

**RACE AS/AND THE TRACE OF THE GHOST: JURISPRUDENTIAL ESCAPISM,  
HORIZONTAL ANXIETY AND THE RIGHT TO BE RACIST IN *BOE TRUST  
LIMITED***

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**SUMMARY**

This contribution draws on critical race theory and critical legal theory in order to read and critique the Supreme Court of Appeal judgment of Erasmus AJA in *BoE Trust Limited* 2013 3 SA 236 (SCA). It will specifically focus on the contested jurisprudential and racial politics reflected in the reasoning followed in the judgement. It specifically takes issue with the way in which the judge avoided dealing directly with the constitutional and political implications of racially-exclusive testamentary provisions. Three specific features of the judgment are highlighted in the note as problematic: first, the rhetorical moves and ‘legal interpretive techniques’ by which the judge escaped the basic legal texts governing the situation in which a racially discriminatory provision is included in a will, as well as the substantive reasoning and normative choices that those texts necessarily invite. Secondly, how the escape from those legal texts evinces, or perhaps even facilitated, a certain evasion of, or anxiety towards the horizontal application of the Bill of Rights which explicitly proscribes overt (racial) discrimination by private non-state actors. And thirdly, how by following a formalist legal approach, one in which the basic assumptions of liberal legalism and capitalism are viewed as natural, normal and immutable, the judgment lacks a decisive rejection of racism. The judgment’s uncritical adulation of the common law of succession (and specifically the principle of freedom of testation) and its negation of a more substantive, constitutionally-infused mode of reasoning and adjudication generally reflects a conservative or traditional view of law. It is suggested that this view of law is problematic in our current post-apartheid context for two central reasons: it stands in tension with the project of transformative constitutionalism and

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prevents the coming into being of a more critical race jurisprudence for post-apartheid South Africa.

**KEYWORDS:** BoE Trust Limited, Race; Colour-blindness; Formalism; Horizontal application of the Bill of Rights; Transformative constitutionalism; Critical race legal analysis; White privilege; Constitution of the Republic of South Africa; Private law.