MINISTER OF EDUCATION AND ANOTHER v SYFRETS TRUST LTD NO AND ANOTHER 2006 (4) SA 205 (C)

Citation	2006 (4) SA 205 (C)
Case No	2544/2004
Court	Cape Provincial Division
Judge	Griesel J
Heard	February 6, 2006
Judgment	March 24, 2006
Counsel	G J Marcus SC (with him S Budlender) for the applicants. No appearance for the respondents, who abided the decision of the Court. J C Heunis SC (with him M F Osborne) as curator ad litem for the potential beneficiaries.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Will - Execution of - Freedom of testation - *Quaere:* Whether protected by s 25 of Constitution, although neither s 25 nor any other provision of Constitution specifically referring thereto.

Trust and trustee - Trust instrument - Variation of - Testamentary trust created for purpose of 'providing bursaries for deserving students with limited or no means of either sex (but of European descent only)' - Trust later amended by codicil to make 'persons of Jewish decent *(sic)*, and females of all nationalities' ineligible to compete for bursaries - Application for order varying trust conditions by deleting discriminatory provisions in will and codicil - Relief sought not a 'deprivation' of property within meaning of s 25(1) of the Constitution - Even if it was a deprivation, it was not 'arbitrary' within meaning of s 25(1) - Conditions constituting unfair discrimination and contrary to public policy as reflected in foundational constitutional values of non-racialism, non-sexism and equality - Court empowered to vary trust deed by deleting offending provisions - Application granted.

Headnote : Kopnota

Quaere: Whether, although neither s 25 nor any other provision in the Constitution of the Republic of South Africa, 1996 specifically refers to freedom of testation or the right of persons to dispose of their assets upon death, freedom of testation forms an integral part of a person's right to property, and must therefore be taken to be protected in terms of s 25. (Paragraph [18] at 216C - E.)

The late S, who had died in 1921, had in 1920 executed a will in which it was provided that the residue of his estate should be held in trust and that after the death of his wife, and in the event of both his sons dying without being survived by lawful issue, it should be applied for the purpose of forming a fund (the trust) 'the income whereof shall be used and appropriated by the administrators of my estate for providing bursaries for deserving students with limited or no means of either sex (but of European descent only)

of the University of Cape Town who have passed the matriculation examination and who desire to proceed with and complete their studies'. The will went on to provide that the amounts of the bursaries, the students to whom they were to be awarded and the periods for which they were entitled to hold and receive the bursaries was to be in the sole discretion of the council or other governing body of the University of Cape Town (the present second applicant). Later in 1920 S had added a codicil in respect of the provision for the bursaries. It was provided in the codicil that 'persons of Jewish decent (*sic*), and females of all nationalities' would not 'be eligible to compete for any scholarships founded by the University of Cape Town in connection with my bequest'. By 1965 both of the sons of S had died without leaving lawful issue and the trust came to be established in terms of the will and codicil. In 1969 the second applicant decided that, by reason of the discriminatory conditions contained in the will, it could not accept the duty of administering the bursaries in question and informed the trustee of this decision. The role reserved in the will for the second applicant council, that of administering the bursaries and selecting the recipients, had since then been performed by the first respondent in its capacity as trustee of the trust. When it came to the attention of the first applicant that the bursaries could be awarded only on the basis of the discriminatory provisions contained in the will and codicil of S, he addressed a letter to the first respondent requesting it to consider excluding the criteria relating to race, gender and religion for potential applicants in the light of the constitutional protection of equality. Without attempting to justify or defend these provisions, the first respondent responded by claiming that the principle of freedom of testation precluded it from deviating from the wishes of the testator, S, as contained in his will and codicil, unless compelled to do so by order of a court. The applicants thereupon launched the present application for an order deleting the discriminatory provisions of the will and codicil, contending that the Court was empowered to do so on any of the following grounds: *(a)* s 13 of the Trust Property Control Act 57 of 1988, which permitted the Court, in certain circumstances, to delete or vary provisions in a trust instrument; *(b)* the common law, which prohibited bequests that were illegal or immoral or contrary to public policy; and *(c)* the direct application of the Constitution, more particularly the equality and anti-discriminatory provisions of s 9. Both the first respondent and the Master (the second respondent) abided the decision of the Court, but the *curator ad litem* to potential beneficiaries of the class referred to in the will and codicil, invoking the right to private succession, including freedom of testation that had now been given constitutional content in the property clause of the Constitution, namely s 25(1), contended that the contested provisions were valid.

Held, that no authority had been referred to justifying the conclusion that the relief sought in the present application amounted to a 'deprivation' of property within the meaning of s 25(1) of the Constitution. Having had full and unfettered use, enjoyment and exploitation of his property during his lifetime, the testator upon his death had chosen to dispose of his property by leaving it in trust to the appointed trustee. The present application did

not seek to alter that state of affairs. All that it sought to achieve was to vary the existing terms of the trust so as to remove therefrom certain provisions that were claimed to be repugnant to public policy. This kind of exercise had been performed by the Courts in innumerable cases over the years, where trust instruments had been varied on the grounds of public policy, necessity or impossibility, or in the application of the *cy près* doctrine, without it ever having been suggested that the testators or the trusts in question had in the process been 'deprived' of their property. It would be unduly straining the language of s 25(1) to hold in these circumstances that the order sought, if

granted, would amount to a deprivation of property. (Paragraph [20] at 217B - F.)

Held, further, that, even if it were to be held that the order sought did indeed constitute a 'deprivation', any such deprivation could not be regarded as 'arbitrary' within the meaning of s 25(1) of the Constitution. For a deprivation to be arbitrary, it had to be procedurally unfair or must take place without sufficient reason. There could be no question of procedural unfairness in this instance, given that any order would be granted only after a full hearing by this Court and a weighing up of all relevant considerations in order to ascertain whether there is sufficient reason for granting such relief. (Paragraph [21] at 217F - H.)

Held, further, as to the question whether the contested provisions were contrary to public policy, that the principle that the courts would refuse to give effect to a testator's directions which were contrary to public policy was a well-recognised common-law ground limiting the principle of freedom of testation, and had been applied since Roman times. (Paragraph [23] at 218C.)

Held, further, however, that, since the advent of the constitutional era public policy was now rooted in the Constitution and the fundamental values it enshrined, thus establishing an objective normative value system. In considering questions of public policy for purposes of the present application, therefore, the Court had to find guidance in 'the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism'. (Paragraph [24] at 218E - 219B.)

Held, further, that it was the public policy of today - not of 1920 (when the will and codicil were executed) - which was decisive in the present application. Thus the argument advanced by the curator, to the effect that the kind of provisions presently under consideration was quite common and could be found in many wills over the years and had to be regarded as having been unobjectionable, at least at the time when the will was executed, had to be rejected. (Paragraph [26] at 220B - C.)

Held, further, that the condition limiting eligibility for the bursaries to candidates of 'European descent' constituted an instance of indirect discrimination based on race or colour. The exclusion of Jews and women in terms of the codicil, in turn, constituted *direct* discrimination on the grounds of gender and religion. Such discrimination, being based on some of the prohibited grounds specified in s 9(3) of the Constitution, was therefore presumed to be unfair 'unless it is established that the discrimination is fair'. (Paragraph [33] at 222A - C.)

Held, further, applying the criteria set out in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489) at para [51] as a guide in the enquiry into the fairness of the discrimination, that the presumption of unfairness was fortified by the following considerations: *(a)* the 'complainants, who were discriminated against in terms of the will fell into groups who 'have suffered in the past from patterns of disadvantage', namely,

blacks, women and Jews; *(b)* although the purpose which the trust sought to achieve was charitable and laudable, ie providing bursaries to 'deserving students with limited or no means', the provisions of the trust immediately disqualified over half of such potential candidates from applying at all, on the basis of their race, gender or religion - the trust did not promote marginalised groups, rather, it discriminated against them. (Paragraphs [33] - [34] at 222C - 223D, paraphrased.)

Held, further, that other legislation enacted by Parliament, such as s 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and ss 3 and 4 of the National Education Policy Act 27 of 1996, as well as various international conventions ratified by Parliament, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, reinforced the conclusion of unfairness. (Paragraph [34] at 223D - 224H, paraphrased.)

Held, further, that it could never be in the public interest of a society founded on 'the achievement of equality' to deny access to funding to continue their education to previously disadvantaged and marginalised groups of people on the basis of their race, gender or religion, namely, blacks, women and Jews. (Paragraph [34] at 225F - G.)

Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust 1993 (2) SA 697 (C) applied.

Held, further, that, in the final analysis, the Court was required to weigh up or balance certain competing constitutional values and principles of public policy. On the one hand, there was the fundamental constitutional right to equality and freedom from unfair discrimination; on the other, the constitutionally guaranteed principle of private ownership, together with its corollaries of private succession and freedom of testation. (Paragraph [39] at 227G - H.)

Held, further, that, in weighing up the competing constitutional right to equality, on the one hand, and, on the other, the right to private property and the trust's right to privacy (insofar as such right can be engaged), the former outweighs the latter. (Paragraph [44] at 228F - G.)

Held, further, that what also served to 'outweigh' the principle of freedom of testation was the fact that one was dealing, in this instance, with an 'element of State action', in the sense that 'the institution appointed to distribute the rewards of the testator's beneficence' was a public agency or quasi-public body, ie the university. Moreover, a trust, though usually created by a private individual or group, was an institution of public concern. This was *a fortiori* the position with regard to a charitable trust such as the present trust. (Paragraphs [45] - [46] at 229B - D.)

Held, accordingly, that the testamentary provisions in question constituted unfair discrimination and, as such, were contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. It followed that the Court was empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will. (Paragraph [47] at 229E - F.) Application granted.

Cases Considered

Annotations

Reported cases

Southern African cases

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA): compared and dictum in para [18] applied

Aronson v Estate Hart and Others 1950 (1) SA 539 (A): compared

Braun v Blann and Botha NNO and Another 1984 (2) SA 850 (A): dictum at 866H applied

Brink v Kitshoff NO 1996 (4) SA 197 (CC) (1996 (6) BCLR 752): referred to

Brisley v Drotsky 2002 (4) SA 1 (SCA) ([2002] 3 All SA 363; 2002 (12) BCLR 1229): dictum in para [91] applied

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995): dictum in paras [54] and [56] applied

Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust 1993 (2) SA 697 (C): applied

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) (2002 (7) BCLR 702): dictum in para [100] applied

Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC) (1997 (2) BCLR 153): dictum in para [20] applied

Grundlingh and Others v Phumelela Gaming and Leisure Ltd 2005 (6) SA 502 (SCA): dictum in para [40] applied

Harksen v Lane NO and Others 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489): dicta in paras [51] and [53] applied

Hoffmann v South African Airways 2001 (1) SA 1 (CC) (2000 (11) BCLR 1211): dictum in para [27] applied

Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W) (1996 (6) BCLR 836): dictum at 607D - 608A (SA) and 855 (BCLR) applied

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079): dicta in paras [17] - [18] and [21] - [22] applied

Janse van Rensburg v Grieve Trust CC 2000 (1) SA 315 (C): compared

K v Minister of Safety and Security 2005 (6) SA 419 (CC): dictum in para [17] applied

Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC) (2004 (6) BCLR 569): dictum in para [70] applied

Law Union and Rock Insurance Co Ltd v Carmichael's Executor 1917 AD 593: compared

Levy NO and Another v Schwartz NO and Others 1948 (4) SA 930 (W): dictum at 937 applied

Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990 (2) SA 906 (A): considered

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A): compared

Marks v Estate Gluckman 1946 AD 289: dictum at 311 - 13 applied

Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC): dictum in para [22] applied

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Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (1) SA 524 (CC): dictum in para [151] applied

Minister of Law and Order v Kadir 1995 (1) SA 303 (A): considered

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741): dictum in para [17] applied

Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC): considered

Moseneke and Others v The Master and Another 2001 (2) SA 18 (CC) (2001 (2) BCLR 103): referred to

Napier v Barkhuizen [2005] JOL 16182 (SCA): dictum in para [7] applied

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) (1998 (2) SACR 556; 1998 (12) BCLR 1517): dictum in paras [17] - [18] applied

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708): dictum in para [41] applied

Pretoria City Council v Walker 1998 (2) SA 363 (CC) (1998 (3) BCLR 257): dictum in para [37] applied

Ryland v Edros 1997 (2) SA 690 (C): considered

S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348): referred to

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dictum in para [262] applied

S v Mamabolo (E TV & Others Intervening) 2001 (3) SA 409 (CC) (2000 (1) SACR 686; 2001 (5) BCLR 449): dictum in para [41] applied

S v Thebus and Another 2003 (6) SA 505 (CC) (2003 (2) SACR 319; 2003 (10) BCLR 1100): dicta in paras [27] and [28] applied

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A): compared

Schultz v Butt 1986 (3) SA 667 (A): considered

Shabalala and Others v Attorney-General, Transvaal, and Another 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593): dictum in para [26] applied

Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA) ([2002] 4 All SA 346): dictum in para [12] applied.

Foreign cases

Blathwayt v Baron Cawley [1976] AC 443 (HL): referred to

Clayton v Ramsden [1943] AC 320 (HL) ([1943] 1 All ER 16): compared

Pennsylvania v Board of Trusts 353 US 230 (1957): considered and compared

Re Dominion Students' Hall Trusts [1947] Ch 183: referred to

Re Drummond Wren [1945] OR 778: approved and applied

Re Lysaght [1966] Ch 191: referred to.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, ss 9, 25: see *Juta's Statutes of South Africa 2004/5* vol 5 at 1-137, 1-138

The National Education Policy Act 27 of 1996, ss 3, 4: see *Juta's Statutes of South Africa 2004/5* vol 3 at 1-222, 1-223

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: see *Juta's Statutes of South Africa 2004/5* vol 5 at 1-253

The Trust Property Control Act 57 of 1988, s 13: see *Juta's Statutes of South Africa 2004/5* vol 2 at 3-74.

Case Information

Application for an order varying certain provisions of a testamentary trust. The facts appear from the reasons for judgment.

G J Marcus SC (with him *S Budlender*) for the applicants.

No appearance for the respondents, who abided the decision of the Court.

J C Heunis SC (with him *M F Osborne*) as *curator ad litem* for the potential beneficiaries.

Cur adv vult.

Postea (March 24).

Judgment

Griesel J:

Introduction

[1] This application concerns a charitable trust, known as the Scarbrow Bursary Fund Testamentary Trust (the trust), which was established in terms of the will of the late Dr Edmund William Scarbrow (the testator), who died in 1921. The trust awards bursaries to 'deserving students with limited or no means' of the University of Cape Town (the university). However, in terms of the will, eligibility for the bursaries is restricted to persons who are of 'European descent', *not* of Jewish descent, and *not* female. The

validity of these provisions of the will is being challenged in this application.

[2] The first applicant is the national Minister of Education (the Minister). The second applicant is the university. Syfrets Trust Ltd (Syfrets), in its capacity as trustee of the trust, is the first respondent. The Master has been cited as the nominal second respondent. Both respondents abide the decision of the Court. By order of this Court, granted on 10 September 2005, Adv *Heunis SC* was appointed as curator *ad litem* to potential beneficiaries of the class referred to in the will. He submitted a full report and also addressed written as well as oral argument to the Court in support of the contested provisions of the will. The Court is indebted to him for his assistance in this regard. The helpful contribution of Adv *Marcus SC*, who appeared with Adv *S Budlender* for the applicants, should also not go unmentioned.

Factual background

[3] On 23 April 1920 the testator executed the will in question, clause 4 of which stipulates that the residue of his estate should be held in trust and that after the death of his wife, and in the event of both his sons dying without being survived by lawful issue, it should (in terms of subclause *(d)*) be applied for the purpose of

> 'forming a Fund to be called "The Scarbrow Bursary Fund" the income whereof shall be used and appropriated by the administrators of my estate for providing bursaries for deserving students with limited or no means *of either sex (but of European descent only)* of the University of Cape Town who have passed the matriculation examination and who desire to proceed with and complete their

> studies for some recognized profession in any of the Universities of the Kingdom of Great Britain and Ireland, the United States of America, the Dominion of Canada or in any recognized University on the Continent of Europe, to assist them to do so - the said bursaries to be held by and payable to the students awarded the same for periods of from two to four years. *I direct that the several amounts of the bursaries, the students to be awarded the same and the periods for which they shall respectively be entitled to hold and receive the same shall be in the sole discretion and control of the Council or other governing body of the University of Cape Town.* I also enjoin on the administrators of my estate the duty of cordially co-operating with the said body in giving the most useful and beneficial effect to my wishes as herein set forth, and I direct that it be periodically announced (by advertisement in the press) that bursaries from the said Fund - styling it in each instance "The Scarbrow Bursary Fund" - are open to such deserving students in order that the fact thereof may be brought home to all interested.'

(My emphasis.)

[4] On 2 December 1920 the testator added a codicil - in manuscript - in which he further restricted the criteria for eligibility of candidates as follows:

> 'By virtue of the power reserved by me so to do under my last will and testament, I now alter my possible bequest to the University of Cape Town, being the portion of clause "4" in the section "d", so far as it affects *persons of Jewish decent* (sic), *and females of all nationalities*, none of whom are to be eligible to compete for any scholarships founded by the University of Cape Town in connection with my bequest.'

(Again my emphasis.)

[5] The testator died on 7 July 1921. Subsequently, in 1953 and 1965, respectively, both his sons died without leaving lawful issue, thus causing the Scarbrow Bursary Fund to be established in terms of the provisions of the will and codicil. In 1969, however, the

council of the university decided, by reason of the discriminatory conditions contained in the will, that it could not accept the duty of administering the bursaries in question and informed the trustee of this decision. In the result, the role reserved in the will for the council, that of administering the bursaries and selecting the recipients, has since that time been performed by Syfrets in its capacity as trustee of the trust. [1]

[6] An advertisement that appeared in a weekend newspaper on 30 March 2002, inviting past and present students of the university to apply for the Scarbrow Bursary, came to the attention of the Minister. What particularly caught his eye were the requirements that applicants for bursaries had to be 'of European descent, male, gentile'. The Minister accordingly addressed correspondence to Syfrets, requesting them to consider excluding the criteria relating to race, gender and religion for potential applicants in the light of the constitutional protection of equality. Syfrets, in its response, did not attempt to justify or

defend the discriminatory conditions in any way. It indicated, nonetheless, that the principle of freedom of testation precluded it from deviating from or varying the wishes of a testator as contained in a will, unless a court order compelled it to do so.

[7] Against this background, the present application was launched. The Minister, as the first applicant, approaches the Court as a member of the Executive, which is required by s 7(2) of the Constitution to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, including the right to equality. In addition, the Minister is responsible for education policy, and in particular higher education policy, in terms of s 3(1) of the National Education Policy Act 27 of 1996 and s 3 of the Higher Education Act 101 of 1997. The Minister also approaches this Court in the public interest. His *locus standi* to bring this application is thus not in issue.

[8] The university, as the second applicant, approaches the Court by virtue of the fact that the testator's will envisaged that the university council would play a critical role with regard to administering the bursaries and selecting the bursary recipients. The university claims that it has been unable to fulfil this role by reason of the perceived discriminatory nature of the conditions in the will. It also has an interest because it is students of the university who are prohibited from applying for the bursary by virtue of their race, gender or religion.

Issues

[9] The applicants claim an order deleting the discriminatory provisions in the will. They contended that this Court is empowered to grant such remedy on any one or more of the following grounds:

(a) s 13 of the Trust Property Control Act 57 of 1988, which permits the Court, in certain circumstances, to delete or vary provisions in a trust instrument;

(b) the common law, which prohibits bequests that are illegal or immoral or contrary to public policy; and

(c) direct application of the Constitution, more particularly, the equality and anti-discriminatory provisions of s 9.

[10] As mentioned earlier, both respondents abide the decision of the Court. In his report the Master referred to the principle of freedom of testation and stated that these

types of trust are quite common. Similar provisions to those presently under consideration 'were given effect to for years and in some instances for decades'. The Master accordingly submitted that, should the present application be granted, 'this could have repercussions for various other existing trusts, which are not parties to these proceedings'. He referred, in conclusion, to various passages from Corbett *et al* [2] and Cameron *et al*, [3] where the learned authors express the view that the Bill of Rights applies 'horizontally' as between

citizen and citizen, although there are as yet no decided cases in South Africa on its applicability to testamentary conditions in relation to charitable testamentary trusts.

[11] The *curator ad litem* submitted that the contested provisions of the will are valid, also invoking the testator's freedom of testation. The arguments in support thereof will be examined in more detail below.

[12] This case thus brings into sharp focus some of the potential problems that have been foreshadowed by legal authors and scholars since the advent of the South African constitutional era, namely the juxtaposition of the constitutionally guaranteed principle of private ownership, together with its corollaries of private succession and freedom of testation, on the one hand, and the constitutional right to equality and freedom from unfair discrimination, on the other. [4] All of the learned authors appear to recognise that *some* testamentary provisions that have been acceptable in the past will no longer pass muster, *inter alia*, by reason of the provisions of the equality clause in s 9 of the Constitution. The only question for them is, which particular provisions will survive scrutiny and which will not. *Corbett et al*, [5] for example, put it as follows:

> 'How far the courts will go in invalidating testamentary conditions as being in violation of the Bill of Rights cannot be envisaged with confidence. It has been suggested, for instance, that different weights might be attached to the grounds mentioned in s 9, the equality provision, or that grounds alluded to in other sections of the Bill of Rights are not to be disregarded; that possibly race and religion will be regarded as more fundamental in the assessment of public policy than, say, sexual orientation or culture.
>
> The future holds out the prospect of a testamentary condition attaching to the taking effect of a testamentary benefit or the continuation of one, as under a trust, being wiped out on a constitutional ground. Assuming that it holds good on other counts, for instance certainty, a condition could possibly be invalid, for example, as prohibiting marriage not within a specified faith, race or nationality; or preventing conversion from, or requiring conversion to, a particular faith; or attaching restrictions of a racial or sexual or political nature on the utilization of a benefit.'

[13] *Cameron et al* are more emphatic, stating that

> 'the objects of a trust will have to conform with the disavowal of unfair discrimination under the 1996 Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, which envisage equality even in person to person relations'. [6]

[14] The problems highlighted by the various authors lend weight to a

perceptive concluding remark to the trilogy of articles by *Du Toit*, namely that the task resting in the hands of the Courts, of deciding which testamentary provisions of a discriminatory nature should henceforth pass constitutional muster, 'is indeed an unenviable one'. [7]

Discussion

[15] The three grounds for the application are all based, to a greater or lesser extent, on the provisions of s 9 of the Constitution, aimed at promoting equality and proscribing unfair discrimination. Thus, although separate, these grounds do not fall into impermeable compartments. As the Constitutional Court has pointed out, all statutes must now be 'interpreted through the prism of the Bill of Rights'. [8] Similarly, with regard to the common law, the Court held that 'the normative influence of the Constitution must be felt throughout the common law'. [9]

[16] In my view, the applicants have made out a compelling case for relief on each of the three grounds advanced. However, in the view that I take of the matter (and employing Ockham's razor), the present application can be dealt with on the basis of the existing principles of the common law, having proper regard to 'the spirit, purport and objects of the Bill of Rights'. [10] In what follows I shall attempt to show that the contested provisions in the will in question are indeed contrary to public policy and, as such, unenforceable. This is an approach strongly advocated by *Du Toit*, [11] who appeals for a 'constitutionally-founded *boni mores* criterion' in reassessing the 'traditional approach' to discriminatory clauses in charitable bequests. This approach also finds support in an insightful article by Lubbe, [12] in which he points out (in the context of contract law) that it is incumbent upon the Court to redefine 'the content of black-letter rules and concepts' of the common law so as to conform to the objective value system of the Constitution. This can be achieved in a given case by giving content to 'open legal norms', such as public policy. [13]

GRIESEL J

Freedom of testation

[17] The 'black-letter rule' that requires consideration in this case is, of course, the principle of freedom of testation, on which the curator strongly relied. He pointed out that this common-law principle lies at the core of our law of succession. He referred in this context, *inter alia*, to *Corbett et al*, [14] who state that 'South African law appears to take the principle of freedom of testation further than any other Western legal system'. He argued, further, that the right to private succession, including freedom of testation, has now been given constitutional content in the property clause contained in s 25(1). [15]

[18] In this regard, counsel on both sides accepted that, although neither s 25 nor any other provision in the Constitution specifically refers to freedom of testation or the right of persons to dispose of their assets upon death, freedom of testation forms an integral part of a person's right to property, and must therefore be taken to be protected in terms of s 25. This suggested principle has not yet been authoritatively recognised by our Courts, although it enjoys support from some of the learned authors on the subject. [16] I am prepared, for purposes of this judgment, to accept the correctness of such view without making any firm finding to that effect.

[19] Proceeding from that assumption, I am of the view that the curator's argument based on the property clause cannot succeed, for a variety of reasons. First, with regard to the meaning of 'deprive' in s 25(1), our Courts have not yet given a definitive interpretation of this term. However, in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [17] (the *FNB* case), the Constitutional Court held that 'in a certain sense, any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'. In the more recent case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [18] the Court found it unnecessary to determine precisely what would constitute 'deprivation'. It was sufficient, for purposes of that case, to hold 'that at the very least, substantial interference or limitation

that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'. [19]

[20] I have not been referred to any authority justifying the conclusion that the relief sought in the present application amounts to a 'deprivation' of property. Insofar as the testator is concerned (even assuming that he can still at this stage be the bearer of rights in respect of property), [20] the relief sought does not in any way interfere with his 'use, enjoyment or exploitation' of his property, nor does it constitute 'substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment'. Having had full and unfettered use, enjoyment and exploitation of his property during his lifetime, the testator upon his death chose to dispose of his property by leaving it in trust to the appointed trustee. The present application does not seek to alter that state of affairs. All that it seeks to achieve is to vary the existing terms of the trust so as to remove therefrom certain provisions that are claimed to be repugnant to public policy. This kind of exercise has been performed by the courts in innumerable cases over the years, where trust instruments have been varied on the grounds of public policy, necessity or impossibility or in the application of the *cy près* doctrine [21] - without it ever being suggested that the testators or the trusts in question were in the process being 'deprived' of their property. In my view, it would be unduly straining the language of s 25(1) to hold in these circumstances that the order sought, if granted, would amount to a deprivation of property.

[21] However, even if it were to be held that the order sought does indeed constitute a 'deprivation', I am not persuaded that any such deprivation could be regarded as 'arbitrary'. For a deprivation to be arbitrary, it must be procedurally unfair or must take place without sufficient reason. [22] In my view, there can be no question of procedural unfairness in this instance, given that any order would be granted only after a full hearing by this Court and a weighing up of all relevant considerations in order to ascertain whether there is sufficient reason for granting such relief.

[22] In any event, it is, of course, trite that the principle of freedom of testation has never been absolute and unfettered: various restrictions have been placed on this freedom over the years - both by the common law and by statute; both in this country and in other open and democratic societies based on human dignity, equality and

freedom. In this regard, *Du Toit* has performed a detailed and valuable analysis of rules applicable to limitation of freedom of testation in various common-law

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as well as civil-law jurisdictions. [23] Save for what is set out later, it is not necessary to repeat that exercise for the purposes of this judgment. Suffice it to state that all of the jurisdictions examined recognise a limitation on the freedom of testation based on considerations of public policy. It is to a consideration of this crucial 'open norm' [24] that I now turn.

Public policy

[23] The principle that the courts will refuse to give effect to a testator's directions which are contrary to public policy is a well-recognised common-law ground limiting the principle of freedom of testation and has been applied since Roman times. [25] The position in this regard is analogous to the principle in the law of contract regarding contractual provisions which are contrary to public policy [26] and it would appear that identical considerations apply to both fields.

[24] Public policy - like its synonyms *boni mores*, public interest and the general sense of justice of the community - is not a static concept, but changes over time as social conditions evolve and basic freedoms develop. [27] As *Hahlo* succinctly put it: [28] 'Times change and conceptions of public policy change with them.' Public policy has in the past been gleaned from the *boni mores*, the general sense of justice of the community, as expressed by its legal policy makers, namely the Legislature and the courts. [29] As such, it has been described as 'an imprecise and elusive concept'. [30] Since the advent of the constitutional era, however, public policy is now rooted in our Constitution and the fundamental values it enshrines, thus establishing an objective normative value system. [31] In

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considering questions of public policy for purposes of the present application, therefore, the Court must find guidance in 'the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism'. [32]

[25] In the light of the foregoing considerations, it is axiomatic that the public policy of 1920 does not necessarily correspond in all respects with the public policy of today. A vivid illustration of the contrast between the values of the constitutional era and what has gone before is found in the judgment of Mahomed J (as he then was) in the landmark 'death penalty case', [33] where he said the following: [34]

> '[262] . . . The South African Constitution . . . retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past

institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order . . . in which there is equality between . . . people of all races". Chapter 3 of the Constitution extends the contrast in every relevant area of endeavour (subject only to the obvious limitations of s 33). The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; s 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, s 8 and the post-amble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; s 11(1) prohibits it. The past permitted degrading treatment of persons; s 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; ss 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; s 21 extends it to every citizen. The past arbitrarily denied to citizens, on the grounds of race and colour, the right to hold and acquire property; s 26 expressly secures it. Such a jurisprudential past created what the post-amble to the Constitution recognises as a society "characterised by strife, conflict, untold suffering and injustice". What the Constitution expressly

aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting

> "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".'

[26] In view of this stark contrast it is self-evident, in my view, that it is the public policy of today - not of 1920 - which is decisive in the present application. This puts paid to an argument advanced by the curator, to the effect that the kind of provisions presently under consideration is quite common and can be found in many wills over the years; thus the provisions in question must be regarded as having been unobjectionable - at least at the time when the will was executed. (This line of argument is also supported by the Master in his report.) [35] In my view, the position in this respect is analogous to the position in the law of contract, where questions of public policy have to be determined with reference to the time when the Court is being asked to enforce or give effect to the provisions of the contract or the will, as the case may be; *not* the time when the contract was concluded or the will was executed. [36]

Equality

[27] In support of the applicants' argument that the contested provisions in the will under consideration are contrary to public policy, most of the emphasis fell on the constitutional right to equality. Section 9(1) of the Constitution provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Subsections (3), (4) and (5) are particularly relevant to the present enquiry and provide as follows:

'(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of ss (3). National legislation must be enacted to prevent or prohibit unfair

discrimination.

(5) Discrimination on one or more of the grounds listed in ss (3) is unfair unless it is established that the discrimination is fair.'

[28] It was not disputed, nor could it be, that the provisions of s 9(4) do indeed apply 'horizontally'. [37] Apart from anything else, the subsection itself contains its own internal regulating mechanism, providing that 'no person' may discriminate unfairly against 'anyone'. This necessarily brings all natural and juristic persons - including a charitable trust like the present one - within the ambit of the section.

[29] Moreover, the national legislation envisaged by ss (4) has now been enacted in the form of the Promotion of Equality and Prevention of

Unfair Discrimination Act 4 of 2000 (the Equality Act) and contains the same internal regulating mechanism as s 9(4) of the Constitution: in terms of s 7 of the Equality Act, [38] 'no person may unfairly discriminate against any person on the ground of race . . .', whereas s 8 contains a similar prohibition against discrimination on the ground of gender.

[30] As even a cursory perusal of our constitutional jurisprudence shows, equality is not merely a fundamental right; it is a core value of the Constitution. This is borne out by various provisions in the Constitution itself, which articulate the ideal of equality. [39] Section 1 of the Constitution, which sets out the founding values of the Republic - including the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism - is the most protected provision in the Constitution: it may be amended only with a supporting vote of at least 75% of the members of the National Assembly and at least six provinces. [40]

[31] The centrality of equality in the constitutional value system has also repeatedly been emphasised by the Constitutional Court. [41] As Moseneke J put it in *Minister of Finance and Another v Van Heerden*: [42]

'The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.'

[32] However, in view of the fact that I have chosen to deal with the present application on the basis of the common law, rather than a direct application of the Constitution, it is not necessary for present purposes to consider the very substantial body of equality jurisprudence in any detail. Instead, the enquiry can be confined to the question whether or not the contested provisions in issue constitute unfair discrimination. If so, it must follow, in my view, that the contested provisions should also be regarded as being contrary to public policy.

Unfair discrimination

[33] Turning now to the contested provisions of the will, it appears to me that the condition limiting eligibility for the bursaries to candidates of 'European descent' constitute an instance of indirect discrimination based on race or colour. The exclusion of Jews and women in terms of the codicil, in turn, constitutes *direct* discrimination on the grounds of religion and gender. [43] Such discrimination, being based on some of the prohibited grounds specified in s 9(3) of the Constitution, is therefore presumed to be unfair 'unless it is established that the discrimination is fair'. [44] In *Harksen v Lane NO and Others*, [45] the Constitutional Court distilled three criteria to guide the enquiry into fairness:

> *'(a)* the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> *(b)* the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, [46] for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;
>
> *(c)* with due regard to *(a)* and *(b)* above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.'

[34] Applying these criteria to the contested provisions under discussion, the presumption of unfairness is, in my view, fortified by the following considerations:

> *(a)* The 'complainants' who are discriminated against in terms of the will fall into groups who 'have suffered in the past from patterns of

> disadvantage', namely blacks, women and Jews. This fact has been recognised in various judgments of the Constitutional Court. [47]
>
> *(b)* The primary purpose which the trust sought to achieve is undoubtedly charitable and laudable, namely providing bursaries to 'deserving students with limited or no means' for tertiary study. Having done so, however, the provisions of the trust immediately disqualify over half of such potential candidates from applying at all, on the basis of their race, gender or religion. Moreover, the trust does not promote marginalised groups; rather, it discriminates against them. The trust does not promote one religious view and exclude all others; rather it targets members of one particular religious group for exclusion and stigmatisation and does so on the basis of their 'descent', rather than their beliefs. As a consequence, even Jews who may have converted to other religions will still be

excluded by reason of their 'descent' - vague and uncertain as this term may be. [48] The discrimination by the trust thus serves only to entrench and perpetuate previously existing patterns of advantage and privilege.

(c) The conclusion of unfairness is reinforced by other legislation adopted by Parliament. In this regard, s 29 of the Equality Act (which section has not yet been brought into operation) [49] refers to a Schedule to the Act containing an 'Illustrative List of Unfair Practices in Certain Sectors'. This list is 'intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed' and includes, *inter alia*, the following:

'Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.'

The prohibited grounds include race, gender and religion. The fact that Parliament has enacted such legislation is therefore indicative of public policy and the community's legal convictions in this sphere. [50]

(d) Another piece of legislation serving as an indicator of public policy in the sphere of education is to be found in the provisions of the National Education Policy Act 27 of 1996, which was enacted so as to provide for the determination of national policy for education. In terms of s 3, the Minister was tasked with determining national education policy in accordance with the provisions of the Constitution

and the Act. Section 4, in turn, sets out certain 'directive principles' of the policy contemplated in s 3. It must be directed toward:

'*(a)* the advancement and protection of the fundamental rights of every person guaranteed in terms of chap 2 of the [interim] Constitution, and in terms of international conventions ratified by Parliament, and in particular the right -

(i) of every person to be protected against unfair discrimination within or by an educational department or education institution on any ground whatsoever;

. . .

(c) achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women. . . .'

(e) One of the international conventions ratified by Parliament (which the Court *must*, in terms of s 39(1)*(b)* of the Constitution, consider), as mentioned in s 4*(a)* of the National Education Policy Act, is the Convention on the Elimination of All Forms of Discrimination against Women (1979) (better known as CEDAW), [51] art 10 of which is particularly significant for present purposes:

'States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

. . .

(d) the same opportunities to benefit from scholarships and other study grants; . . . .'

(f) Apart from CEDAW, South Africa has also ratified various other relevant international human-rights conventions, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. [52] Thus South Africa - including this Court - is bound by international law to give effect to the provisions of these various conventions so as to eliminate, *inter alia*, all forms of discrimination based on race or gender and to promote greater equality, specifically in the field of education.

(g) The applicants also placed reliance - in support of their application in terms of s 13 of the Trust Property Control Act - on a judgment of this Court in the matter of *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will*

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Trust. [53] The Court was asked to delete the word 'white' in a bequest in terms of a will executed in 1899 in terms of which the testator bequeathed the residue of his estate in trust to be applied to 'the founding and maintaining of a home for destitute white children'. In a judgment described as 'an ostensible break with the traditional approach to the validity of particularly racially-orientated charitable testamentary bequests in South African law', [54] it was held by Berman J (Seligson AJ concurring) that the clause in question was contrary to the public interest:

'It cannot seriously be contended that by continuing to restrict the intake of destitute children to the homes to those whose skins are white will better serve the interests of the public than to open their half-empty premises to children who are destitute but are excluded therefrom solely by reason of the fact that their skin is coloured brown or black or indeed any other colour but white. The contrary is unarguably the case - the interests of the public in this country, the inhabitants of which are mainly non-white in colour, cries out for the need to house and to care for destitute children, whatever their ethnological characteristics may be.' [55]

To my mind, there can be no doubt that the public interest - and public policy - dictates that a similar result should follow in this case with regard to the need for tertiary education. Following the approach in the *William Marsh* case (*supra*), the rhetorical question could be asked whether public policy would best be served by excluding all black people, women and Jews from applying for this bursary to further their education, no matter how academically talented and financially needy they may be; or whether public policy would best be served by opening the scholarship to all students and graduates of UCT so that the truly most talented and most needy are able to benefit from the opportunities it provides. In my view, the answer is self-evident: it can never be in the public interest of a society founded on 'the achievement of equality' to deny access to funding, to continue their education, to previously disadvantaged and marginalised groups of people on the basis of their race, gender or religion.

(h) Finally, in considering the dictates of public policy in the context of the present matter, the attitude of the university with regard to the contested testamentary provisions is not without significance. [56] As pointed out earlier, the council of

the university took a principled stand not to administer the bursaries as directed by the will of the testator due to the discriminatory provisions attached to the bequest, thus indicating quite unequivocally that the university in 1969 already regarded the provisions under which they were

expected to perform their functions as being repugnant to public policy.

Foreign law

[35] I have earlier referred to the analysis of relevant foreign law (which the Court *may* consider, in terms of s 39(1)*(c)* of the Constitution) when it comes to considerations of public policy. *De Waal* [57] has cautioned, however, that the law of succession, as one of the most 'indigenous' branches of private law, 'does not lend itself comfortably to comparative research'. He submits that reference to foreign law in the context of freedom of testation should be considered with caution, because

> 'the determination of the correct limits of freedom of testation is intimately linked to the interpretation of public policy, and comparative research is of less value when dealing with questions relating to the identification of public policy'.

[36] That said, it is instructive, nonetheless, to compare the position in two foreign jurisdictions to see how they deal with discrimination on the grounds of gender, race and religion in certain contexts. In English law, the position used to be that it is not against public policy or unlawful in a private trust to discriminate on grounds of race, religion, nationality or colour. [58] However, the Race Relations Act of 1976 has changed the situation quite significantly. In terms of that Act, it would not be regarded as unlawful to confer benefits on persons of a class defined by reference to race, nationality, or ethnic or national origins; in other words, it is lawful to discriminate *in favour of* such groups, but not *against* them. However, it is not permissible to discriminate even in favour of a class defined by reference to colour. [59] A trust to educate white children in Leicester will therefore simply be regarded as a trust to educate children in Leicester. [60]

[37] A particularly instructive example of the application of principles of public policy, albeit not in the context of the law of succession, is to be found in a case that came before the High Court of Ontario in Canada, shortly after the end of World War II. [61] It concerned an application to declare invalid a restrictive covenant applicable to land. The covenant read: 'Land not to be sold to Jews or persons of objectionable nationality.' Mackay J held that the covenant was void, being contrary to public policy. In the course of his judgment, he, *inter alia*, made the following very pertinent remarks:

> 'In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or

> residential areas, or, conversely, would exclude particular groups from particular business or residential areas.

> Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent Judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognised principles of public policy to a set of facts requiring their invocation in the interest of the public good.
>
> That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. [62] But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. . . .
>
> My conclusion therefore is that the covenant is void because it is offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on te type of discrimination which the covenant would seem to perpetuate.'

[38] In my judgment, the views expressed so eloquently more than 60 years ago in a foreign jurisdiction apply with equal force in our new democratic society of today. Here, likewise, it does not require 'innovation in legal principle' to strike down the offending conditions in the will of the testator. All that is required is to apply well-recognised principles of public policy to a set of facts requiring their invocation in the interest of the public good.

Balancing

[39] In the final analysis, the Court is required to weigh up or balance certain competing constitutional values and principles of public policy. On the one hand, there is the fundamental constitutional right to equality and freedom from unfair discrimination; on the other, the constitutionally guaranteed principle of private ownership, together with its corollaries of private succession and freedom of testation.

[40] Apart from his reliance on the property clause and the principle of freedom of testation, the curator also relied - albeit somewhat tentatively - on certain further countervailing rights, namely the constitutional rights to dignity (s 10), privacy (s 14) and freedom (s 12). He accordingly submitted that the application could not succeed because the applicants relied on s 9 without according any weight to the countervailing constitutional considerations: s 9 cannot be relied on to 'trump' the countervailing rights, so it was argued.

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[41] In my view, reliance on these rights is misplaced. Leaving aside for the moment the interesting question whether or not any of these rights can be invoked on behalf of the testator (who is dead), [63] it appears to me that the rights to human dignity and freedom can only be invoked by natural persons and thus not on behalf of the trust, a juristic person. [64] As regards the right to privacy, while juristic persons such as the trust are entitled to privacy rights, such rights can never be as intense as those of human beings [65] and juristic persons are thus entitled to a reduced level of protection

as compared to privacy rights of natural persons. [66]

[42] Reverting to the balancing exercise between the various competing rights and values, the approach to be followed has been laid down by Cameron J in *Holomisa v Argus Newspapers Ltd*: [67]

> 'The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.'

[43] *Lubbe* [68] refers to difficulties relating to how value-based decisions are to be couched and to whether such solutions are correct and socially adequate. He suggests that such difficulties

> 'can be met by having regard not only to the *consensus* of opinion amongst commentators, but also to whether the solutions come to are recognised in our historical sources, reflect community traditions and convictions, and have been applied in other jurisdictions that reflect the values of contemporary civilisation'.

[44] I have shown above the extent to which the values of equality and non-discrimination have been entrenched in our Constitution. I have also referred briefly to the way in which other jurisdictions have dealt with similar problems. I am accordingly driven to the conclusion that, in weighing up the competing constitutional right to equality, on the one hand, and, on the other, the right to private property and the trust's right to privacy (insofar as such right can be engaged), [69] the former outweighs the latter. I am fortified in this conclusion by the views of various commentators. Thus *De Waal* [70] suggests 'that the right to freedom of

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testation should yield to the other rights mentioned' (including the right to equality). Similarly, *Cheadle, Davis and Haysom* [71] state:

> '(I)n the ongoing development of liberal constitutional theory, the right to property has relinquished its status as principal bulwark against the abuse of State power in favour of the right to equality and the right to dignity.'

[45] What also serves to 'outweigh' the principle of freedom of testation, is the fact that one is dealing, in this instance, with an 'element of State action', in the sense that 'the institution appointed to distribute the rewards of the testator's beneficence' is a public agency or quasi-public body, ie the university. As *Du Toit* points out: [72]

> 'State action renders the distribution practice of such an institution with regard to the proceeds of a charitable bequest open to a constitutional challenge simply on the ground that the Constitution prohibits the State from conducting discriminatory practices.'

[46] Moreover, a trust, though usually created by a private individual or group, is an institution of public concern. [73] This is *a fortiori* the position with regard to a charitable trust such as the present trust. [74]

Conclusion

[47] Based on the foregoing analysis, I conclude that the testamentary provisions in question constitute unfair discrimination and, as such, are contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and

equality. It follows, in my judgment, that this Court is empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will.

[48] This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored; it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions - which discriminate *unfairly* on the grounds of race, gender and religion - are invalid. There are many other examples of differentiation in this field, [75] which will have to be considered by another Court on another occasion.

Order

[49] For the above reasons, the following order is granted:

(a) The words '(but of European descent only)' in clause 4*(d)* of the will of the late Edmund William Scarbrow, dated 23 April 1920, as well as the entire codicil, dated 2 December 1920, are struck out.

(b) Save as provided in para 3 of the order of this Court, dated 10 September 2004, there shall be no order as to costs.

Applicants' Attorney: *State Attorney*. *Curator ad litem's* Attorneys: *Carter & Associates*.

[1] At the hearing before me, the curator sought to bring a counter-application for amendment of the clause in question so as to regularise this position. In the light of the conclusion reached on the main application, however, it is not necessary to consider this aspect.

[2] *The Law of Succession in South Africa* 2 ed (2001) at 47, 133.

[3] *Honoré's South African Law of Trusts* 5 ed (2002) at 167.

[4] See, for example, *Cameron et al (op cit* at 154, 167, 171 - 2); *Corbett et al (op cit* at 47 - 8, 133 - 4); De Waal 'The Law of Succession and the Bill of Rights' (published in *Bill of Rights Compendium* (1998 with loose-leaf updates) at 3G-1 *et seq*); Francois du Toit *Testeervryheid in die Suid-Afrikaanse Reg in die Lig van 'n Handves van Regte* (unpublished LL D thesis, Universtity of Stellenbosch, 2000) ('Thesis'), as well as a trilogy of articles by the same author on the topic of freedom of testation, published in *Stellenbosch Law Review* in 1999 (at 232 *et seq*); 2000 (at 358 *et seq*); and 2001 (at 222 *et seq*).

[5] *Op cit* at 134.

[6] *Op cit* at 172.

[7] (2001) 12 *Stell LR* 222 at 257. See also *Du Toit* Thesis at 404.

[8] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) at paras [21] - [22].

[9] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para [17]. See also *S v Thebus and Another* 2003 (6) SA 505 (CC) (2003 (2) SACR 319; 2003 (10) BCLR 1100) at para [28].

10 Section 39(2), read with s 8(3)*(a)* of the Constitution. See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para [18]; *S v Thebus and Another* above n 9 *loc cit*; Du Toit (2001) 12 *Stell LR* 222 at 235.

11 (2001) 12 *Stell LR* 222 *et seq*.

12 G F Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law' (2004) 121 *SALJ* 395 at 407.

13 *Id* at 403.

14 *Op cit* n 2 at 40.

15 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

16 See, for example, *De Waal (op cit* n 4 para 3G6 at 3G - 11) and other authorities referred to therein; *Corbett et al op cit* n 2 at 47; Du Toit (2001) 12 *Stell LR* 222 at 233 - 4.

17 2002 (4) SA 768 (CC) (2002 (7) BCLR 702) at para [57].

18 2005 (1) SA 530 (CC).

19 Paragraph [32].

20 As to which, see para [41] below.

21 Compare, for example, *Cameron et al (op cit* n 3 at 515 - 35).

22 *FNB* case, above n 17 at para [100].

23 Thesis at 243 - 67 (English law); 281 - 2 (Australian law); 313 - 18 (Dutch law); 333 - 7 (Belgian law) and 348 - 52 (German law). See also Du Toit (2000) 11 *Stell LR* 358 *et seq*; *De Waal (op cit* n 4 at para 3G8 at 3G - 19) with regard to German law.

24 *Lubbe (op cit* n 12 at 403).

25 See, for example, Du Toit (1999) 10 *Stell LR* 232 at 236 - 7; *Levy NO and Another v Schwartz NO and Others* 1948 (4) SA 930 (W) at 937 and authorities referred to therein.

26 See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891G - 898D; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I - 9J; *Afrox Healthcare Bpk v Strydom* above n 10 at para [8;] *Lubbe (op cit*).

27 Compare *Corbett et al (op cit* at 133); Corbett 'Aspects of the Role of Policy in the Evolution of Our Common Law' (1987) 104 *SALJ* 52 at 64, 68; *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 866H; *Magna Alloys* above n 26 at 891H; *Afrox Healthcare Bpk v Strydom* above n 10 at para [28].

28 (1950) 67 *SALJ* 231 at 240.

29 *Schultz v Butt* 1986 (3) SA 667 (A) at 679C - E. See also *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E - H.

30 *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 913G - I. Compare also *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598, where Innes CJ described public policy as 'an expression of vague import'.

31 See, for example, *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995) at paras [54] and [56]; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) ([2002] 3 All SA 363; 2002 (12) BCLR 1229) at para [91]; *Afrox Healthcare Bpk v Strydom* above n 10 at para [18]; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) at para [17]; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 (1) SA 389 (SCA) ([2002] 4 All SA 346) at para [12]; *S v Thebus and Another* above n 10 at para [27]; *Napier v Barkhuizen* [2005] JOL 16182 (SCA) at para [7.] See also

Ryland v Edros 1997 (2) SA 690 (C) at 704D.

32 *Napier v Barkhuizen,* above n 31 para [7].

33 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665). See also Mia Swart 'The Carfinian Curse: the Attitude of South African Judges towards Women between 1900 and 1920' (2003) 120 *SALJ* 540; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at para [151].

34 Paragraph [262]. (All references are to provisions in the interim Constitution.)

35 Above para [10].

36 Compare *Magna Alloys* case above n 26 at 894G.

37 Compare *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) at 326F - G; *De Waal (op cit* n 4 para 3G1 at 3G - 4); Du Toit (2001) 12 *Stell LR* 222 at 241.

38 Brought into operation on 16 June 2003 in terms of Proc R49 of 2003; *Government Gazette* 25065 of 13 June 2003.

39 For example, the Preamble, ss 1*(a)* and *(b)*, 7(1), 9(1), 36(1) and 39(2).

40 Section 74(1).

41 See, for example, *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593) at para [26]; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708) at para [41]; *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) (1997 (2) BCLR 153) at para [20]; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (1998 (3) BCLR 257) at para [37]; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (2000 (11) BCLR 1211) at para [27]; *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC) (2000 (1) SACR 686; 2001 (5) BCLR 449) at para [41]; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (2004 (6) BCLR 569) at para [70].

42 2004 (6) SA 121 (CC) at para [22] (footnotes omitted).

43 It is arguable that some of the other grounds mentioned in s 9(3), such as sex and ethnic or social origin, may also be relevant, but the case was not presented on that basis and it is not necessary for present purposes to say anything more in that regard.

44 Section 9(5). See also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489) at para [53]; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) (1998 (2) SACR 556; 1998 (12) BCLR 1517) at paras [17] - [18].

45 Above n 44 para [51], quoted with approval in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (1998 (3) BCLR 257) at para [38]. See also Cheadle, Davis and Haysom *South African Constitutional Law - The Bill of Rights* 2 ed (2005, with loose-leaf updates) at 4 - 51.

46 *President of the Republic of South Africa and Another v Hugo* above n 41.

47 See, for example, *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (1996 (6) BCLR 752) at para [40]; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC) (2001 (2) BCLR 103) at paras [20] and [21] (on discrimination against black people); *Brink v Kitshoff NO (supra*) at para [44] (on discrimination against women); *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348) at para [152] (on discrimination against Jews as a result of anti-semitism).

48 Compare, for example, *Clayton v Ramsden* [1943] AC 320 (HL) ([1943] 1 All ER 16); *Aronson v Estate Hart and Others* 1950 (1) SA 539 (A).

49 See n 38 above.

50 Compare *Grundlingh and Others v Phumelela Gaming and Leisure Ltd* 2005 (6) SA 502 (SCA) at para [40].

51 Adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979; signed by South Africa on 29 January 1993 and ratified on 15 December 1995. (See *Carmichele's* case above n 31 para [62] n 67.)

52 See Barrie in *Bill of Rights Compendium* 1B40 at 1B - 78. See also the Preamble to the Equality Act, where specific reference is made to South Africa's 'international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination', including the Convention on the Elimination of All Forms of Racial Discrimination as well as CEDAW.

53 1993 (2) SA 697 (C).

54 Du Toit (2001) 12 *Stell LR* 222 at 253.

55 At 703I - J. See also *Pennsylvania v Board of Trusts* 353 US 230 (1957), where the US Supreme Court held that a similar condition in a will, which left a fund for the operation of a 'college' to admit 'poor white male orphans', violated the Fourteenth Amendment, which enshrines, *inter alia*, 'the equal protection of the laws'.

56 Compare Du Toit (2001) 12 *Stell LR* 222 at 256 para *(d)*.

57 *Op cit* n 4 para 3G at 3G - 5. See also *Corbett et al (op cit* n 2 at 133).

58 *Re Dominion Students' Hall Trusts* [1947] Ch 183; *Re Lysaght* [1966] Ch 191; *Blathwayt v Baron Cawley* [1976] AC 443 (HL).

59 Hanbury and Martin *Modern Equity* 16 ed (2001) at 341. See also Hayton and Marshall *Commentary and Cases on the Law of Trusts and Equitable Remedies* 11th ed (2001) at 509; Du Toit (2000) 11 *Stell LR* 358 at 366 - 7.

60 Du Toit (2001) 12 *Stell LR* 222 at 254.

61 *Re Drummond Wren* [1945] OR 778.

62 Note: The judgment was handed down on 31 October 1945.

63 An argument that was raised in the written heads of argument on behalf of the applicants, but not persisted in during oral argument. See, for example, Sinclair in Van Heerden *et al Boberg's Law of Persons and the Family* 2nd ed (1999) at 50; Cockrell in *Bill of Rights Compendium* para 3E5 at 3E-8; *S v Makwanyane* above n 33 para [26].

64 Rautenbach in *Bill of Rights Compendium* para 1A22 at 1A-34 - 36; Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005) at 37 - 8.

65 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* above n 8 paras [17] - [18].

66 *Currie and De Waal (loc cit)*.

67 1996 (2) SA 588 (W) (1996 (6) BCLR 836) at 607D - 608A (SA), described by Dennis Davis *Democracy and Deliberation* at 119 as a judgment 'which represents the finest precedent we have of the kind of jurisprudence that should be inspired by the new Constitution'.

68 *Op cit* n 12 at 408 - 9.

69 See para [41] above.

70 *Op cit* n 4 para 3G12 at 3G-26.

71 *Op cit* n 45 at 20 - 3.

72 (2001) 12 *Stell LR* 222 at 255. See also *De Waal (op cit* para 3G12 at 3G-28).

73 *Cameron et al (op cit* at 11 - 12).

74 Compare *Marks v Estate Gluckman* 1946 AD 289 at 311 - 13.

75 See, for example, *De Waal (op cit* para 3G12 at 3G-25 - 28).