MODERN FREEDOM OF TESTATION IN SOUTH AFRICA: ITS APPLICATION BY THE COURTS[1]

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ABSTRACT

Freedom of testation is considered to be one of the founding principles of the South African law of testate succession. Testators are given freedom to direct how their estate should devolve and free rein to dispose of their assets as they deem fit. As a result, effect must be given to the expressed wishes of the testator. Prior to 1994, such freedom could be limited only by common law or statutory law; more recently, such freedom has been tested against the Constitution of South Africa. This means that a provision in a will cannot be enforced by the courts if it is *contra bonos mores*, impossible or too vague, in conflict with the law, or is deemed to be unconstitutional.

Having regard to the unfair discrimination provisions of section 9(3) of the Final Constitution, can a court enforce a will or a trust deed which discriminates against potential beneficiaries on account of their race, gender, religion or disability? Will such clause pass the test of constitutionality, be justified or considered to achieve a legitimate objective? Can potential beneficiaries or anyone who has *locus standi* challenge the freedom of testation by relying on the freedoms and rights entrenched in the Bill of Rights? It is against this background that the paper attempts to answer

1 This paper was drawn from my LLM Thesis titled 'The relationship between the Constitution of the Republic of South Africa (1996) and freedom of testation in modern South African law'.

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these questions and explore the extent to which the Constitution has an impact on freedom of testation. The central thesis of the article is to determine whether clauses in wills or trust instruments which differentiate between different classes of beneficiary can be deemed to be valid. This is done by looking at several more recent cases that have appeared before our courts.

Key words: Freedom of testation; trust deed; Constitution of the Republic of South Africa; common-law limitations; statutory limitations; race; gender; testator; testatrix; impossibility.

INTRODUCTION

The right of individuals to dispose of their property as they please after their death was recognised in Roman law, Roman-Dutch law and English law, and found full expression in South African law.[2] The South African law of succession affords a testator a very wide freedom of testation.[3] Nevertheless, a person's freedom of testation is limited by common law,[4] statute law,[5] and, more recently, by the Constitution.[6]

2 Corbett *et al The law of succession in South Africa* (2001) at 39; Schoeman-Malan Recent developments regarding South African common law and customary law of succession 2007 *PER* at 1.

3 *Curators Ad litem to Certain Potential Beneficiaries of the Emma Smith Educational Fund v University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); Du Toit *Succession law in South Africa – A historical perspective.* In Reid, De Waal & Zimmermann (eds). *Exploring the law of succession* (2007) at 69; Jamneck *et al The law of succession in South Africa* (2012) at 116; Smith *Freedom of testation: A memento of capitalist patriarchy* (unpublished LLM thesis, Unisa) (2009) at 96.

4 *Ex parte Marks' Executors* 1921 TPD 284*; Ex parte Administrators Estate Lesser* 1940 TPD 11*; Fram v Fram* 1943 TPD 362*; Scott v Estate Scott* 1943 NPD 7; *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Barnett v Estate Schereschewske* 1957 (3) SA 679 (C); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T); *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C).

5 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA). Examples of legislation that limit freedom of testation include the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965; the Maintenance of Surviving Spouses Act 27 of 1990; the Mineral and Petroleum Resources Development Act 28 of 2002, and the Pension Funds Act 24 of 1956.

6 Constitution of the Republic of South Africa, Act 108 of 1996 (referred to here as 'the Constitution').

COMMON-LAW LIMITATIONS ON FREEDOM OF TESTATION

Under the common law, as applied in South Africa since Union in 1910,[7] a testator's freedom of testation was restricted by the *boni mores*.[8] The courts did not (and still do not) enforce conditions in a will that are seen as *contra bonos mores* or against public policy.[9]

Under the covering principle of the *boni mores,* a number of conditions may be identified which have, in the past, frequently been brought to our courts' attention. These conditions include those that concern marital relationships, either by prohibiting the beneficiary from marrying or by interfering with a marital relationship,[10] as well as conditions that force a beneficiary to live in a certain place or to change his or her name.[11]

CONDITIONS CONCERNING MARITAL RELATIONSHIPS

Two types of condition that concern marital relationships have been identified by our courts, namely conditions that prohibit a beneficiary from marrying or from remarriage, and conditions which interfere with marital relationships.

In the first place, one finds conditions that prevent a beneficiary from getting married. In the case of *Aronson v Estate Hart,*[12] the testator bequeathed his estate to his son on condition that he 'should not marry out of the Jewish faith'. The applicant argued that the condition was void on the basis of uncertainty, as it encouraged the beneficiary to continue living in an unmarried state. The court held that the condition that a person should not marry someone who is not of the Jewish faith is valid. The Appellate Division therefore upheld the decision of the court a *quo.*

7 A National Convention held in 1908 resulted in the unification of Britain's four southern African colonies, and the Union of South Africa was formally established on 31 May 1910 (Maisel & Greenbaum *Foundations of South African law* (2002) at 62).

8 See Du Toit in Reid, De Waal & Zimmermann (eds) (2007) at 68.

9 *Ex parte Trustees Estate Loewenthal* 1939 TPD 250; *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163; *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan* 1967 (4) SA 397 (N); *Ex parte Kruger* 1976 (1) SA 609 (O); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC).

10 *Wasserzug v Administrators of Estate Nathanson* 1944 TPD 369; *Levy v Schwartz* 1948 (4) SA 930 (W); *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C).

11 *Ex parte Mostert: In re estate late Mostert* 1975 (3) SA 312 (T); *Ex parte Dodds* 1949 (2) SA 311 (T); *Loock v Steyn* 1968 (1) SA 602 (A); *Ex parte Higgs: In re Estate Rangasami* 1969 (1) SA 56 (D).

12 *Aronson v Estate Hart* 1950 (1) SA 539 (A); Joubert Jewish faith and race clauses in Roman-Dutch law 1968 *SALJ* at 402–420

In the aftermath of the *Aronson* case, Hahlo[13] pointed out that the question is not whether intermarriage between a Jew and a Christian is a good or a bad thing. The question is rather whether or not it is contrary to our notions of propriety that a testator should be allowed to use the power of the purse to force his descendants for one, two or more generations to profess a faith which they may no longer hold.[14]

This type of condition was also the subject of discussion in *De Wayer v SPCA Johannesburg.*[15] In this case, the testatrix directed, in her will, that the residue of her estate should go to her son, on condition that he remained unmarried after her death. She further directed that if he did ever marry, he would only inherit the movable property and that the immovable property would then go to the Society for the Prevention of Cruelty to Animals in Johannesburg. The son applied for the removal of the condition on the grounds that the condition imposed a general restraint on him, preventing him from ever marrying, and that the condition was invalid, as it was contrary to public policy.

The court held that it is settled law that a general restraint on marriage is *contra bonos mores,* and that the will placed a general restriction on the testatrix's son's marrying any woman at any time. It was clearly the intention of the testatrix to discourage her son from marriage, and therefore the condition was invalid.[16]

A contrary view is, however, held by our courts with regard to conditions prohibiting someone who has been married before from marrying again. Such a condition is not seen as being contrary to good morals.[17]

In *Ex parte Gitelson,*[18] the applicant was appointed by the testator as the sole heiress of his estate, on condition that she would provide for and maintain their children until they reached the age of majority. A further condition was that if she remarried, she had to pay each of their four children one-fifth of the value of the estate as at the date of the testator's death.

The applicant was of the view that she was unable to carry on with farming operations on the farm left in the estate, and therefore sold the property by public auction. The Registrar of Deeds, however, refused to register the transfer and demanded that the applicant either obtain authority from the court or furnish security to cover the inheritance that may become due to the children in the event of her remarriage.

As the applicant contended that she was unable to provide security, she asked the court to authorise the sale and transfer of the property. The two major children agreed to the sale of the farm, as well as to their mother's receiving the proceeds of

13 Hahlo Jewish faith and race clauses in wills: A note on *Aronson v Estate Hart* 1950 *SALJ* at 233.

14 See also Du Toit The constitutionally bound dead hand? The impact of constitutional rights and principles of freedom of testation in South African law 2001 *Stell LR* at 227.

15 1963 (1) SA 71 (T).

16 *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T) at 79.

17 *Ex parte Dodds* 1949 (2) SA 311 (T); *Ex parte Gitelson* 1949 (2) SA 881 (O); *Stevenson v Greenberg* 1960 (2) SA 276 (W*);* Jamneck *et al* (2012) at 119.

18 1949 (2) SA 881 (O).

the sale. As an alternative to the prayer, she asked for security to be dispensed with, and that the sum of £4 631 2s 8d be held by her in trust on behalf of the two minor children, under the strict supervision of the Master of the High Court. Judge Horwitz held that a bequest of property subject to restraints against remarriage does not conflict with public policy and is to be regarded as valid, as opposed to a condition prohibiting a beneficiary who has never been married from ever getting married. The condition was therefore valid, and it was ordered that the relevant security be provided by the applicant.

The second type of condition concerning marital relationships is that which interferes with an existing marital relationship. This condition was considered in a number of cases.[19]

In *Ex Parte Swanevelder,*[20] certain farms were left to the applicant, subject to a *fideicommissum* in favour of her children. The will provided that if the applicant should die without children, the farms had to be sold and the proceeds should be distributed among the testators' other children or their descendants. If any of the applicant's children should die childless, such a child's share should go to the brothers or sisters, and if all her children should die childless, the farms had to be sold and the proceeds distributed among the testator's other children. It was further provided that if the applicant's husband were to predecease her, this condition would lapse. The applicant applied for an order declaring the conditions null and void, as they caused a separation between husband and wife. The court held that the testator's intention was not to cause the dissolution of the marriage, as the will referred only to the dissolution of the marriage through the death of the husband, and the condition was therefore held to be valid.

In *Levy v Schwartz*,[21] on the other hand, the court came to a different conclusion. Mrs Levy, one of the applicants in the case, was the daughter of the testator and a beneficiary under his will. The testator bequeathed a sum of money to Mrs Levy, but she was to receive this money only 'in the event of her marriage being dissolved by the death of her husband or through *any other cause*,[22] before the date of the distribution'. However, the benefits that were left to the testator's other children were not subject to the same restrictions as applied to Mrs Levy. The applicant contended that the conditions in the will, which prevented her from receiving the benefit unless she divorced her husband, were invalid because they were against public policy or *contra bonos mores*. The court found the provision indeed to be *contra bonos mores*,

19 *Ex parte Marks' Executors* 1921 TPD 284*, Ex parte Administrators Estate Lesser* 1940 TPD 11*; Fram v Fram* 1943 TPD 362; *Scott v Estate Scott* 1943 NPD 7*; Aronson v Estate Hart* 1950 (1) SA 539 (A); *Barnett v Estate Schereschewske* 1957 (3) SA 679 (C); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T).

20 1949 (1) SA 733 (O).

21 1984 (4) SA 930 (W).

22 My emphasis.

against public policy and invalid, since it was clearly the testator's intention to bring to an end to the applicant's marriage.

In the case of *Barclays Bank DC & O v Anderson,*[23] on the other hand, the testator bequeathed certain portions of his farm to his children provided that they personally and permanently occupy such land. However, two of the testator's daughters' husbands had business interests which made it nearly impossible for them to live on the farm, and as they were experiencing health problems as well, the daughters left the farm to go and reside with their husbands. The executor applied for an order declaring that in leaving the farm permanently they would lose their rights to the benefits. The daughters argued that the provisions of the will were void on the basis that they aimed to create a separation between husband and wife, which is contrary to public policy in South Africa. The court held that the two daughters had forfeited their rights because they had failed to occupy the testator's land as stated in the will. In addition, the court held that there was no indication that the testator had intended to terminate the marriage between the parties through such a provision.

The difference between the decisions in the *Levy* case and the *Anderson* case lies in the intention of the testator. In the *Levy* case, it was the testator's intention to break up the marriage through the provisions in the will, whereas in the *Anderson* case, a break-up of the beneficiaries' marriages as a result of the will would have been purely coincidental, and had not been intended by the testator.

CONDITIONS THAT FORCE A BENEFICIARY TO LIVE IN A CERTAIN PLACE OR TO CHANGE HIS OR HER NAME

Under the common law, conditions of a will that require someone to live in a certain place or on a certain property are valid and enforceable.[24] In *Ex parte Higgs: In re Estate Rangasami,*[25] the testator bequeathed his estate to his sons on condition that 'should any of my aforesaid sons marry and elect to leave the parental roof and establish a home somewhere, he shall forfeit all interest under the will'.

The court held that the testator had no intention of preventing his sons from marrying, and that his intention was to keep the property and his family intact. It further held that the condition in the will was not contrary to public policy or *contra bonos mores*.

In *Ex parte Dodds*,[26] the testators in a joint will appointed a series of beneficiaries under a *fideicommissum* and, with a view to perpetuating their name, imposed,

23 1959 (2) SA 478 (T).

24 *Ex parte Dodds* 1949 (2) SA 311 (T); *Ex parte Kock* 1952 (2) SA 502 (C); *Ex parte Higgs: In re Estate Rangasami* 1969 (1) SA 56 (D); Jamneck *et al* (2012) at 121.

25 1969 (1) SA 56 (D).

26 1949 (2) SA 311 (T) at 311.

among other things, the condition that if one of the heirs should be a married woman, her husband would be obliged to assume their surname.

The husband of a daughter of the testator applied for an order declaring the condition to be null and void or, alternatively, that the condition should be deemed to have been complied with by the applicant herself, henceforth coupling the name of the testator with her married surname. The court held that the testator's desire was given effect to with the daughter's existing surname, and that a change of name by the applicant himself was unnecessary.

In the *Anderson*[27] case discussed above, the testator also expected his daughters to live on the farm permanently. Two of the testator's daughters wanted to leave the farm to go and reside with their husbands. The executor applied for an order declaring that, in leaving the farm, they would lose their right to the benefits of the will. The court held that the two daughters had forfeited their rights because they had failed to occupy the testator's land, as stated in the will.

COMMON-LAW LIMITATIONS: SUMMARY

As we have seen, the South African law of succession affords a testator a very wide freedom of testation. This wide freedom is, however, not absolute, but may be limited by common law.[28] In summary, the common law limits this freedom by giving courts the power to declare provisions in a will null and void if the provisions concerned are found to be *contra bonos mores*, vague or in conflict with the law.[29]

There are also statutory limitations on freedom of testation, which will now be discussed.

STATUTORY LIMITATIONS ON FREEDOM OF TESTATION

Freedom of testation in South African law is not only subject to common-law limitations, but is also subject to certain statutory restrictions. The following may be discussed as examples:

27 *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T).

28 *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC); *Curators Ad Litem to Certain Potential Beneficiaries of the Emma Smith Educational Fund v University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA).

29 *Levy v Schwartz* 1948 (4) SA 930 (W); *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Ex parte Kock* 1952 (2) SA 502 (C)*; Standard Bank of SA Ltd v Betts Brown* 1958 (3) SA 713 (N); *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *Ex parte Higgs: In re Estate Rangasami* 1969 (1) SA 56 (D).

a. Section 2(1) of the Maintenance of Surviving Spouses Act.[30]
b. Sections 6, 7 and 8 of the Immovable Property Act (Removal or Modification of Restrictions) Act.[31]
c. Section 13 of the Trust Property Control Act.[32]
d. Sections 9 and 36 of the Constitution of the Republic of South Africa Act.[33]

THE MAINTENANCE OF SURVIVING SPOUSES ACT 27 OF 1990

Section 3 of the Maintenance of Surviving Spouses Act limits a testator's freedom of testation in an indirect manner by awarding a claim for maintenance against the estate of the deceased spouse to the surviving spouse under certain circumstances. This means that even if a testator uses his freedom of testation to disinherit his or her surviving spouse *in toto*, the latter still has a claim against the estate of the deceased for reasonable maintenance up until his or her death or remarriage. In determining what reasonable maintenance is, the court will consider the following factors:

1. the amount of the estate of the deceased spouse that is available for distribution to heirs or legatees;[34]
2. the existing and expected earning capacity, financial needs and obligations of the surviving spouse, and the subsistence of the marriage;[35]
3. the standard of living of the surviving spouse during the subsistence of the marriage, and his or her age at the time of the death of the spouse.[36]

With such a claim for maintenance, a surviving spouse will therefore be able to get a share of a testator's estate, despite his or her having exercised his or her freedom of testation and disinherited his or her surviving spouse.[37]

THE IMMOVABLE PROPERTY (REMOVAL OR MODIFICATION OF RESTRICTIONS) ACT 94 OF 1965

Under the common law, it was possible for a testator to determine that any property, including immovable property, should stay in his or her family for as many genera-

30 27 of 1990.
31 94 of 1965.
32 57 of 1988.
33 108 of 1996.
34 Section 2(*a*) of Act 27 of 1990.
35 Section 3(*b*) of Act 27 of 1990.
36 Section 3(*c*) of Act 27 of 1990.
37 *Glazer v Glazer* 1963 (4) SA 694 (A); *Volks v Robinson* 2005 (5) BCLR 446 (CC); *Oshry v Feldman* 2010 (6) SA 19 (SCA).

tions as he or she wished, and examples of *fideicommissa* for 99 generations were often found.[38] The Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, however, imposed limitations[39] on these *fideicommissa*. In terms of s 6, all *fideicommissa* over immovable property are restricted to a maximum of two substitutions after the original fiduciary. In such a case, the second *fideicommissary* would eventually hold the property as a full unconditional owner and would be under no obligation to hand it over to a third *fideicommissary*.

SECTION 13 OF THE TRUST PROPERTY CONTROL ACT 57 OF 1988

Another indirect limitation on a testator's freedom of testation is found in s 13 of the Trust Property Control Act.[40] Section 13 gives the court the power to amend or vary trust provisions if a provision or provisions in the trust bring about consequences which the trust founder, in the opinion of the court, did not contemplate and which:

1. hamper the achievement of the objectives of the founder;
2. prejudice the interests of beneficiaries; or
3. are in conflict with public interest.[41]

The *William Marsh* case[42] is one of those which was decided in terms of s 13 of the Trust Property Act. In this case, the testator had in his will, which was executed in 1899, bequeathed to his son the residue of his estate in trust, to be used for the establishment and maintenance of a home for destitute white children. Over the years, due to changes in socio-economic circumstances in South Africa, the numbers of destitute white children had dwindled and, as a result, the home, which accommodated 120 children, now only accommodated half the number of children. It was anticipated that the number of children accommodated in the home would further decline in the future. There were a number of destitute children of different race groups for whom the home could provide sanctuary, but this went against a provision of the will. It was held, in this instance, that the testator could not have foreseen or anticipated this dilemma, and the provision was therefore altered.

38 *Ex parte Openshaw* 1953 (3) SA 76 (E); *Ex parte Anderson* 1958 (1) SA 691 (C).
39 *Ex parte Barnard* 1929 TPD 276; *Ex parte Schnehage* 1972 (1) SA 300 (O).
40 57 of 1988.
41 *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).
42 *Ex parte President of the Conference of Methodist Church of Southern Africa*: *In re William Marsh Will Trust* 1993 (2) SA 697 (C).

Pursuant to the *William Marsh* case, *Minister of Education v Syfrets Trust Ltd*[43] was one of the landmark cases that was decided on the strength of s 13 of the Trust Property Control Act. Although this case was decided according to the principles of s 13 of the Trust Property Control Act, it was one of the first cases in which reliance was also placed on the Constitution during arguments. As a result, this case is discussed in more detail below, where the focus is on the influence of the Constitution on freedom of testation.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The right of an individual to dispose of his or her own assets as he or she pleases is recognised in modern freedom of testation; the Constitution of the Republic of South Africa[44] has, however, had an impact on how the courts are interpreting freedom of testation in South Africa.

The case of *Minister of Education v Syfrets Trust Ltd*[45] is the first reported decision in which the age-old principle of freedom of testation was challenged by relying on the protected freedoms and rights in the South African Bill of Rights. In this case, the testator, Mr Scarbrow, made a will in 1920 in which he provided that the residue of his estate should be held in trust. He further provided that after the death of his wife, in the event of his sons dying without having children, the residue should be applied for the purpose of forming a trust called the 'Scarbrow Bursary Fund'.

The purpose of the fund was to 'provide bursaries for deserving white, non-Jewish male students who wished to study overseas'. In 2002, an advertisement inviting past and present students of the University of Cape Town to apply for bursaries under the Scarbrow Bursary Fund was placed in a newspaper. This advertisement angered the Minister of Education because it was only open to students of European descent who were male and non-Jews. As a result, the Minister of Education brought an application to the High Court requesting the removal of the discriminatory provisions in the will. The Minister based his application on the following three grounds:

1. Section 13 of the Trust Property Control Act,[46] which confers upon the court the power to vary a trust provision if the provision brings about consequences that were unforeseen by the trust founder (the testator) and that are in conflict with public interest.

43 2006 (4) SA 205 (C).
44 108 of 1996.
45 2006 (4) SA 205 (C).
46 57 of 1988.

2. The common law, which prohibits bequests that are illegal, immoral or contrary to public policy.[47]
3. The Constitution, in particular the provisions of s 9 dealing with equality and anti-discriminatory practices.

The *curator ad litem* argued that the contested provision in the will was valid because of the testator's right to freedom of testation. The court pointed out that the right to freedom of testation is not absolute, but may be limited by the common law[48] and statute law.[49]

In accordance with the above three contested grounds, the court held the following:

1. Public policy: under the common law, a testator's freedom of testation is restricted by public policy and, as a result, our courts will not enforce a condition in a will which is seen to be contrary to public policy.[50] The court pointed out that the concept of public policy is not static but changes over time as social conditions develop and basic freedoms improve.[51] Before the advent of the Constitution, public policy in South Africa was determined by the courts and the general sense of the community. Today, public policy is entrenched in the Constitution and the fundamental values that it protects. As the Constitution is the supreme law of the country, the court had to look at the constitutional values of human dignity, equality and the advancement of non-racialism and non-sexism. As a result, the court came to the conclusion that the conditions in the will were contrary to public policy.
2. Equality: Section 9 of the Constitution provides that no one may 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,

47 *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC); *Curators Ad Litem to Certain Potential Beneficiaries of the Emma Smith Educational Fund v University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA).

48 *Wasserzug v Administrators of Estate Nathanson* 1944 TPD 36; *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Standard Bank of SA Ltd v Betts Brown* 1958 (3) SA 713 (N); *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C).

49 Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965; Maintenance of Surviving Spouses Act 27 of 1990; Subdivision of Agricultural Land Act 70 of 1970; Mineral and Petroleum Resources Development Act 28 of 2002; Pension Funds Act 24 of 1956.

50 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at para 23.

51 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at para 24; Jamneck *et al* (2012) at 117; Hahlo 1950 *SALJ* at 240.

language or birth. However, the court, in coming to its conclusion, did not directly apply the Constitution, but based its decision on s 13 of the Act and its common-law power to delete provisions that are contrary to public policy. The court was of the opinion that if it were to hold that the provisions concerned amounted to unfair discrimination, it could also hold them to be contrary to public policy.[52]

3. On the condition that the bursaries were available only to candidates of 'European descent', the court held that this amounted to discrimination based on the grounds of race and colour, and as a result it was against public policy.[53]

In this case, the court held that the testamentary provision constituted unfair discrimination and that, as a result, the court was empowered in terms of the common law and s 13 of the Trust Property Control Act[54] to remove the provisions in a will that are contrary to public policy. The court ordered that the provision in question be removed from the will.

In *Minister of Education v Syfrets Trust Ltd,*[55] the court confirmed the principle that freedom of testation can be limited by public policy. This principle, adopted by courts in earlier cases, is debated below with regard to *University of Kwa-Zulu Natal v Makgoba,*[56] *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal,*[57] *In Re Heydenrych Testamentary Trust,*[58] and *In re BOE Trust Ltd.*[59] The *Syfrets* case has now ushered in constitutional entrenchment of the principle of freedom of testation, and any attempt to limit this principle must be weighed against the values enshrined in the Constitution.[60]

The right to equality is constitutionally recognised in South Africa. In fact, it is guaranteed by s 9 of the Constitution, which prohibits unfair discrimination based on the listed or analogous grounds. During the Interim Constitution, the Constitutional Court in *Harksen v Lane*[61] set out the test to determine whether this right has been violated. In terms of the equality test, discrimination that is based on a listed ground

52 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at para 27; Jamneck *et al* (2012) at 118.

53 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at para 33; Jamneck *et al* (2012) at 118.

54 Act 57 of 1988.

55 2006 (4) SA 205 (C).

56 (17124/2005) [2009] ZAKZDHC 28 (17 July 2009).

57 2011 (1) BCLR 40 (SCA).

58 2012 (4) SA 103 (WCC).

59 2009 (6) SA 470 (WCC).

60 *University of Kwa-Zulu Natal v Makgoba* (17124/2005) [2009] ZAKZDHC 28 (17 July 2009); *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA); *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC)*; and Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC).

61 1998 (1) SA 300 (CC).

is presumed to be unfair. The other party will then have to rebut the presumption of unfairness. However, if the discrimination is based on an analogous ground, the complainant will have to establish unfairness. The complainant will have to satisfy the court that discrimination has the effect of injuring his or her dignity. When determining unfairness, the court focuses on the impact of the discrimination on the complainant and others in his or her situation. The courts consider various factors to determine whether the discriminatory provision has affected complainants unfairly. Those factors include:

(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.
(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.

If the court, having considered these factors, concludes that the discrimination is not unfair, then there will be no violation of the right to equality. However, if the court concludes that discrimination is unfair, then there is a violation of this right, except if the violation is rescued by s 36.

The Constitution entitles the court to interfere with the testator's freedom of testation by removing racially restrictive conditions. In this case the discrimination was presumed to be unfair.

THE IMPACT OF THE CONSTITUTION ON FREEDOM OF TESTATION IN RECENT CASES

We have seen the impact that the Constitution started to have on freedom of testation when the decision in *Minister of Education v Syfrets Trust*[62] came before the courts. In this article, a number of more recent South African cases are discussed in order to determine the impact that the Constitution has had on the principle of freedom of testation and to highlight developments after the *Syfrets Trust* case. In addition, the

62 2006 (4) SA 205 (C);

courts' attitude towards applying *boni mores* in order to limit the testator's freedom of testation is analysed.

LIFE AFTER *MINISTER OF EDUCATION V SYFRETS TRUST LTD*: THE DECISION IN *EX PARTE BOE TRUST LTD*

As previously mentioned, the case of *Minister of Education v Syfrets Trust Ltd* was the first reported decision in which the influence of the Constitution on the principle of freedom of testation was highlighted.

Whereas this was the first case in the modern era to investigate the impact of the Constitution and the Bill of Rights, later cases developed the principles discussed in the *Syfrets Trust* case, and this researcher attempts to illustrate these developments through a discussion of these cases. After this decision, a few other cases with similar facts were served in our courts; the first of these was *Ex Parte BOE Trust Ltd*,[63] where the applicants were the trustees of the Jean Pierre de Villiers Trust, a trust created by the will of Daphne Brice de Villiers, his widow. After various bequests to her siblings, nephews, nieces and godchildren, the residue of the estate was left in trust with the following provision:

> 'The remaining income shall be applied by my trustees for the provision of small bursaries to assist white South African students who have completed an MSc degree in organic chemistry at a South African university and are planning to complete their studies with a doctorate degree at a university in Europe or in Britain.'[64]

The trust further provided that those who were selected as suitable candidates were required to return to and work in South Africa upon completion of their studies. The testatrix then provided that if it was impossible for the trustees to fulfil the trust's conditions, the income should instead be distributed to specified charitable institutions.[65]

Four universities, namely those of Cape Town, Stellenbosch, Free State and Pretoria, had been approached by the trustees to administer the bursaries, but had refused to do so because of what they deemed to be discriminatory provisions. The registrars of these universities were, however, prepared to administer the trust on condition that the bursaries were made available to students of all races.[66] The trustees also had reservations about the racial content of the bequest. The court issued a rule *nisi,* calling on all parties with an interest in the matter to show cause why the word 'white' should not be removed from the will. The rule *nisi* was served on all

63 2009 (6) SA 470 (WCC) at para 1.
64 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 2.
65 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 24.
66 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 4.

the universities concerned, as well as on the Master of the High Court, but was not served on the charity organisations named in the will. There was no opposition to the rule *nisi*, and as a result the court granted the order.

The applicant sought an order amending the terms of the trust as follows:

a) that the word ''white'', as used in the contested paragraph of the will, must be deleted be cause it is directly or indirectly discriminatory against potential beneficiaries of the bursaries contemplated in the will, on the basis of race or colour, and is therefore contrary to public interest;[67]

b) that the provision infringes upon the right to equality in section 9(1) of the Constitution, and it is contrary to the provisions of section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act;[68]

c) that it is contrary to sections 3 and 4 of the National Education Policy.'[69]

In the court's view, the principle of freedom of testation formed part of Roman and Roman-Dutch law, had been received into South African law and, in some respects, was taken further than in other Western legal systems.[70] It indicated further that freedom of testation is confirmed and protected under s 25 of the Constitution, which provides that no one may be deprived of property except in terms of the law of general application; that no law may permit arbitrary deprivation of property; and that the right to property includes the right of the testator to give enforceable directions regarding the disposal of his or her property after death.

The court found that the provisions in this case were not contrary to public policy and that s 9(3) of the Constitution advocated against unfair discrimination. Moreover, the discrimination found here was designed to achieve a legitimate objective, which was to enhance skills and avoid skills loss in South Africa, which meant that it was fair.[71]

Moreover, under s 13 of the Trust Property Control Act,[72] the courts were empowered to vary a trust provision only if they were of the opinion that the provision concerned would bring about consequences that the founder of the trust did not contemplate or foresee.[73] In this case, the will was executed on 14 July 2002, which is eight years after the commencement of the new constitutional dispensation. As a result, it could not be said that the testatrix did not foresee that the new constitutional dispensation would render the bequest contrary to public policy, and consequently s 13 could not be applied.[74]

67 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 3.
68 4 of 2000.
69 27 of 1996.
70 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 9B.
71 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 15.
72 57 of 1988.
73 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 18A.
74 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 19G.

In conclusion, the court emphasised that it would not rewrite testamentary dispositions simply because the trustees wished to amend them; and that since the trustees were refusing to administer the bursary, they had made the testator's bequest impossible to implement. As a result, the court ordered that the income of the trust should go to the charity organisations named in the will.[75]

The trustees appealed to the Supreme Court of Appeal (SCA).[76] The main reason for the appeal was to rely on the precedent created in *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal,*[77] a case which was decided by the SCA after the appellants had lost the *BOE* case in the High Court. It is important to note this fact, namely that the *Emma Smith* case had not been decided yet when the High Court judgment was issued in the *BOE* case. The *BOE* appeal was based on the following:

a) whether or not the SCA should allow the deletion of the word 'white'; and
b) whether or not the two cases could be distinguished.

The SCA in *BOE*[78] upheld the decision of the High Court and refused to order that the deterring provisions of the testamentary bequest be deleted. In giving reasons for the judgment, the court placed emphasis on s 25 of the Constitution and reiterated that a person's right to dispose of his or her property is protected by the Constitution.[79]

The question to be asked is whether or not this case can be distinguished from the *Emma Smith* case;[80] the court held that it was indeed distinguishable, because the latter provided for a single purpose only, namely that the funds in the trust be dedicated to the promotion and encouragement of education. No alternatives were provided for if the bequest should become impossible to implement, as was done in the *BOE* case.[81]

Modiri[82] criticises the reasoning followed in the SCA judgment of the *BOE* case by Erasmus AJA. He is of the opinion that the judge focused on the grounds of impossibility rather than unlawfulness. According to Modiri, Erasmus AJA was of the view that it was not relevant to reflect on unlawfulness because the testatrix had foreseen that it may become impossible to give effect to her provisions. This was clear from the fact that other arrangements were made, namely for the income to be

75 *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 26.
76 *Ex parte BOE Trust Ltd* 2013 (3) SA 236 (SCA).
77 2010 (6) SA 518 (SCA).
78 *Ex parte BOE Trust Ltd* 2013 (3) SA 236 (SCA).
79 2013 (3) SA 236 (SCA) at para 26A. This view was also adopted in the *Syfrets* case 2006 (4) SA 205 (C) at para 17.
80 *Curators ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA).
81 2013 (3) SA 236 (SCA) at para 25.
82 Modiri JM Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited* 2013 *PER* 583–616.

distributed among a number of charities should the bursaries fail.[83] Modiri maintains that the inclusion of alternative beneficiaries helped Erasmus AJA to overrule the principles laid down in *Emma Smith* and *Syfrets*.[84]

This researcher is of the opinion that it is unfortunate that the testatrix employed the word 'impossible' and that the court and Modiri followed suit and focused on this word. The context in which the word is used loses sight of the proper meaning of 'impossibility'. At no stage in the circumstances of the case was it ever 'impossible' to apply the testamentary provisions.[85] The *Concise Oxford Dictionary*[86] defines impossible as 'not being able to occur, exist, or be done; very difficult to deal with', which means that it would only have been 'impossible' to pay the bursaries to white students if no white students had existed. It was always *possible* to pay the benefit to the stated beneficiaries, but because of the universities' refusal to apply the provision because of their reasoning that under the current dispensation it was unconstitutional and therefore unlawful, the provision became *ineffective*. Be that as it may, the testatrix did foresee that it may become ineffective and therefore did provide for an alternative, but this fact alone did not mean that she intended to discriminate. Her intention was to develop and preserve sorely needed skills, and the discrimination was therefore not unfair. She had simply exercised her right of freedom of testation and the court respected this right.

Looking at the decisions of both the court *a quo* and that of the SCA, this researcher has to agree with the courts rather than with Modiri's criticism that there were constitutional matters that the court did not address. It is clear that the court did consider the Constitution, and especially s 9(3). The court did emphasise that not only should discrimination be considered, but that such discrimination should be seen to be unfair. In the *BOE* case, the court clearly illustrated how the importance of freedom of testation and the liberties afforded by the Constitution may be kept in balance by applying the principles of unfair discrimination. The court furthermore showed that in South Africa freedom of testation is still considered to be one of the fundamental principles of the South African law of succession, and that testators are afforded the right to dispose of their assets as they please.[87]

83 Modiri 2013 *PER* 591.

84 Modiri 2013 *PER* 592.

85 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC); *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal*; 2010 (6) SA 518 (SCA).

86 Soanes & Stevenson *Concise Oxford English Dictionary* 11 ed (Oxford University Press 2009).

87 *Ex parte BOE Trust Ltd* 2013 (3) SA 236 (SCA) at para 26. Du Toit The impact of social and economic factors on freedom of testation in Roman law and Roman-Dutch law 1999 *Stell LR* at 232; Du Toit The limits imposed upon freedom of testation by the *boni mores*: Lessons from common law and civil law (continental) legal systems 2000 *Stell LR* 358.

The court held that the provisions in this case were not contrary to public policy simply because they amounted to discrimination. In this case, the bequest did not amount to unfair discrimination because it was designed to achieve a legitimate objective, namely that of enhancing skills and avoiding skills loss in South Africa.

UNIVERSITY OF KWA-ZULU NATAL V MAKGOBA

University of Kwa-Zulu Natal v Makgoba[88] was the second reported case, after the *Syfrets* case, in which the influence of the Constitution on the principle of freedom of testation was discussed. This case was decided prior to *Ex parte BOE*[89] (discussed above), but as it forms the background to the next important case, namely *Emma Smith Educational Fund v University of KwaZulu-Natal*,[90] which was the appeal to this case, it is discussed as a prologue to the discussion of the latter case.

The facts of *University of Kwa-Zulu Natal v Makgoba* were as follows:

In 1920, Sir Charles George Smith established a scholarship in his mother's name for the funding of overseas studies of scholars intending to become painters, sculptors, architects or art teachers.

The relevant provisions are set out in clause 26(*f*) of the will of the late Sir Charles, which reads as follows:[91]

> 'As to three tenths thereof [of the residue of his estate] to the Council of the Natal University College (hereinafter with their Successors in Office called the Council) to be taken and held by the Council in trust to the intent that the same shall be dedicated in perpetuity for the promotion and encouragement of education in manner hereinafter appearing, namely:
>
> 1. The proceeds of this bequest shall form a fund to be called The Emma Smith Educational Fund in memory of my Mother.
> 2. The Council shall stand possessed of the said Fund and the investments from time to time representing the same upon trust to apply the income thereof in and towards the higher education of European girls born of British South African or Dutch South African parents, who have been resident in Durban for a period of at least three years immediately preceding the grant, payment or allowance hereby authorized.'

In 1999, the University of KwaZulu-Natal (formerly known as the Natal University College) launched an application in the Durban High Court seeking an order for the variation of the trust document.

The applicants sought the following:

88 (17124/2005) [2009] ZAKZDHC 28 (17 July 2009).
89 2013 (3) SA 236 (SCA).
90 2011 (1) BCLR 40 (SCA).
91 *University of Kwa-Zulu Natal v Makgoba* at para 4.

a) the deletion of the words 'European', 'British' and 'or Dutch South African' in clause 26(*f*)(2);[92]
b) the deletion of the word 'Durban' and its replacement with the words 'the Ethekwini Municipality'.[93]

The applicants argued as follows:

a) 'that the provision in the trust is discriminatory on the grounds of race, and is therefore contrary to public policy or *contra bonos mores;* and
b) that since the provision in the will is contrary to public policy, the court was empowered in terms of section 13 of the Trust Property Control Act[94] to vary the provisions, because it has consequences which the founder of the trust did not foresee or contemplate.'[95]

The applicants supported their argument by stating that it was impossible to identify children born of parents of European, British or Dutch descent. They also acknowledged the supremacy of the Constitution and the provisions that nullify any law or conduct that is inconsistent with it. In the light of the above, the applicants further argued that the discriminatory provisions may expose the university to legal proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. (PEDUDA) [96]

The curators' counter-argument was as follows:

(a) 'that section 13 of the Trust Property Control Act does not apply to the trust because the trust was transferred from Natal University College to the University of KwaZulu-Natal by means of statutory enactments, which had the effect of having the trust written into statute, and the court therefore has no jurisdiction to hear the matter;[97]
(b) that freedom of testation is not only a fundamental principle of the law of succession, but is also enshrined in section 25 of the Constitution, which provides that no one may be deprived of property, except in terms of the law of general application. This funda mental right is just as important as any of the rights contained in the Bill of Rights, and nothing in the trust deed entitled the university to interfere with the right of freedom of testation.'

The curators further submitted that, in the event that the court finds s 13 of the Trust Property Control Act to be applicable to the Trust, the following changes should be made:

1. reference to British and South African parentage be removed;

92 *University of Kwa-Zulu Natal v Makgoba* at para 1(*a*)(i).
93 *University of Kwa-Zulu Natal v Makgoba* at para 1(*a*)(ii).
94 57 of 1988.
95 *University of Kwa-Zulu Natal v Makgoba* at para 7.
96 4 of 2000.
97 *University of Kwa-Zulu Natal v Makgoba* at para 15.

2. reference to residence in Durban should be removed, and replaced with the requirement that the prospective applicant should have attended an educational institution in the province of KwaZulu-Natal for a period of three years before the application for the bursary;[98]
3. reference to the term 'poor' should be deleted and replaced with a phrase indicating that 'the intending recipient would not be able to pursue a course of study without financial assistance'.[99]

The curators pleaded with the court to retain the word 'White', and emphasised that if the court were to vary the testamentary provision, then it should take the following approach:

> a) 'that 30% of the trust income should be allocated to white women;[100]
> b) that any balance of the remaining 30%, plus a further 50% of the income, be allocated to bursaries for women who are non-white; and
> c) that the trustees should use their discretion in distributing the outstanding balance, or that it should be accumulated as capital.'

Finally, the curators recommended that the university stop acting as trustees of the fund in order to avoid any conflict or embarrassment, and that this function should be transferred to a private trust administrator.[101]

Nicholson J's decision in this case was heavily influenced by the *Syfrets* case. He stated the following:

> 'I do not believe that this case can be distinguished in any material way from the *Syfrets* and *William Marsh* matters. The decisions in those matters were well reasoned and I am bound by them unless I believe them to be wrongly decided.'[102]

It was the court's view that the offending provisions were *contra bonos mores* and that it was in the public interest that the relief sought by the applicants be granted. The learned judge emphasised further that s 13 of the Trust Property Control Act gave the court the power to vary trust deeds that were contrary to public policy, and as a result it ordered that the words 'European', 'British' and 'or Dutch South African' be deleted, and that the word 'Durban' be replaced with the words 'Ethekwini Municipality'.[103]

The *curators ad litem* of the Emma Smith Educational Trust Fund appealed against this decision of the Durban High Court to the SCA.

98 *University of Kwa-Zulu Natal v Makgoba* at para 9.
99 *University of Kwa-Zulu Natal v Makgoba* at para 10.
100 *University of Kwa-Zulu Natal v Makgoba* at para 11.
101 *University of Kwa-Zulu Natal v Makgoba* at para 12.
102 *University of Kwa-Zulu Natal v Makgoba* at para 81.
103 *University of Kwa-Zulu Natal v Makgoba* (17 July 2009) at para 90.

THE SUPREME COURT OF APPEAL CASE IN *CURATORS AD LITEM TO CERTAIN BENEFICIARIES OF EMMA SMITH EDUCATIONAL FUND V THE UNIVERSITY OF KWAZULU-NATAL*

The *Makgoba* case discussed above was taken on appeal in *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal*.[104] As seen above, the court *a quo* granted an order in favour of the university to have deleted the racially restrictive provisions under which the Emma Smith Educational Fund had been created, and to have the word 'Durban' replaced with 'the Ethekwini Municipality'.[105]

In giving its decision, the court reasoned that the testator had, during his lifetime, witnessed the increasing expansion of his home city, and he must have been aware that it would continue to expand even after the trust was established. The SCA consequently did not interfere with the decision of the High Court, but dismissed the appeal.

In its judgment, the SCA pointed out that the protection of equality was enshrined in s 9 of the Constitution, and that in terms of s 9(4) of the Constitution national legislation was enacted to prevent unfair discrimination. As a result of s 9(4), the PEPUD[106] had been enacted. Section 7 of this Act provides that

> no person may unfairly discriminate against any person on the ground of race, including—
>
> (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
>
> (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the need of such persons.

The SCA also referred to the schedule of the Act which contains a list that includes the following:[107]

> (a) Unfairly excluding learners from educational institutions, including learners with special needs.
>
> (b) Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.
>
> (c) The failure to reasonably and practically accommodate diversity in education.

In view of the PEPUDA, the court felt obliged to vary the trust provisions.

104 2010 (6) SA 518 (SCA) 1.

105 *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) 1 at para 2.

106 4 of 2000; 2010 (6) SA 518 (SCA) 1 at para B.

107 Section 29(2), Act 4 of 2000; 2010 (6) SA 518 (SCA) 1 at para B.

The SCA further pointed out that the university is a higher education institution, as defined in the Higher Education Act,[108] and that as such it is bound by s 37(3) of the Act, which is aimed at redressing past inequalities and ensuring that admission policies are not discriminatory.[109]

With regard to the curators' argument that varying testamentary provisions interferes with freedom of testation,[110] and that doing so would discourage people from creating trusts, the SCA held that the fundamental values of the Constitution and the constitutional imperative prohibit testators from making wills which amount to racial discrimination. Such prohibited wills include educational trusts which have the effect of benefitting a certain racial group of students. The Constitution[111] entitles the court to interfere with the testator's freedom of testation by removing racially restrictive conditions in a will that are contrary to public policy. In such cases, the fundamental values of the Constitution will take precedence over freedom of testation.[112] The court can, however, interfere with the testator's freedom of testation in terms of the common law, statute and Constitution, but only in cases where the testamentary provisions amount to unfair discrimination. The court concluded that by interfering with freedom of testation, the testator is not being deprived of his or her property; such property is merely being made accessible to all races.

The SCA dismissed the appeal against deleting the words 'European', 'British' and 'or Dutch South African' contained in clause 26(*f*)(2) of the trust deed, confirming instead that the words should be deleted.[113]

IN RE HEYDENRYCH TESTAMENTARY TRUST

More recently, in the case of *In re Heydenrych Testamentary Trust,*[114] freedom of testation was also challenged by relying on s 13 of the Trust Property Control Act and the Constitution.

In this case, the applicant, in its capacity as the administrator of three charitable testamentary trusts, made an *ex parte* application to the Western Cape High Court to change the terms of the trust deeds concerned and to delete certain discriminatory provisions contained in them.

108 Higher Education Act 101 of 1997.

109 *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) 518 (SCA) at para 39.

110 *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) 518 (SCA) at para 46.

111 Section 2 of the Constitution, 1996.

112 *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) 518 (SCA) at para 42.

113 *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) 518 (SCA) at para 39.

114 2012 (4) SA 103 (WCC).

In terms of the first trust, the Heydenrych Trust, which had been established in 1943, the testator provided that the residue of his estate should be kept in trust and invested for the following purpose of:

> 'Providing for the education of European boys of good character of the Protestant faith to enable them to qualify for the civil service of the Union or as Pharmaceutical Chemist (sic). I do specially stipulate that at least one half of the boys so assisted shall be of British descent.'[115]

The second trust, the Houghton Trust, which had been established in 1989, was to provide bursaries to two or more South African boys to enable them to be educated at Oundle School, Peterborough, Northamptonshire, and thereafter to study at Oxford or Cambridge University. The trust further provided that if it was no longer possible to send boys to Oundle School, the bursaries may be used for study at Rugby School in Britain. As a last resort, the bursaries may be made available for a school such as St Andrew's College in Grahamstown or any other school in South Africa which had the same aims and objectives as Oundle School. These bursaries were available only to members of the white population group.[116]

The third, the George King Trust, which also provided for a bursary, was established in 1987. It was to be administered by the University of Cape Town, and its purpose was to provide financial assistance to promising music students of good character who were in need and were 'members of the white group of Protestant Faith'.[117]

The Women's Legal Centre joined the application as *amicus curiae* and pointed out that the provisions of all three trusts were discriminatory on the grounds of gender, in the sense that the first only provided for boys, the second school mentioned (St Andrew's College) admitted only boys, and that the schools abroad that were nominated by the testator in the third instance were also boys' schools.[118]

The court found that the challenged conditions in the trust deeds constituted unfair discrimination on the grounds of gender and race, and that they were contrary to s 9(4) of the Constitution and therefore not in the public interest.[119]

Furthermore, the court highlighted the fact that all the wills being challenged had been executed before the advent of the Constitution and were, as a result, contrary to public policy. The court was empowered, under s 13 of the Trust Property Control Act,[120] to vary trust provisions only if it was of the opinion that the provisions concerned would bring about consequences that the founder of the trust did not foresee. The court held that in the case of the *Heydenrych Testamentary Trust* the testator did not foresee or contemplate the advancement of women in the field

115 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 6.
116 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 6I–J.
117 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 6.
118 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 3.
119 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 20.
120 57 of 1988.

of chemistry, while in the case of the Houghton Trust the testator did not foresee or contemplate the fact that the granting of scholarships on a discriminatory basis would be rendered unconstitutional and against public policy, and therefore unlawful. As a result, the court ordered that all references to 'European boys', 'of British descent', 'members of the white group' and 'members of the white population group' be deleted from the three trust deeds.[121]

The impact of this decision is that although freedom of testation should be respected, it is not absolute: the court has the power to vary trust provisions where the founder was not aware of the prejudice or did not foresee that the *boni mores* would change to the extent that his or her provisions would amount to unfair discrimination at a later stage.

CONCLUSION

When comparing the above four cases, it is clear that the courts were at first reluctant to apply the Constitution directly to any discriminatory provisions, but rather applied the well-known principles of the *boni mores* or the Trust Property Control Act in order to limit freedom of testation. In the *Syfrets* case, the High court applied the existing principles of public policy in order to vary the offending provisions of the trust deed in question.[122] After this decision, however, the courts gradually started moving away from this traditional reluctance by still applying the *boni mores* principle, but in conjunction with s 13 of the Trust Property Control Act. In the *Emma Smith Educational Fund* case, the court confirmed the deletion of discriminatory provisions based on the application of s 13 of the Trust Property Control Act, but used it in conjunction with the Constitution in order to indicate that the provisions were against public policy. This view made the application of s 13 possible. In the *BOE* case, the court clearly illustrated how the importance of freedom of testation and the liberties afforded by the Constitution may be kept in balance by applying the principle of unfair discrimination.

In the *Heydenrych* case, the court placed even more emphasis on s 9 of the Constitution and explicitly stated that the provisions of the trusts were in conflict with that section as they constituted unfair discrimination. Although the decision was still mainly based on s 13 of the Trust Property Control Act, the court no longer hesitated to rely on s 9 of the Constitution in reaching its decision.

These cases clearly show the progress made in the application of *boni mores* and constitutional principles to freedom of testation. All these cases illustrate that freedom of testation remains highly respected and will not suffer as a result of a mere inkling of discrimination. However, if unfair discrimination is evident, the courts

121 *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) at para 21.
122 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).

will not hesitate to apply the Constitution and the public policy values enshrined in it.

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