the meeting. This evidence was supported by four witnesses, two of whom were offended by the speech. Ironically, however, Tlhomelang testified that he personally was not affronted by the speech. Bester denied the altercation and claimed that he did not utter the term 'swartman'. A disciplinary hearing was held in which Bester was found guilty of insubordination by disrupting a safety meeting and for making racial remarks. He was dismissed. Bester then referred the dispute to the CCMA and a series of legal fracases commenced.

The CCMA Commissioner found in Bester's favour and ordered his retrospective reinstatement. The Commissioner's decision was overturned on review by the Labour Court (LC).[17] With reference to its previous decision in *Modikwa Mining Personnel Services*

[12] Commission for Conciliation, Mediation and Arbitration.

[13] *Rustenburg Platinum Mine* (note 2 above) at para 1.

[14] Ibid at paras 2–3.

[15] Ibid at paras 3–4.

[16] The Court, however, did not focus attention on the perjorative 'daardie' in the utterance, an issue which is explored in the analysis below.

[17] *Rustenburg Platinum Mine v SAEWA obo Bester & Others* [2016] ZALCJHB 75.

v Commission for Conciliation Mediation and Arbitration and Others,[18] the LC held that racism remains 'prevalent in South African workplaces' and that the use of 'racial identifiers' perpetuates racial stereotypes. It added that racism, as a social construct, is infused with 'ideological baggage' and has the potential to subjugate others, especially where persons from particular race groups are viewed as the 'other'.[19] The LC concluded that the use of 'swartman' in these circumstances was not a mere identifier and that the speech was both derogatory and racist. Using the test established by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines andOthers Limited*,[20] the LC held that the Commissioner 'reached a decision that a reasonable decision-maker would not have reached'.[21] The LC's recognition that the notions of othering, difference and unequal power relations are core aspects of racist speech is insightful and worth exploring further, as I demonstrate in part III below.

The Labour Appeal Court (the LAC)[22] overturned the LC's decision and found that whilst the racial identifier in issue was offensive, it was neither derogatory, nor racist.[23] The term was used merely to identify Tlhomelang, as the owner of the relevant vehicle. Although the Constitutional Court was critical of the LAC's evaluation of Bester's evidence and its conflation of the respective versions,[24] aspects of the LAC judgment are critical for the analysis that follows, and are therefore addressed here to frame the discussion.

The LAC first acknowledged the imperative to outroot racism in the workplace. It then held that an objective test should be applied to determine whether 'swartman' had been derogatory. This test, said the LAC, is not based on how the employer understood the words, nor on the subjective feelings of the person targeted, but on whether a reasonable, objective and informed person would have perceived the words to be objectionable.[25] The LAC stressed the importance of context, holding that 'swartman' should ordinarily be treated as neutral, only acquiring a 'pejorative' meaning in special circumstances.[26] The LAC appeared to recognise the inherent tension between the constitutional promise of the establishment of 'a truly equal society, embracing non-racism' and the need to address the racial inequalities of the past,

[18] [2012] ZALCJHB 61; (2013) 34 *Industrial Law Journal* 373 (LC).

[19] The Labour Court judgment (ibid) is discussed in para 19 of the LAC judgment: *SAEWA obo Bester v Rustenburg Platinum Mine & Another* (2017) 38 *Industrial Law Journal* 1779 (LAC); [2017] 8 BLLR 764 (LAC) (*SAEWA obo Bester)*. In relation to othering, the work of hate crime scholars such as Barbara Perry, Neil Chakraborti, Gail Mason and Paul Iganski, to name a few academics, is instructive. See B Perry 'Intervening Globally: Confronting Hate Across the World' (2016) *Criminal Justice Policy Review* 590; N Chakraborti 'Crimes Against the "Other": Conceptual, Operational, and Empirical Challenges for Hate Studies' (2010) *Journal of Hate Studies* 9; G Mason 'Victim Attributes in Hate Crime Law: Difference and the Politics of Justice' (2014) *British Journal of Criminology* 161; P Iganski 'Hate Crimes Hurt More' (2001) *American Behavioral Scientist* 626.

[20] [2007] ZACC 22; 2008 (2) SA 24 (CC). See too *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 *Industrial Law Journal* 863 (LAC); [2002] 6 BLLR 493.

[21] Para 14 of *SAEWA obo Bester* (note 19 above) contains detailed extracts of the LC's judgment.

[22] *SAEWA obo Bester* (note 19 above).

[23] Ibid at para 25.

[24] Ibid at para 46.

[25] Ibid at para 16.

[26] Whilst the LAC did not explain its understanding of a pejorative meaning, I take the LAC to have used this term to mean that the speaker expressed contempt or disapproval. See the discussion in part 111 below.

which tension requires recognition that racial categories are regularly employed in society.[27] It observed, for example, that it is a valid concern that the use of race descriptors to identify people of different races permits the categorisation of people into social groupings, which is comparable to racial stereotyping, and perpetuates othering. Yet, despite this understanding, the LAC opined that it could not ignore that racial descriptors remain common in South African society, often occurring inadvertently in conversation,[28] or even as a means to advance black consciousness and identity-politics.[29] Thus, according to the LAC, it should be careful to condemn racial descriptors as this would be too 'absolute' a stance. In this section of its judgment, as discussed below, the LAC overlooked the central role that racially-loaded speech plays in the enactment and perpetuation of unjust social hierarchies, even when this occurs unintentionally or during an ordinary conversation.

The LAC then employed aspects of Bester's evidence to support its ruling that his use of 'swartman' in the particular context of the case was not racist.[30] These included findings that: Bester did not know Tlhomelang (corroborated by Tlhomelang);[31] that Bester did not object to parking next to Tlhomelang (on the grounds of race); that Bester had no reason to denigrate Tlhomelang; that Bester used 'swartman' merely to identify Tlhomelang; and that Bester did not have a racist intent.[32] Thus, the LAC concluded that although Bester 'may have been unwise to opt for this descriptor', the context demonstrated that Bester could have used 'swartman' merely to describe Tlhomelang, whose name he did not know.'[33] Accordingly, the LAC found that the LC erred in holding that the Commissioner 'reached a decision that a reasonable decision-maker would not have reached'.[34]

The Constitutional Court reversed the LAC's finding. The Court accepted that the matter was a constitutional one as it required an analysis of constitutional rights,[35] and raised the important question of whether a speech utterance amounts to racism.[36] The Court reiterated the need to obliterate racism in South Africa and stressed that 'as a custodian of the Constitution,'

[27] The argument is that this approach perpetuates racial differences and hierarchies, and may threaten the non-racial project. Yet, a failure to recognise the impact of racism and power relationships has the capacity to amount to an endorsement of racial inequality and undermines the constitutional commitment to the progressive realisation of substantive equality. See generally J Modiri 'Race, Realism and Critique: The Politics of Race and *Afri-forum v Malema* in the (In)equality Court' (2013) *South African Law Journal* 274; J Modiri 'Towards a "(Post-)apartheid" Critical Race Jurisprudence: "Divining our Racial Themes"' (2012) *Southern African Public Law* 232.

[28] *SAEWA obo Bester* (note 19 above) at para 29.

[29] Ibid at paras 19, 29. The example employed by the LAC is the following: 'the unidentified person who called yesterday was a black man'. Regarding the problem of the use of race in the black consciousness movement work, the LAC states: 'If it were considered to be so, then organisations seeking to perpetuate black consciousness and identity would be subject to outright condemnation — and our society has yet to adopt so absolute a stance'. The mistake the LAC makes is to provide an example of the use of the words in a situation in which the speech does not have illocutionary force (an issue which is addressed below).

[30] Ibid at paras 25–27.

[31] Ibid at para 23.

[32] Ibid at paras 23, 26, 27.

[33] Ibid at para 27.

[34] Ibid at para 40. Earlier on in the same para the LAC uses the term 'could' — the Constitutional Court's disdain for the use of 'would' seems somewhat misplaced. See *Rustenburg Platinum Mine* (note 2 above) at fn 12.

[35] *Rustenburg Platinum Mine* (note 2 above) para 31, the rights cited were dignity, equality and fair labour practices.

[36] Ibid at para 32.

it was obliged to ensure that 'the values of non-racialism, human dignity and equality are upheld.'[37]

On the merits, the Court confirmed that an objective test should be used to determine whether the words used were racially derogatory,[38] but with an important rider. The Court held that:

> The Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past — of what is neutral, normal and acceptable — might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral — our societal and historical context dictates the contrary. In this sense, the Labour Appeal Court's decision sanitised the context in which the phrase 'swart man' was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.[39]

It added that despite the Constitution's acknowledgment of the need to overcome the racial strife and societal divisions of the past order, 'racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others'.[40] As a result,

> (g)ratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society.[41]

The Court concluded that the LAC erred in finding that Bester's use of 'swartman' was a mere racial descriptor and racially innocuous. Moreover, according to the Court, the LAC's application of the objective test had been too strict, because it 'sanitised' the context and the totality of the circumstances in which the words were uttered.[42] This approach prompted a somewhat blurred account to the effect that the test was not whether the witnesses had been correct in their understanding that the statement was racist, but rather whether 'objectively the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning. Only Mr Bester could have given evidence that he uttered the words with no racist intent. He failed to do so.'[43]

The CCMA Commissioner's decision was set aside, as one that a reasonable decision-maker could not have reached.[44] The Court held that the Commissioner had relied incorrectly on Bester's apparent defence that he used the term 'swartman' as a racial descriptor and

[37] Ibid at para 37. The Court referred to its earlier decision in *South African Revenue Service* (note 8 above) where it held at para 29 that 'The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism.'

[38] *Rustenburg Platinum Mine* (note 2 above) at para 45.

[39] Ibid at para 48.

[40] Ibid at para 52.

[41] Ibid at para 53.

[42] Ibid at para 49.

[43] Ibid at para 50.

[44] Ibid at para, using the test in *Sidumo* (note 20 above).

not as a derogatory or racist slur.[45] This was a flawed approach. In fact, Bester had denied uttering 'swartman'. He had also conceded that if he had used these words, that could have amounted to a dismissible offence.[46] Thus, both the Commissioner and the LAC erred by relying on non-existent evidence to conclude that Bester's speech was innocuous.[47] The Court, accordingly, confirmed Bester's dismissal, remarking that he had shown no remorse and that he had not acquired the ability to behave in a way that respects the dignity of all his co-workers.[48]

I shall demonstrate in the analysis below that despite some valuable insight into the real issues, specifically the tendency to approach skewered racial relations from a neutral or colour-blind perspective,[49] the Constitutional Court gave insufficient attention to the relationship between the form of the speech act in issue and the hierarchy of the actors involved. An appreciation of this synergy and the power of speech would have enhanced the understanding of the harm constituted by Bester's utterance. Additionally, in its assessment of whether the utterance amounted to racist speech worthy of censure, the Court conflated the meaning of the words, their force, the speaker's intention and the causal consequences of the utterance. The better approach is to consider the illocutionary force of an utterance such as 'swartman', with specific reference to the speakers involved and the societal context. It is to this analysis that I now turn, with the aim of applying the principles discussed to the factual scenario and speech type in issue in *Rustenburg Platinum Mine* and then juxtaposing the speech with the struggle song in *Duncanmec*.

III SPEECH THEORY INTRODUCED

A The harm caused by hate speech versus the harm enacted by hate speech

It is trite that speech can be used to do many things — it can insult, offend, harass, derogate, threaten, frighten, demean, humiliate, browbeat and oppress people.[50] On the other hand, speech is regarded as valuable as a means to assert self-autonomy and individual fulfilment, to attain the truth, and to promote democratic self-government.[51] These and a number of other rationales for freedom of expression create what has been called a 'free speech-principle',

[45] Ibid at paras 43, 46.

[46] Ibid at para 46

[47] Ibid at paras 46–47.

[48] Ibid at para 62.

[49] For further analysis of this concept, see the work of J Modiri (note 27 above) and E Bonilla Silva 'The Linguistics of Color Blind Racism: How to Talk Nasty about Blacks Without Sounding "Racist"' (2002) *Critical Sociology* 41; and 'Rethinking Racism: Toward a Structural Interpretation' (1997) *American Sociological Review* 465.

[50] RM Simpson 'Un-Ringing the Bell: McGowan on Oppressive Speech and the Asymmetric Pliability of Conversations' (2013) *Australasian Journal of Philosophy* 555, 560; R Delgado 'Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling' in M Matsuda, CR Lawrence III, R Delgado & KW Crenshaw (eds) *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (1993) 89.

[51] See generally F Schauer *Free Speech: A Philosophical Enquiry* (1982) 7–10; TI Emerson *The System of Freedom of Expression* (1970) 15; TI Emerson 'Toward a General Theory of the First Amendment' (1963) 72 *The Yale Law Journal* 877. 878; T Scanlon 'A Theory of Freedom of Expression' (1972) *Philosophy and Public Affairs* 204; J Weinrib 'What is the Purpose of Freedom of Expression?' (2009) 67(1) *University of Toronto Faculty of Law Review* 165. These and other rationales for freedom of expression have been accepted by the South African courts. See, for example, *South African National Defence Union v Minister of Defence* [1999] ZACC 7, 1999 (4) SA 469 (CC); *Print Media South Africa & Another v Minister of Home Affairs & Another* [2012] ZACC 22, 2012 (6) SA 443 (CC); *Democratic Alliance v African National Congress & Another* [2015] ZACC 1, 2015 (2) SA 232 (CC), to name a few.

providing a substantive basis for the protection of freedom of expression.[52] However, despite the importance of the right to freedom of expression in society, it can also be exceptionally harmful. The right is thus not absolute and most democracies accept that speech can be legitimately regulated.[53] The difficulty lies in determining which types of speech are deserving of the law's intervention, with the harm principle being the traditional way of determining the dividing line.[54] Simply put, only acts of expression that cause sufficient harm to others should be unworthy of the law's protection.

Numerous theorists have written about the harm caused by hate speech and the need to regulate such speech. [55] However, most justifications for hate speech bans have developed as counter-arguments to the rationales underpinning the importance of free expression in a democratic society; and aim to show that hate speech is unworthy of protection and should be censored.[56] Consequently, the justifications for hate speech prohibitions usually focus on the harm caused by hate speech to illustrate that it does not sufficiently promote the free speech rationales.[57] It is thus not surprising that some of the reasons advanced for excluding hate speech from the scope of protected speech include the following: that hate speech impairs the dignity and self-esteem of speakers, listeners, bystanders and victims (to counter the autonomy rationale);[58] that hate speech is incapable of advancing the truth and that the attainment of knowledge cannot be elevated above other important rights and values, such as human dignity

[52] Schauer (note 51 above); A Tsesis 'Free Speech Constitutionalism' (2015) *University of Illinois Law Review* 1015. For a South African perspective, see Botha (note 1 above) at 780.

[53] *S v Mamabolo (E TV & Others Intervening)* [2001] ZACC 17, 2001 (3) SA 409 (CC) paras 40–41. The South African courts have accepted that the limitation enquiry involves a weighing up of competing factors and values, and ultimately a proportionality assessment where different interests are balanced. See too *Brümmer v Minister of Social Development & Another* [2009] ZACC 21, 2009 (6) SA 323 (CC) para 59.

[54] The oldest rationale for freedom of expression, associated with the work of John Stuart Mill, is that it promotes the discovery of the truth: see JS Mill *On Liberty and Other Essays* (1998). The premise of Mill's theory is that views censored because of their supposed falsity may in fact be true and that their elimination increases the possibility of 'exchanging error for truth'. Moreover, even if false views are published, we are forced to defend those which could be true. However, Mill's defence of freedom of expression accepted that restrictions on liberty were permitted to prevent harm to others. For a development of Mill, see W Sumner *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004); D Brink 'Millian Principles, Freedom of Expression and Hate Speech' (2001) *Legal Theory* 142; J Feinberg *The Moral Limits of The Criminal Law*: *Harm to Others* (1984) 31–36, 45–51.

[55] I Maitra 'Silence and Responsibility' (2004) *Philosophical Perspectives* 189; S Brison 'The Autonomy Defense of Free Speech' (1998) *Ethics* 335; M Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in M Matsuda et al (eds) *Words that Wound* 17 also available at (1989) *Michigan Law Review* 2320; J Waldron *The Harm in Hate Speech* (2012) 105; C West 'Words that Silence: Freedom of Expression and Racist Hate Speech' in I Maitra & MK McGowan (eds) *Speech and Harm: Controversies Over Free Speech* (2012) 236–237; K Gelber '"Speaking Back": The Likely Fate of Hate Speech Policy in the United States and Australia' in Maitra & McGowan (eds) 50, 53–54; R Delgado & J Stefanic 'Four Observations about Hate Speech' (2009) *Wake Forest Law Review* 353, 362–363 listing the harms caused by direct hate speech on the victims.

[56] See generally A Brown *Hate Speech Law: A Philosophical Examination* (2015) 1–18.

[57] Ibid; F Schauer 'The Phenomenology of Speech and Harm' (1993) 103 *Ethics* 635, 636; R Cohen-Almagor 'Harm Principle, Offensive Principle, and Hate Speech' in R Cohen-Almagor *Speech, Media and Ethics* (2005) 2–23.

[58] For an interesting perspective on the link between hate speech restrictions and self-autonomy, see CE Baker 'Autonomy and Hate Speech' in I Hare & J Weinstein (eds) *Extreme Speech and Democracy* (2009) 139; CE Baker 'Hate Speech' in M Herz & P Molnar (eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (2012) 57; CE Baker 'Harm, Liberty and Free Speech' (1997) 70 *Southern California Law Review* 979, 981. See too J Waldron 'Dignity and Defamation: The Visibility of Hate' (2010) *Harvard Law Review* 1596.

(to refute the truth rationale);[59] that hate speech undermines political participation and damages democratic self-government (to show that hate speech is not essential in a democracy);[60] that hate speech results in acts of discrimination against targeted groups, inter-group violence, structural inequality and the lessening of social cohesion (to show that hate speech causes extensive harm);[61] and so on. The hate speech ban proponents accordingly argue that the extent and type of harm caused by hate speech justifies its regulation.

Yet, this approach is restricted because it focuses merely on the harm that speech *causes* (the so-called perlocutionary effects of speech). The various arguments usually run into trouble for three reasons. Firstly, it can be difficult to show the causal interconnection between the speech and the harm.[62] Secondly, there is considerable uncertainty about the threshold of harm needed to warrant state intervention, which involves a balancing of the harm caused by hate speech and the impact on the right to freedom of expression.[63] Thirdly, the hate speech concept is nebulous at best and allows for the regulation of a wide variety of speech acts, including offensive, insulting and hurtful speech.[64] This feature has prompted critiques that the hate element in most hate speech is misleading, because the threshold for what constitutes 'hate' differs between jurisdictions — some laws require that the perpetrator be motivated by hatred whereas others require only prejudice, offence or intolerance.[65]

The reason why the causal harm approach to hate speech regulation struggles to filter out the distinction between speech which should be tolerated and speech which should be censored is because it fails to take into account the performative force of the speech act itself — that is, what speech does as speech.[66] The over-emphasis on the causal harm of hate also

[59] Schauer (note 51 above) at 25–26, 33; *R v Keegstra* 1990 3 SCR 697 at para 87 (Dickson CJ reasoned that untrue statements cast as hate speech are unlikely to further knowledge or 'lead to a better world' and therefore cannot be justified by the truth rationale); Cohen-Almagor (note 57 above) at 9–10. In South Africa, see *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC) at para 35. See also the judgment of Cameron J in *The Citizen 1978 (Pty) Ltd & Others v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC) para 78, holding that 'truth-telling' is one of the tenets of the transition from the injustices of the past to democracy and constitutionalism. In *Afri-forum* (note 5 above) at para 33 the Court held that hate speech should not be respected merely because speech promotes the truth.

[60] Waldron (note 55 above) at 4; S Shiffrin 'Consent, Democratic Participation, and First Amendment Methodology' (2011) 97 *Virginia Law Review* 559 at 560–561; SM Feldman 'Hate Speech and Democracy' (2013) 32 *Criminal Justice Ethics* 78, 87; R Post 'Hate Speech' in I Hare & J Weinstein (eds) *Extreme Speech and Democracy* (2009) 128; 287.

[61] See generally the texts referred to in note 55 above.

[62] MK McGowan 'Oppressive Speech' (2009) *Australasian Journal of Philosophy* 389,390.

[63] K Gelber 'Differentiating Hate Speech: A System Discrimination Approach' 2019 *Critical Review of International Social and Political Philosophy* 1, 2; I Maitra & MK McGowan 'On Racist Hate Speech and the Scope of a Free Speech Principle' (2010) *Canadian Journal of Law and Jurisprudence* 343 364–365.

[64] Brown 'The Myth of Hate Speech' (note 1 above) at 421–422.

[65] D Brax 'Motives, Reasons and Responsibility in Hate/Bias Crime Legislation' (2016) *Criminal Justice Ethics* 230, 233; B Perry 'A Crime by Any Other Name: The Semantics of Hate' (2005/2006) 4 *Journal of Hate Studies* 121; J Garland & N Chakraborti 'Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union' (2012) *European Journal of Criminology* 38, 42; K Goodall & M Walters 'Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth' *Report prepared for Equality and Justice Alliance* (2019) 35, available at https://www.humandignitytrust.org/wp-content/uploads/resources/Legislating-to-Address-Hate-Crimes-against-the-LGBT-Community-in-the-Commonwealth-Final.pdf, pointing out that hate laws 'vary along a spectrum'.

[66] R Langton 'The Authority of Hate Speech' in J Gardner, L Green & B Leiter (eds) *Oxford Studies in Philosophy of Law* (2018) 123; Maitra & McGowan (note 63 above) at 364.

tends to ignore the reality that language operates in concert with existing social practices and hierarchies, and is core to social interaction.[67] One way of overcoming these problems is to use the constitutive harm approach to speech regulation, where the focus is not on speech *causing* harm, but on speech *as* harm — the illocutionary force of the words. Here, the relationship between speech theory and identity oppression, including the social hierarchical structures in which racist speech usually manifests itself, is key.[68] This way of solving the hate speech problem is becoming increasingly influential and is aligned with concerted trans-disciplinary efforts worldwide to show that the link between speech acts and other forms of expressive conduct should be part of our attempt to understand and explain identity-based oppression and social hierarchies.[69] In short, if we wish to diagnose the link between speech and group-based disadvantage, we need to explore how speech acts, including racial slurs and racist names, not only enable the depiction of marginalised people as unwanted out-groups, but also enact this social hierarchy.[70] The benefit of this approach is that it adds another more nuanced dimension to the traditional regulatory framework for racist speech in the South African context, which requires balancing the harm of the speech and the need to promote freedom of expression.

B Hate speech and speech-act theory — racist speech as subordination

The constitutive harm approach requires an understanding of speech act theory and the potential of words to do 'things'.[71] The usual point of departure is JL Austin's work, *How to Do Things with Words*, in which he assessed the performative quality of language.[72] Austin classified speech acts into three main types: locutionary, illocutionary and perlocutionary. A locutionary act, quite simply, is to state something which has meaning or content. The locution concerns the content of the speech and fixes meaning. An illocutionary act is the action performed *in* saying something, also described as an act that is done with words. Examples include warning, ordering, betting, marrying and the like ('I promise'; 'I bequeath'; 'I bet' and 'I do'). A perlocutionary act, on the other hand, is the action performed *by* saying something, or the act

[67] L Tirrell 'Genocidal Language Games' in I Maitra & MK McGowan *Speech and Harm: Controversies Over Free Speech* (2012) 174; L Tirrell 'Toxic Speech: Toward an Epidemiology of Discursive Harm (2017) *Philosophical Topics* 139, 142.

[68] This is a growing area of research evidenced by the more frequent use of trans-disciplinary approaches (sociology, linguistics, criminology, legal theory, philosophy) to solve problems in hate speech scholarship. Sociologists research the relationship between hate and group dynamics, focusing on the othering of out-groups. Psychologists usually work with the victims of hate speech, considering the impact of group-hatred on victims. Political scientists address the issue of hate in public and political discourse, and consider the impact of such speech on political outcomes. Criminologists consider the question of the criminalisation of conduct or speech that promotes group-hatred. Linguists investigate the nature of the speech acts comprising hate speech. See A Brown 'What is Hate Speech? Part 2' (note 1 above) at 566.

[69] Simpson (note 50 above) at 558.

[70] CR Lawrence III 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' (1990) *Duke Law Journal* 431. See too S Gilreath 'Tell Your Faggot Friend He Owes Me $500 for My Broken Hand: Thoughts on a Substantive Equality Theory of Free Speech' (2009) *Wake Forest Law Review* 557, 604, who contends that 'words create the hierarchies and people fill them', as quoted by Simpson (note 50 above) at 558.

[71] R Langton & J Hornsby 'Free Speech and Illocution' (1998) *Legal Theory*, who also argue that we need to appreciate that 'speech is not just a matter of making meaningful noises, but … of doing things with words' at 23.

[72] Austin's basic premise is that to say something is to do something, and that this can entail a number of different things, JL Austin *How to Do Things with Words* (1962) 12. See the criticism of Austin's work in JR Searle 'Austin on Locutionary and Illocutionary Acts' (1968) *The Philosophical Review* 405.

that is the consequence of the words (such as the impact on the feelings, thoughts or conduct of the audience or the speaker).[73] For Austin the distinction here between *in* and *by* is crucial, with a perlocutionary act described as 'what we bring about or achieve by saying something'.[74] Austin added that, although both illocutions and perlocutions are performatives,[75] there is a tendency to blur the distinction between what is done with words — that is the illocutionary act — and what is done because of words, the perlocutionary act. The distinction in the context of this article is crucial because of the importance of distinguishing the harm constituted by the speech act (the illocutionary force) as opposed to the harm caused by the speech (the perlocutionary force). In short, speech can constitute a form of action.

The difference between these speech acts is best explained with reference to Austin's example of the following statement: 'He said to me: "Shoot her"'. The locutionary meaning / content of these words is that he said 'shoot' with reference to a particular person, namely 'her'. The illocution in saying 'shoot her' is that he was ordering me to shoot her. The perlocution is that if I shoot her, the consequence of the words uttered will be that I shot her (and perhaps she will die).

Austin's speech theories have been adapted by a number of scholars, including Mari Matsuda,[76] Mary Kate McGowan,[77] Rae Langton,[78] Jennifer Hornsby,[79] and Catharine MacKinnon,[80] and applied to explain the harm enacted first by pornography and then by racist speech.[81] These theorists argue that it is inadequate to treat the regulation of pornography and racist speech through the limited free speech / censorship lens. Instead, the focus should be on the relationship between speech, inequality, structural oppression and subordination, with a recognition that speech plays a pivotal role in the enactment and perpetuation of structural hierarchies. In particular, racial utterances are not merely a symptom of racism, but constitutive thereof. The failure to take into account the illocutionary harm of racist speech also leads to an inadequacy in the balancing process and wider reasoning of the courts when deciding how to weigh the promotion of free speech against the regulation and censorship of hate speech.[82]

[73] Austin ibid at 101. It should be clear that a particular utterance may not actually bring about its perlocutionary effect.

[74] It is acknowledged that this is a simplification of Austin's theory and that Austin did not address the question of hate speech or racist speech.

[75] A performative utterance is one that does more than merely describe a given reality. Performatives also change the social reality they are describing.

[76] Matsuda (note 55 above).

[77] McGowan (note 62 above) at 389. McGowan uses David Lewis's conversational score theory to explain that moves in conversations are rule based, similar to plays in a baseball match.

[78] R Langton 'Speech Acts and Unspeakable Acts' (1993) *Philosophy & Public Affairs* 293; R Langton 'The Authority of Hate Speech' (note 60 above) at 123–125; R Langton 'Blocking as Counter-speech' in *New Work on Speech Acts* (2018) 144.

[79] Langton &Hornsby (note 71 above) at 21.

[80] C MacKinnon 'Linda's Life and Andrea's Work' in *Feminism Unmodified: Discourses on Life and Law* (1987) 130; 'Francis Biddle's Sister' in the same volume at 176; and 'Sexual Politics of the First Amendment' also in this volume at 209; C MacKinnon *Only Words* (1993). See too the discussion in R Langton 'Speech Acts' (1993) (note 78 above) at 299, 302–303, 305–306.

[81] It is acknowledged that these arguments were developed to overcome the First Amendment free speech position. See generally A Meiklejohn 'The First Amendment is an Absolute' (1961) *The Supreme Court Review* 245; Schauer (note 51 above) at 7–10; K Greenawalt *Speech, Crime and the Uses of Language* (1989) 33–34.

[82] This insight may not necessarily lead to particular legal outcomes, but would aid an understanding of the nature and weight to be attached to the particular harms of racist speech (particularly in the South African context). I thank David Bilchitz, the editor of this article, for the point.

To return to the work of the analytical feminist scholars, and starting with pornography, MacKinnon[83] and Langton[84] contend that pornography both enacts the subordination of women (the illocutionary force of subordination) and causes the subordination of women (the perlocutionary effect). Pornography also silences women and, for these reasons, should not be protected by the law.[85] The subordination and silencing claims have been extended to racist speech to provide an alternative normative basis for its regulation.[86] Speech, says Langton, has both causal and constitutive aspects.[87] Just like the act of pornography, the racist speech act is both injurious and harmful in itself. It too subordinates and silences its victims, with Langton understanding subordination to include the creation of social norms which construct social inequality for victims, the undermining of their rights and powers, and the framing of what constitutes acceptable behaviour towards victims. [88] In addition, the same speech act promotes harm (in the form of racial discrimination or violence or harassment and the like). So, the speech act both causes subordination and oppression of its targets (the perlocutionary effect)[89] and constitutes subordination (the illocutionary force thereof). Subordination cannot be viewed merely as a downstream or secondary harmful effect of racist speech.[90] Instead, the very act of engaging in speech of this type is a harmful subordinating act. Racist hate speech should thus not be cast merely as a form of uncivil speech which causes harm, but as a speech act that *is* harm, because it reinforces and perpetuates the more 'tangible' forms of discrimination or identity-based violence or oppression.[91] The crucial question in the context of this article, which I address shortly, is whether a racial 'descriptor' in the form of 'swartman' can be equated with speech of this type.

Langton illustrates her theory with reference to the enactment of a South African apartheid-era type law. She explains that where the legislator enacts a law that states that 'Blacks are not permitted to vote' the legislator is doing more than simply expressing its racist views about the black citizens of South African society (the locutionary act). The enacted law

[83] MacKinnon (note 80 above).

[84] Langton 'Speech Acts' (1993) (note 73 above).

[85] Langton 'Speech Acts' (1993) (note 73 above) at 297. See too LH Schwartzman 'Hate Speech, Illocution, And Social Context: A Critique of Judith Butler' (2002) *Journal of Social Philosophy* 421, 426. The counter to this view is that the regulation of pornography amounts to illegitimate censorship. See, for example, N Strossen 'A Feminist Critique of the Feminist Critique of Pornography' (1993) *Virginia Law Review* 1099.

[86] In brief, the argument is that 'identity-oppressive speech' is a critical component of the way in which identity-oppression and inter-group subordination occurs. The speech acts are not merely elements in the causal chain. They are part and parcel thereof, Simpson (note 50 above) at 558–559.

[87] Langton 'Speech Acts' (1993) (note 73 above) at 302–303. See too McGowan (note 62 above) at 391–392

[88] Langton 'Speech Acts' (1993) ibid at 302–303.

[89] See the work of Matsuda, Delgado, and others, as set out in note 55 above.

[90] For an interesting analysis of the relationship between the regulation of hate speech and discrimination in relation to 'upstream' and 'downstream' laws, see R Dworkin 'Forward' in I Hare & J Weinstein (eds) *Extreme Speech and Democracy* (2011) vii–viii and Waldron (note 56 above) at 178–179.

[91] Maitra & McGowan (note 63 above) at 366–367. I am aware of the criticisms of the language-based oppression arguments. One such critique is that despite the many structural changes in western capitalistic societies post the 1960s and 1970s, structural inequalities across race and gender remain pervasive. If the enacted laws and institutions aimed at overcoming inequality and oppression are unable to achieve reform, why do we bother to 'pin the blame' on language through the medium of speech theory? This critique fails to appreciate that when addressing racist speech, language is the problem. Moreover, speech is a core component of our humanity and defines our autonomy as human beings. Speech is also core to social interaction. See too Simpson (note 50 above) at 559–560.

is also a perlocutionary act because it has the effect of preventing black people from voting. More importantly for this context, the law is an illocutionary act and, in particular, an act of subordination, because: a) it ranks black citizens as less worthy than other (white) citizens;[92] b) it actually deprives black people of rights and powers; and c) it legitimates discriminatory conduct against black people. All of these count as subordinating illocutions. Just like an open act of discrimination, such as the refusal in a shop to serve a Muslim man wearing a fez,[93] the legislator's statement also constitutes a subordinating act, this time in the form of speech. 'Whites only' signs and other such displays, including restaurateurs or guesthouse owners who instruct their employees not to serve persons from an 'out-group', have exactly the same purpose.[94]

The utterance in *Rustenburg Platinum Mine* comprised the following words: 'verwyder daardie swartman se voertuig'. How would it fit into Langton's taxonomy of racist speech? The meaning of these words (the locutionary content) is 'remove that black man's vehicle'. The perlocutionary effect of the words, if Bester's demand had been successful, is that Sedumedi would have taken steps to assign Tlhomelang another parking bay. It is, however, the illocutionary impact of the use of 'daardie swartman' with which we are concerned. Did the racial descriptor, used in an aggressive tone, and coupled with the demonstrative 'daardie' subordinate Tlhomelang? I believe it did. The use of 'swartman' in this context was more than a mere speech mechanism designed to identify Tlhomelang, who happened to be a black man, as the owner of the vehicle in issue. Instead, the racial name amounted to a form of 'othering' and served to rank Thlomelang as belonging to an out-group. Moreover, the use of 'daardie' in combination with 'swartman' and the ordering tone used by Bester aggravated the force of the utterance and the inherent insult. In this way, Bester's words enacted the existing social hierarchical structures between black and white people.

In part IV below I add to this analysis when I discuss the features of racial slurs and apply these to 'swartman'. Before doing so, however, an obvious objection is that Bester's speech is not comparable to Langton's legislator example, because he did not have the authority to subordinate Thlomelang. It is clear that Bester did not possess the same basic power as the South African legislator or even the restaurateur and, therefore, if he did have power, it was acquired through other means. I now address this problem.

C The problem of authority

Langton, like others, is aware of the critique that in the legislator example, the illocutionary act was successful, because the speaker had authority.[95] The reality is that in many cases of ordinary racist speech (if such speech can ever be called ordinary), the speaker lacks authority.

[92] Langton 'Speech Acts' (1993) (note 73 above) at 303 — 'It ranks blacks as having inferior worth'.

[93] This is a South African example: see *Woodways CC v Vallie* [2009] ZAWCHC 155, 2010 (6) SA 136 (WCC).

[94] Langton 'Speech Acts' (1993) (note 78 above) at 303. See also MK McGowan 'On "Whites Only" Signs and Racist Hate Speech: Verbal Acts of Racial Discrimination' in *Speech and Harm: Controversies Over Free Speech* (2012) 121.

[95] Langton 'Speech Acts' (1993) (note 78 above) at 304, saying 'The authoritative role of the speaker imbues the utterance with a force that would be absent were it made by someone who did not occupy that role.' Similarly, where a restaurant owner introduces a policy which states that no foreign nationals may be served (here I draw on the current xenophobic attitudes prevailing in our society), the owner has authority over the restaurant and his speech can subordinate. This example is taken from McGowan's work 'Oppressive Speech' (note 62 above) at 393. The restaurateur's policy is an authoritative speech act. Had the patrons and / or employees uttered the same words, they would not have had the same force.

It is therefore arguable that he or she cannot subordinate. The authority problem is a critical potential stumbling block in the argument. On Austin's theory, for a speech act to have a successful illocution, certain 'felicity' requirements must be met, one of which is that the speaker must have authority.[96] So, does an ordinary speaker, for example, someone on the street corner or on a social media site, who shouts a racial epithet with reference to a person of colour, have authority in the same sense as the legislator who enacts racist laws?[97] Similarly, does a white employee who labels a fellow black employee as a 'swartman' have the authority to enact the subordination of the person targeted?[98]

Langton has recently expanded her theory to address the authority problem.[99] She acknowledges, firstly, that not all hate speakers have authority. Nonetheless, even where there is no authority, speech has potential to cause harm, depending on the factors contributing to its power.[100] Here, we are in Austin's perlocutionary realm and the usual harmful consequences of hate speech are acknowledged. However, according to Langton, where the speaker has authority, the 'harm in hate speech' is exacerbated, because of the illocutionary force of the words. Whatever else 'the harm in hate speech' is, it is worse when the speaker has authority. An obvious objection to this line of reasoning is that it is circular and creates the impression that racist speech is not harmful unless the speaker has authority. This aspect of Langton's response is therefore inadequate because we know intuitively that speech uttered by a speaker without authority has the capacity to be harmful. More is required to address the problem of authority.

The second leg of Langton's riposte is that for hate speech there are many sources of authority, both formal and informal.[101] The legislator has formal authority. Speakers with informal authority, however, can also subordinate. According to Langton, informal

[96] Austin (note 72 above) at 28–29.

[97] Critics have argued that the authority problem is fatal to the claim that the more banal types of racist speech can subordinate. See L Green 'Pornographizing, Subordinating, and Silencing' in R Post (ed) *Censorship and Silencing: Practices of Cultural Regulation* (1998) 285, 297 and N Bauer 'How to Do Things with Pornography' in S Shieh & A Crary (eds) *Reading Cavell* (2006) 68. Green claims that pornography is not authoritative; is low-value speech (disapproved of but tolerated); is used by speakers with low social positions; and cannot subordinate. In response, Ishani Maitra in 'Subordinating Speech' in *Speech and Harm: Controversies over Free Speech* (2012) 94 argues that given the widespread use and sales of pornography, it cannot be treated as low status. Bauer at 86–87 claims that pornography is not authoritative because it cannot authorise the subordination of women. There is quite simply no excuse for those who behave as the speech / pornography suggests they should. She says: 'It's because no person or institution that is not formally invested with the authority has such authority apart from individuals' granting it to them'. Maitra's response is addressed in note 101 below.

[98] Similarly, do striking workers who sing racially loaded struggle songs during a strike have the authority to enact subordination of the people targeted in the song? In this context, I believe not. My argument is set out in part V below.

[99] Langton does so in two works, both initially presented as public lectures. See 'The Authority of Hate Speech' and 'Blocking' (both in note 78 above).

[100] Langton 'The Authority of Hate Speech' (note 78 above) at 136–137.

[101] Langton ibid at 126. Another argument used to counter the problem of authority includes Matsuda's claim that where the state fails to regulate or condones racist speech, the speakers have implied state authority to engage in such speech. See Matsuda, referred to in Maitra & McGowan (note 63 above) at 370. Maitra in 'Subordinating Speech' (note 97 above) at 94–96 also develops a thought-provoking argument. The question she explores is whether 'ordinary' racist speech can subordinate in the same way as Langton's South African legislator example. Explicitly, if such speakers do not have social authority can their racist speech subordinate? Can their speech rank their victims as inferior, deprive them of the dignity, and legitimate acts of discrimination? Maitra argues that a speaker's authority need not derive from social position. Instead, authority could be acquired by either derived or licensed authority. Inaction by others in response to racist speech confers authority.

authority can be acquired through 'presupposition accommodation', for example where a speaker presupposes authority and no-one objects (the omission aids the accommodation).[102] Specifically, where a speaker uses racial epithets and there is no objection from those who hear the speech, the speaker could acquire informal or subtle authority because it becomes presupposed that this type of speech is socially acceptable.[103] Silence counts, says Langton, and authority is acquired through the omission.[104] The result is that the 'hate' is normalised and eventually the speech 'gains the informal authority of a social practice'.[105] In this way 'ordinary' hate speakers generally do have authority and their speech has illocutionary force, with the capacity to subordinate.[106]

The critical question here is whether an utterance in the form of a supposed racial descriptor, such as 'swartman', when used by a white man to refer to a black man, would fall into the subordinating category. I claim that it can, acknowledging that my claim is context-dependent and hinges on factors such as the hierarchy of the actors involved, the social and historical context, and whether the speaker used a subordinating tone. We also know, of course, on the facts in *Rustenburg Platinum Mine*, that Bester's speech did not go unchallenged. The reality, however, is that speech acts of this type are commonplace in South African society, as evidenced by the numerous occasions on which courts and tribunals have been called upon to address instances of racist speech. For this reason, it is arguable that until confronted, utterances of this sort are part of the social structure and are usually ingrained.[107]

Another way in which to solve the authority problem is developed by McGowan, who argues convincingly that the enactment of social norms through the use of racist speech does not need any form of special authority.[108] She claims that off-hand and everyday remarks in ordinary conversations are mechanisms which impact on patterns of structural inequality, even where the speaker does not intend to engage in oppressive speech, and that this usually occurs in a subtle and obscure manner. The power is derived from social context because our

[102] Langton 'The Authority of Hate Speech' (note 78 above) at 126. Langton also describes the phenomena as 'blocking'.

[103] See MacKinnon *Only Words* (note 80 above) at 31, who argues that words and images place people in categories and hierarchies, which eventually, if left unchallenged, become 'inevitable and right'. In this way, feelings of inferiority and superiority become actualized.

[104] Langton 'The Authority of Hate Speech' (note 78 above) at 135.

[105] Langton speaks of practical and epistemic authority, 'aided by the acts and omissions of hearers who themselves have, or lack, authority; and how omissions, in particular, aid the acquisition of authority, through presupposition accommodation.' She argues that Streicher's anti-Jew propaganda is a classic example of epistemic authority, 'since it had local credibility, even if it lacked expertise'.

[106] Compare the work of Waldron, who although aware of the harm in hate speech and the need for regulation, casts the hatemonger as an outsider or 'a detested lonely wolf', that is as a person without authority. Judith Butler is equally critical. She argues that hate speech can never have authority, for this attributes power to the hate speaker. See J Butler *Excitable Speech* (1997). Note though that Langton does not argue that hate speakers always have authority, but when they do have authority, the subordinating harm is far worse. The speech can still cause harm, but possibly not constitute harm.

[107] See, for example, the LAC judgment (note 19 above) at para 30, where the LAC refers to the evidence of a witness, van der Westhuizen, who used a race descriptor, namely 'daar swart mannetjie' during the hearing. Ironically, this utterance is arguably even more derogatory than 'swartman' as 'mannetjie' means 'small man', which term could be equated to the derogatory use of 'boy' or 'girl' to refer to African employees.

[108] MK McGowan 'Conversational Exercitives and the Force of Pornography' (2003) *Philosophy and Public Affairs* 155; MK McGowan *Just Words: On Speech and Hidden Harm* (2019) 1. (For an explanation of 'exercitives' see note 109 below.) McGowan makes use of a technique known as the kinematics of conversation.

behaviour and conversational utterances are contributions (or moves) in norm-based social practices.[109] Moreover, such speech constitutes harm as opposed to just causing harm. The harm is constituted 'via adherence to norms enacted'[110] and, in turn, perpetuates social and structural inequality. McGowan adds that her thesis demonstrates that speech is even more harmful than originally conceived; aggravated by the fact that harm occurs even in the hands of non-authoritative speakers, who may not intend to oppress, discriminate or subordinate.[111]

McGowan's argument is particularly attractive as it explains both the impact of the 'swartman' utterance in *Rustenburg Platinum Mine* and the manner in which Bester, as an 'ordinary' speaker, acquired authority to subordinate the target of his speech, Tlhomelang, even though Bester may not have intended to act in a racist manner. In particular, in my view, McGowan's theory explains how Bester's speech, subtle and obscure as it may seem on face value, in fact, constituted harm by enacting the prevailing social norms that apply in South African society today. In this way, Bester acquired authority. My argument can be supplemented by an understanding of the illocutionary force of racial slurs, to which I now turn.

IV THE ILLOCUTIONARY FORCE OF RACIAL SLURS

Lynne Tirrell argues persuasively that whilst the normative power of derogatory terms, such as racial epithets, lies in their negative force or impact, the reality is that the mere use of such terms allows their speakers to wield considerable 'social strength'.[112] For speakers, derogatory racial terms construct an 'us' versus 'them' reality, where the 'them' are cast as an unwanted outgroup. The consistent use of such terms establishes and normalises social hierarchies and the speech becomes licensed. In this sense, a racial slur has illocutionary force. Mark Richard adopts a similar approach. He defines a slur as a speech device made to 'denigrate, abuse, intimidate, and show contempt, which is used to portray its targets in negative and oppressive light.'[113] He adds: 'what makes a word a slur is that it is used to do certain things, that it has ... a certain illocutionary potential'.[114]

According to Tirrell,[115] there are five key features of deeply derogatory terms. These features are aligned with the illocutionary force of racist speech and enable an appreciation of why the Constitutional Court intuitively treated the 'swartman' descriptor in *Rustenburg Platinum Mine*

[109] McGowan in *Just Words* (note 108 above) at 18–19 and 26–27 calls this mechanism a 'conversational exercitive'. She explains that the term 'exercitive' was first used by Austin (note 10 above) to refer to a speech act that exercises 'powers, rights, or influences'. McGowan has adapted the term to refer to an authoritative speech act that enacts harmful social norms. When such a speech act occurs as part of a conversation, it is a 'conservational exercitive'.

[110] McGowan *Just Words* (note 108 above) at 2.

[111] McGowan claims that ordinary individuals are not 'mere passive clogs' in the social structure, but active participants in the extension of unequal social structures.

[112] L Tirrell 'Genocidal Language Games' (2012) *Speech and Harm: Controversies over Free Speech* 174, 175. Swanson, another prominent scholar in this field, evades the authority problem by arguing that the use of a slur by person A encourages and emboldens others to consent to the use thereof and the entrenchment of the racial ideology associated therewith. See E Swanson 'Slurs and Ideologies' in *A Volume on Ideology* (2015) 16.

[113] M Richard *When Truth Gives Out* (2008) 40. See too J Butler (note 106 above) at 80 who argues that when a person uses a racial slur, he or she 'chimes in with a chorus of racists, producing at that moment the linguistic occasion for an imagined relation to an historically transmitted community of racists ... racist speech could not act as racist speech if it were not a citation of itself; only because we already know its force from its prior instances do we know it to be so offensive now, and we brace ourselves against its future invocations.'

[114] Richard ibid at 1.

[115] Tirrell (note 112 above) at 190.

not as a mere racial identifier, but as a type of racial epithet with illocutionary force (action engendering in Tirrell's parlance), and one deserving of censure. Firstly, deeply derogatory terms act as markers of in-group /out-group status. Tirrell explains:

> When speaker A uses a racial epithet to tell her friend B to stay away from a particular racial group of people, A sets up an insider/outsider relation, whereby A and B are not members of that group. They are insiders in their own presumed-to-be-better world, and they are outsiders to the badness of that racial group. Racist epithets of many sorts fit this pattern. 'Nigger', 'spic', 'kike', 'mick', 'Jew', 'nyenzi', 'inzoka', and many others seem to fit and are used accordingly.[116]

These types of epithets should thus be distinguished from belittling insults, such as 'jerk' or 'slob' or 'idiot'. Whilst offensive, the latter type of name-calling is not linked to a person's identity,[117] and thus, according to Tirrell, should not be classed as deeply derogatory. A person could, for example, cease to be a slob or only behave like an idiot in specific situations. It is clear that 'swartman' fits the in /out dichotomy. It is highly unlikely, for example, that if the person parking next to Bester was a fellow white man, that Bester would have walked into the meeting and said, 'remove that white man's car'. Whilst I could be accused of conjecture, a more probable reaction may have been, 'get rid of that idiot's 4 x 4', or alternatively Bester may have known his parking nemesis by name.

Secondly, deeply derogatory terms communicate negative messages based on the essential characteristics of the person targeted and, in so doing, enact and perpetuate social hierarchies.[118] Tirrell calls this the essentialism condition — the purpose of the negative message is to depict group-based racial category differences, such as race, religion, ethnicity and gender, as being socially undesirable.[119] A similar way of looking at this is to refer to the work of Eric Swanson,

[116] Tirrell ibid at 191.

[117] Identity characteristics are similar to immutable or inherent characteristics, i.e. aspects of a person's being that are fundamental to identity, such as sex, race or ethnicity, and which usually cannot be changed easily by the person. The traditional approach when selecting group characteristics for hate laws is to use the immutable characteristics approach, although this has been criticised. For a fuller discussion, see J Botha 'The Selection of Victim Groups in Hate Crime Legislation' (2019) 136 *South African Law Journal* 781.

[118] Tirrell (note 112 above) at 191–192. At footnote 53 Tirrell deals with the situation in which a member of the targeted group uses the same term to refer to another member of the same group. According to Tirrell this usually reflects an internal class division in which the speaker presumes that the term applies to the other (her target), but not to herself. Alternatively, it could be used by a speaker against herself. Usage in this manner reflects an acceptance of the insider/outsider division. On other occasions, the member of the subordinated group could use the term 'in a reclaimed way, shifting the meaning. This also depends on an insider/outsider function, because typically only members of the subordinated group are allowed to use the term in the reclaimed way.' Tirrell's thesis could be used to explain the cases in which one black person calls another black person a 'k' or an 'n'. A case of this nature was recently finalised in South Africa in a magistrate's court. Peter-Paul Ngwenya, a local businessman, was found guilty of *crimen injuria* for calling the CEO of Investec, Fani Titi, a 'QwaQwa kaffir' and a 'Bantustan boss'. Ngwenya argued that the words were intended to mean that Titi was 'willing to sell out his fellow blacks and collaborate with whites'. According to the magistrate such words are inherently racially offensive and constitute hate speech, regardless of the identity and race of the speaker and the target. It seems that the magistrate may have lacked insight into the more complex functioning of derogatory racial terms and their potential to enact harm, especially when used within a community. The matter is a complex one, which I do not address here. However, for further reading, see Tirrell 'Derogatory Terms: Racism, Sexism and the Inferential Role of Reasoning' in C Hendricks & K Oliver (eds) *Language and Liberation: Feminism, Philosophy, and Language* (1999) at 41; IL Allan *The Language of Ethnic Conflict: Social Organisation and Lexical Culture* (1983).

[119] See Botha (note 117 above) for a full discussion of group identity and the selection of victim groups for hate crime and hate speech legislation in the South African context.

who says that the use of the slur 'cues the ideology'.[120] Not only do racial slurs evoke past racist speech, they also evoke and endorse past racist actions and ideologies.[121] Thus, racial names generate and perpetuate out-group prejudice and justify differential treatment. As explained below when discussing the social context and social embeddedness factors, I argue that in the South African context and with reference to the use of derogatory terms to refer to people of a different race under apartheid, the term 'swartman' satisfies this condition. It fits the mould of derogatory speech in the sense that it was employed to define Tlhomelang in racial terms and to convey essential differences between Bester and Tlhomelang. Certainly, Bester did not align himself positively with Tlhomelang, who was cast as someone from a different racial group.

Thirdly, in contexts where there are patterns of historical oppression and systemic racial discrimination, the racial slur in a speech act is more likely to take on an illocutionary force. Tirrell calls this the 'social embeddedness condition' and claims that in societies where there is entrenched racism, the racial term is at its most powerful, because it is used (either intentionally or sub-consciously) to demean, humiliate and dominate.[122] She explains that: '[T]he mere word is not the issue; at work is the derogatory term, as used in a speech act (within a hurled epithet …) combined with both social embeddedness and essentialism.'[123] Swanson adds to the analysis. He explains that the use of racial slurs by persons belonging to dominant groups strengthens ideologies by emboldening speakers and listeners enabling them to enact the ideology depicted by the slur (even though this may occur unwittingly).[124] In this way, the use of slurs contributes to the 'power, persistence, and growth of the ideologies they cue.'

The social context factor assists with an understanding of why the utterance 'swartman', which on the face of it, appears to be a mere description of a person on the basis of race, was in fact derogatory and worthy of censure. It also provides a more substantive basis for the Constitutional Court's finding that certain racial terms cannot be treated as 'presumptively neutral' and that the LAC's approach 'sanitised' racism.[125] Whilst the Court was correct to find that the LAC sanitised the use of 'swartman', its mistake was the inappropriate boxing of the social embeddedness condition underlying the use of derogatory racial terms within the framework of an objective test to determine the meaning of the word 'swartman'. The meaning

[120] E Swanson 'Slurs and Ideologies' (note 112 above) at 11–12. Swanson also deals with the situation in which persons within the same group use slurs to degrade one another. He agrees that it is far more harmful when the speaker is from a dominant group.

[121] Swanson ibid at 17–18.

[122] See too the work of Gelber (note 55 above), aligning hate speech with systemic discrimination. She argues that we need to appreciate that the primary reason why we regulate hate speech is because of the harm it causes and that this involves an understanding of three key principles, namely the a) speaker's authority or capacity to harm, b) a hearer's vulnerability as a member of a systemically marginalised group, and c) the nature of the utterance. To identify hate speech, it is necessary to ascertain which groups may legitimately claim to be systemically marginalised. To this extent local context becomes even more important.

[123] Tirrell (note 112 above) at 192.

[124] Swanson (note 112 above) at 14. Interestingly Swanson explains further that 'Unless the speaker has misjudged the speech situation, they will largely "get away" with using the slur, which gives them a reason to think that their use of the slur and the concomitant cueing of an ideology is permissible or at least unlikely to be sanctioned. This gives the speaker "a *pro tanto* reason to think that the ideology associated with the slur is justified". Finally, such a speaker also inflames his or her own feelings of superiority and difference when using the slur, by emphasising the differences they see between themselves and their target — their perception, in the case of a racial slur, that "the subordinate race is intrinsically different and alien".' It is arguable that Bester used the term 'swartman' in this manner.

[125] *Rustenburg Platinum Mine* (note 2 above) at para 48.

of the words used was clear — the Court did not need to use an objective test to determine the locutionary content of 'swartman'. Moreover, a racial descriptor with reference to a person's skin colour is not per se derogatory. The better approach therefore would have been to analyse the illocutionary force constituted by the 'hurled' utterance, which was far more significant than a racial descriptor, mainly because of its association with historical oppression.

The fourth feature of racial slurs is their capacity to serve a number of functions, depending on the context of use.[126] Tirrell calls this the 'functional variation' feature. As we have seen, the main purpose of derogatory terms is the insider /outsider defining function, but this is not their only purpose. They could also be used to label the behaviour of out-group people in a negative way, such as 'gosh, person X is such a "swartman"' (white colleague to black colleague about another black colleague), or 'you're behaving just like a "dutchman"' (English speaking South African in a predominantly English urban area referring to an Afrikaans speaking person)[127] or 'Lucy is such a bimbo' (male person to female person about another female person — Tirrell's example). Here we have a speaker from a dominant group using third-person derogation[128] to define acceptable / unacceptable mannerisms or caricatures[129] for people from an out-group in a way that 'boomerangs from the target back to the hearer.' In this way, the derogatory term is able to set suitable societal norms. What is critical to appreciate is that truly derogatory terms are able to serve multiple functions, depending on the context of the utterance. In my view, Bester's use of 'swartman' to refer to Thlomelang served not only to describe Thlomelang skin colour, but also to portray and label him in a negative and subordinate manner as a nameless person from an out-group (from Bester's perspective).

Finally, derogatory terms can be action-engendering to the extent that they define legitimate treatment or status-functions for the people so named — that is, where the use of the derogatory name depicts certain groups of people as lesser beings justifying their subordination. The classic example is the word 'girl' to refer to a woman or 'boy' to refer to an African man. The names 'girl' or 'boy' for children are perfectly acceptable, but when applied to adults the purpose is to assign a negative status or to rationalise paternalistic and patronising treatment, such as paying lower wages, or assigning certain work functions or undermining self-autonomy generally. The reality as Tirrell explains is that 'Boys don't have the same rights as men. Neither do girls. Assign the status, and the treatments follow.'[130] As to 'swartman', I argue that it was used in the context of the factual scenario in *Rustenburg Platinum Mine* to define the status of Tlhomelang as someone who was subordinate to Bester and who occupied a diminutive social position.

In sum, derogations or slurs must be distinguished from mere insults, even though they share common features. The purpose of an insult is to hurt the target, potentially inflicting a 'sudden sting'. Derogations, on the other hand, inflict long-lasting harm and result in the realignment of the target's place in the world. Derogatory terms license discriminatory treatment and are subordinating. Applied to the facts in *Rustenburg Platinum Mine* and with reference to the South African context, it is my claim that the utterance 'swartman' served as

[126] Tirrell (note 112 above) at 192–193.

[127] This example was provided by my Afrikaans-speaking husband. The term 'Dutchman' when used by an English-speaking South African person to refer to an Afrikaans-speaking person is invariably not complimentary.

[128] A third-party derogation occurs when the speaker, who is a member of a dominant group, converses with a person from a subordinate group, and then uses a derogatory label to describe a third person, who shares the same group characteristics as the listener. See Tirrell (note 112) at 192.

[129] Swanson uses this term. See (note 115 above) at 12.

[130] Tirrell (note 112 above) at 193.

a derogatory racial slur and as a speech act that was used to validate a social norm entrenching the previously enacted unequal status of black persons, even though this may have occurred unintentionally.[131]

V THE SONG IN *DUNCANMEC*

Up until now, I have focused on the facts and judgment in *Rustenburg Platinum Mine* to illustrate that speech theory provides an enhanced means to assess the harm enacted by racial names. But, speech theory can also be applied to test the legitimacy of the struggle song which formed the basis of the enquiry in *Duncanmec* and helps to supplement the Court's finding that the arbitrator's decision was a reasonable one in the context of the facts of that case.[132]

In *Duncanmec,* the Court was concerned with the dismissal of nine employees who were found guilty of racially offensive conduct.[133] The employees, who were union members, participated in an unprotected strike at the employer's premises. They danced, sang struggle songs and refused to return to work when ordered to do so by their line manager.[134] The lyrics of the offensive song were translated from the isiZulu to mean: 'our mothers will rejoice when we hit the "boer"' (with the employer cast as 'boer').[135] The employees were charged with participating in an unprotected strike and gross misconduct, specifically singing racial songs and defying the instruction to return to work.[136] At an in-house disciplinary hearing, the employees were found guilty on both charges and dismissed. The arbitrator disagreed with this finding. She viewed a recording of the incident and noted that the strike was peaceful and of short duration.[137] Finding that a distinction should be drawn between using racial names and singing an apartheid-order struggle song, the arbitrator concluded that whilst the singing of the song was offensive and amounted to misconduct, the employees had not engaged in racist conduct. Their dismissal was thus substantively unfair, with the arbitrator awarding a written warning and reinstatement.[138]

The Constitutional Court was asked to consider whether the arbitrator's decision was one that a reasonable decision-maker would have made. Counsel for Duncanmec argued that the arbitrator had not fulfilled her duties reasonably and that the song amounted to hate

[131] Frantz Fanon *Black Skin White Masks* (1967) at 32 argues that the use of racial slurs or descriptors without intention to insult or degrade does not excuse the speaker. The lack of intention makes the situation worse. He says: 'it is just this absence of wish, this lack of interest, this indifference, this automatic manner of classifying him, imprisoning him, primitivizing him, decivilizing him, that makes him angry.' It is the social practice that is problematic, and which renders the words used more powerful, not the intention.

[132] *Duncanmec* (note 4 above) para 51.

[133] Ibid para 2.

[134] Ibid para 10.

[135] The Court held that whilst the song was offensive, the term 'boer' was not racially offensive. See *Duncanmec* (note 4 above) paras 37–39 and the discussion below. See too *Afri-forum* (note 5 above) paras 2–5 discussing the meaning of the term 'boer'.

[136] *Duncanmec* (note 4 above) para 11.

[137] Ibid para 18.

[138] Ibid paras 19–20. The compensation was limited to three months as a sign of the arbitrator's disapproval of the conduct.

speech and racism.[139] The employees should accordingly have been dismissed. NUMSA, the employees' union, asserted that the singing of a struggle song, even one containing the lyrics in question, could not be equated with racism. Instead, struggle songs served the 'purpose of marshalling the workers to stand together in "solidarity and defiance of the authority of the employer"' and should be treated as a 'rallying call for workers to unite'.[140]

In assessing whether the employees had engaged in racist conduct, the Constitutional Court held that the mere use of the term 'boer' did not constitute racism. Depending on the context of use, the word could mean 'farmer' or 'white person'. These translations are not racially offensive.[141] Nonetheless, the Court held that it was prepared to approach the matter on the basis that the employees were guilty of engaging in racially offensive behaviour (as opposed to 'crude' racism) for two reasons. Firstly, the arbitrator had decided that singing of the song was inappropriate and could cause hurt to those who heard it, and secondly, NUMSA had not objected to this finding.[142] On the question of sanction, the Court confirmed that the arbitrator's decision not to dismiss the employees was reasonable. The arbitrator had taken into account the context in which the song was sung (as set out above), the relationship between the employer and the employees, and the employees' personal disciplinary records and circumstances.[143] Moreover, according to the Court, Duncanmec's argument that the arbitrator had permitted racism by failing to dismiss the employees was unfounded. They were not found guilty of racism and even if the singing of the song did amount to racist speech, our law does not require an automatic dismissal for the use of racist terms at work.[144] Instead, each case must be assessed in light of its own particular circumstances and a balance struck between the imperative to treat racism firmly and the perpetrator fairly.[145]

The Court's evaluation of whether the song amounted to racially offensive speech lacked substance and analytical rigour. The Court struggled to distinguish between racially offensive behaviour and so-called crude racism in the workplace context. In my opinion, this happened because the Court did not engage sufficiently with the nature of the speech act in issue (a struggle song) and whether it had the capacity to enact harm in the circumstances at stake. An appreciation of speech theory, specifically the illocutionary force of a struggle song, would undoubtedly have enhanced its analysis. The Court's judgment would also have benefited by juxtaposing the legitimacy of the song as sung in these circumstances with its earlier decision in *Rustenburg Platinum Mine*, where the use of 'swartman' was held to constitute racist speech,

[139] Ibid para 32. Counsel for Duncanmec also argued, with reference to the minority judgment of Ngcobo J in *Sidumo* (note 20 above) that the arbitrator had applied her own sense of fairness when deciding that the employees should not be dismissed. Moreover, her decision was 'out of kilter' with the prevailing jurisprudence requiring racism to be eliminated from the workplace.

[140] *Duncanmec* (note 4 above) para 25

[141] Ibid para 37

[142] Ibid paras 37–39.

[143] Ibid para 51.

[144] Ibid para 48, with reference to *South African Revenue Service* (note 8 above) para 43.

[145] *Duncanmec* (note 4 above) paras 48–49.

and the decision in *Afri-forum and Another v Malema and Others* (*Afri-forum*),[146] where a struggle song containing similar lyrics was held to constitute hate speech.[147]

The illocutionary force of the song as sung in *Duncanmec* carries significantly less weight than the racial epithet in *Rustenburg Platinum Mine*. There are a number of marked differences between the two speech acts and the circumstances involved. Firstly, the speakers in *Duncanmec* were a small group of employees who occupied a lowly position in the workforce and who were involved in strike and protest action against their employer. Secondly, the societal context and the history of oppression in the two cases are not comparable. Thus, the hierarchy and power relations between the actors involved are distinguishable. In particular, it is highly unlikely that the employees in *Duncanmec* had the authority to subordinate or demean the employer, the 'target' of the song.[148] Thirdly, the utterance in *Rustenburg Platinum Mine* took the form of a hurled racial name as a slur, and the tone used was pejorative and insulting, whereas *Duncanmec* concerned a traditional struggle song used to protest against oppression. Whilst musical communications in the form of song can certainly constitute hate speech,[149] the illocutionary force of the song in question must be assessed with reference, not only to its historical significance, but also to its purpose as a current-day protest song used by a subordinate group to express and consolidate their dissatisfaction with the status quo of many workplaces in South Africa.[150] Accordingly, although the Constitutional Court arrived at the correct outcome in *Duncanmec*, its judgment would have been normatively richer had it included an analysis of the illocutionary force of the song to assess whether the song had the capacity to enact harmful norms in the form of racial subordination. I argue that it did not invoke such force — particularly in the circumstances at play in *Duncanmec*.

Finally, and whilst the Court in *Duncanmec* acknowledged (in passing) that the circumstances of the singing of the protest song by the workers in issue was not comparable to the facts in *Afri-forum*,[151] speech theory would also have enabled the Court to explain the

[146] *Afri-forum* (note 5 above). Here the Equality Court was asked to determine if the song amounted to hate speech in terms of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This section was recently declared unconstitutional as being overbroad by the Supreme Court of Appeal in *Qwelane v South African Human Rights Commission & Another* [2019] ZASCA 167, 2020 (2) SA 124 (SCA). The matter was set down for hearing before the Constitutional Court on 7 May 2020, but was postponed because of the lockdown imposed as a result of the COVID-19 pandemic. See too J Botha 'Of Semi-Colons and the Interpretation of the Hate Speech Definition in the Equality Act: *South African Human Rights Commission v Qwelane (Freedom of Expression Institute as Amici curiae) and a related matter* [2017] 4 All SA 234 (GJ)' (2018) 39 *Obiter* 526 for an analysis of the earlier Equality Court judgment.

[147] See too *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC), where the slogan used was tested against the definition of hate speech in s 16(2)(c) of the Constitution.

[148] It is acknowledged that the power dynamics would be different if the workers were in the majority and if the protest was not a peaceful one, with a sense of threat involved.

[149] From a South African perspective, the decisions in *Freedom Front* (note 147 above) and *Afri-forum* (note 5 above) are obvious examples. See too BA Messner, A Jipson, PJ Becker and B Byers 'The Hardest Hate: A Sociological Analysis of Country Hate Music' (2007) *Popular Music and Society* 30 for an interesting analysis of the history of protest songs and songs as hate speech.

[150] See too MJ Grant 'Musical Communication, "Hate Speech" and Human Rights Law' in W Gephart (ed) *Law and The Arts* 217.

[151] *Duncanmec* (note 4 above) para 27, with reference to the LC judgment at paras 78–80.

distinction between the outcomes reached in *Duncanmec* and *Afri-forum*.[152] In *Afri-forum* the Equality Court held that the singing and chanting of a struggle song containing the lyrics 'shoot the Boer' and 'they are scared the cowards; you should shoot the boer; they rob these dogs', coupled with threatening gestures, by a political leader on a number of separate occasions (all political platforms, barring a birthday party) amounted to hate speech.[153] The circumstances surrounding the singing of the struggle song in *Afri-forum* engendered it with an illocutionary force significantly more powerful and harmful than the singing of the song on the facts in *Duncanmec*. The speaker in *Afri-forum* had authority as a political leader (the then leader of the ANC Youth League);[154] the song was sung at political rallies as a means to rouse up the audience;[155] the singing of the song was not a once-off incident — on the facts, it had been used in at least three separate political gatherings;[156] the singing was accompanied by aggressive gestures;[157] and the lyrics actually used were more far threatening than those in the song sung by the workers in *Duncanmec*. Had the *Duncanmec* Court engaged more proactively with the hierarchal and power relationship between the actors involved in *Duncanmec* and compared the authority of the striking employees to that of the speaker in *Afri-forum*, the Court's judgment would have been more convincing, both substantively and as a means to enlighten the public on the limits of free speech.[158] In short, the Court would have done far better had it addressed the intricacies of the racist speech problem head-on and examined the potential of a struggle song containing racist lyrics to enact harm.

VI CONCLUSION

I have argued that the harm of racist speech should be assessed not with reference to the meaning of the words used or by tallying and weighing the harm it causes. The better approach is to view racist speech as a subordinating and oppressive speech act, with illocutionary force, where the speaker enacts harm through the words used. Racist speech in the form of racial names is particularly dangerous, because such speech perpetuates structural inequality and oppression and deprives its targets of their status in society. This understanding of the power of racist speech demonstrates that it has the capacity to normalise inter-group hatred, to categorise people as inferior, to enforce othering and to keep intact a shared understanding of social hierarchies and relationships.[159] It is thus a mistake to view a term such as 'swartman'

[152] In this article, I do not critique the judgment in *Afri-forum* (note 5 above). My intention is merely to juxtapose the singing of the Duncanmec song with the circumstances in *Afri-forum* to illustrate the distinction in illocutionary force.

[153] *Afri-forum* (note 5 above) at para 52.

[154] Ibid at para 50.

[155] Ibid at paras 49, 67 and 86–89.

[156] Ibid at paras 49, 67. The incidents were widely reported in the press thereafter and resulted in a public outcry — see paras 68–75, 81

[157] Ibid at para 56.

[158] See the analysis of M Du Plessis 'Between Apology and Utopia — The Constitutional Court and Public Opinion' (2002) 18 *South African Journal of Human Rights* 1 who reiterates that an apex court must be prepared to deal with difficult moral cases by using substantive judicial reasoning. He argued that for the Court to be capable of enlightening members of the (dissenting) public of the role expected of them as citizens of a constitutional democracy, the Court must engage proactively with the issues at stake by employing substantive jurisprudential reasoning.

[159] I acknowledge that if the social context changes, the capacity to harm is not static, and new targets could be constructed.

as an innocent racial descriptor, especially in the context in which the utterance occurred in *Rustenburg Platinum Mine*.

The words of MacKinnon are particularly apt. She says: 'Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized.'[160] Applied to the belligerent and pejorative use of 'swartman' in the South African work context, it is clear that the term has the capacity to enact harm, to subordinate and rank, and to perpetuate racist attitudes and inequality, regardless of the lack of intent on the speaker's part.

Thus, although the Constitutional Court in *Rustenburg Platinum Mine* reached the correct outcome, namely that the speech was worthy of censure, the Court's substantive reasoning would have been enriched by utilising speech theory to examine the illocutionary force of the term 'swartman' when used by a white man to refer to a black man. An understanding of the capacity of speech to enact harm through subordination enables an appreciation of the power of speech, which is not limited merely to testing the meaning of the words employed (the locutionary content) and the harm that speech causes (the perlocutionary effects). The point is reinforced when regard is had to the distinction between the speech used in *Rustenburg Platinum Mine* and the 'struggle song' in *Duncanmec*. The latter song, when understood properly in its context, did not have 'ranking' power or the ability to enact subordination and identity-based oppression.

Whilst the Court was not asked to test the constitutional legitimacy of the speech acts in either *Rustenburg Platinum Mine* or *Duncanmec*, or to assess whether a law restricting freedom of expression should be constitutionally permissible, there is no doubt that a conceptualisation of the illocutionary harm of racist speech enables a finer appreciation of the harm constituted by such speech. This is true not only for cases with facts and issues similar to those in *Rustenburg Platinum Mine* and *Duncanmec*, but also for the more complex cases where the Court is asked to engage in a constitutional review of legislation which censors freedom of expression.[161] Here, a better understanding of the illocutionary force of speech and its capacity to enact subordination and identity-oppression enhances the inevitable balancing exercise in which the Court will be required to weigh the benefits of the promotion of free speech against the need to regulate and censor harmful speech.

[160] MacKinnon *Only Words* (note 80 above) at 31.

[161] See *SA Human Rights Commission v Qwelane* (forthcoming), a challenge to the overbreadth of the hate speech prohibition in s 10(1) of the Equality Act (note 146 above).