CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 315/18

In the matter between:

JAMES KING N.O.	First Applicant
TRUDENE FORWORD N.O.	Second Applicant
ANNELIE JORDAAN N.O.	Third Applicant
ELNA SLABBER N.O.	Fourth Applicant
KALENE ROUX N.O.	Fifth Applicant
SURINA SERFONTEIN N.O.	Sixth Applicant

and

CORNELIUS ALBERTUS DE JAGER	First Respondent
JOHANNES FREDERICK DE JAGER	Second Respondent
ARNOLDUS JOHANNES DE JAGER	Third Respondent
HENDRICK CHRISTIAAN DE JAGER	Fourth Respondent
JACOBUS HENDRIK SERFONTEIN	Fifth Respondent
DAVID-JOHN FORWORD	Sixth Respondent

CHARL WYNAND ROUX Seventh Respondent

KALVYN ROUX Eighth Respondent

MASTER OF THE HIGH COURT, CAPE TOWN Ninth Respondent

Neutral citation: *King N.O. and Others v De Jager and Others* [2021] ZACC 4

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Judgments: Mhlantla J (minority): [1] to [88]
Jafta J (majority): [89] to [163]
Victor AJ (concurring): [164] to [246]

Heard on: 11 February 2020

Decided on: 19 February 2021

Summary: unfair discriminatory bequest — private wills — freedom of testation — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — section 39(2) of the Constitution

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders granted by the High Court and Supreme Court of Appeal are set aside.

4. It is declared that clause 7 of the will of the late Mr Carel Johannes Cornelius De Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is inconsistent with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and therefore unenforceable.
5. The costs of Mr James King shall be paid from the estate of Mr Kalvyn de Jager.
6. There shall be no order as to costs in respect of other parties.

JUDGMENT

MHLANTLA J (Khampepe J, Madlanga J and Theron J concurring):

Introduction

[1] This matter concerns a will that was executed over a hundred years ago. It is common cause that a clause in a will, which contains a fideicommissum substitution,[1] discriminates against female descendants. At its core, this application concerns a novel issue whether and to what extent a court may encroach on freedom of testation, through the vehicle of public policy, in the context of private wills with unfair discriminatory bequests against unknown descendants on the sole basis of immutable characteristics. This matter calls on this Court to grapple with the perplexing question how to reconcile the fundamental right to equality and the primacy of freedom of testation in the context of

[1] De Waal and Schoeman-Malan *Law of Succession* 5 ed (Juta & Co (Pty) Ltd, Cape Town 2015) at 147-8 defines a fideicommissum as:

> "A legal institution in terms of which a person (the *fideicommittens*) transfers a benefit to a particular beneficiary (the *fiduciary* or *fiduciaries*) subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit goes over to a further beneficiary (the *fideicommissary* or *fideicommissarius*)."

private wills. This question must be answered through the lens of public policy against the backdrop of our constitutional democracy.

[2] The applicants seek leave to appeal the decision of the Supreme Court of Appeal, which dismissed their application for declaratory orders that would grant them the entitlement to certain fideicommissary property.

Background facts

[3] On 28 November 1902, Mr Karel Johannes Cornelius De Jager and Mrs Catherine Dorothea De Jager (the deceased's grandparents) executed a joint will[2] (will) in terms of which they bequeathed various properties, including farming properties, to their six children – four sons and two daughters, subject to a fideicommissum.[3] One of their sons Cornelius, had three sons: Corrie, John and Kalvyn (deceased). The first to third respondents are John's sons. Mr Kalvyn de Jager died testate on 5 May 2015. He had no sons but left five daughters (the second to sixth applicants). His daughters had four sons – the fourth to eighth respondents (deceased's grandsons).

[4] The fideicommissum was governed by clause 7, which provided:

> "With respect to the bequest of grounds/land to their sons and daughters, as referred to under Clauses 1, 2, 3 and 4 of this, their Testament, it is the will and desire of the appearers that such grounds/land will devolve, following the death of their children, to said children's sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other *Fidei Commissaire* heirs from the lineage of the sons of

[2] Last Will and Testament dated 20 November 1902.

[3] The children of the deceased's grandparents were Gabriel, Carel, Cornelius, Arnoldus, Johanna and Georgina.

> the appearers by representation, in continuity, and in the case of the death of a daughter or a daughter's son without leaving a male descendant, her or his share will fall away in the same way and on the same conditions, and go to the other daughters or their sons, by representation, of the deceased's son's brothers or their sons "per stirpes", respectively."[4]

[5] In terms of the will, beyond the first generation, the fideicommissary property would, as far as the second and third generations were concerned, not devolve upon their female descendants. The deceased was the last grandson of the testators in respect of whose estate a fiduciary asset from the original will fell to be dealt with. The substitution of the estate following his death will thus be the last substitution.

[6] When Mr Cornelius de Jager died, his sons (including the deceased) each became fiduciary heirs to a one-third share in the farms subject to clause 7. The eldest son, Corrie, died childless. His one share in the properties devolved in equal shares to his two surviving brothers, John and the deceased. When John died in 2005, his share of the properties devolved upon his three sons. It is clear that until the death of the deceased the terms of the fideicommissum were interpreted in light of clause 7. They limited the fideicommissary beneficiaries to the sons of the testators' children and, thereafter, their sons. The clause was interpreted as not applying to any female descendants of the testators.

[7] Since the deceased had no male descendants, a problem arose after his death in 2015. The first applicant, Mr James King, was appointed as one of the six co-executors in the deceased's estate. The co-executors received three claims against the fideicommissary properties. The first was by the deceased's daughters, who claimed that the terms of the clause were discriminatory because female descendants were excluded from inheriting. Thus, they were entitled to inherit from their father's estate. The second was lodged by the first to third respondents, who relied on the terms of clause 7 and contended that since the deceased had no sons, the fideicommissum devolved on them. The third was lodged by

[4] Last Will and Testament dated 20 November 1902.

the deceased's grandsons, who contended that if their mother's claim of unfair discrimination did not succeed, clause 7 of the will should be interpreted in such a way that the property devolves on them, as the deceased's male descendants (his grandsons).

Litigation history

High Court

[8] As a result of the conflicting claims, the first applicant launched an application in the High Court[5] and sought directions on how to deal with the fideicommissary properties. He supported the contention by the deceased's daughters that certain portions of clause 7 unfairly discriminated against them on the grounds of gender and sex. He thus sought an order declaring the offending portions of the will invalid. He also sought amendments that would have the effect of amending the will to include a provision that would enable the female descendants or daughters to inherit the fideicommissary properties.[6]

[9] The High Court noted that it was common cause between the parties that the terms of clause 7 were discriminatory against the female descendants of the testators.[7] That Court considered the key tension to be whether this discrimination raised an issue of public policy that warranted intervention by a court to strike out or amend the impugned provision of the will. In doing so, the High Court considered several cases dealing with public charitable testamentary trusts and the right to equality in the new constitutional era.[8]

[5] *King N.O. v De Jager* 2017 (6) SA 527 (WCC) (High Court judgment).

[6] Id at para 21.

[7] Id at para 46.

[8] Id at paras 28-38. It went on to discuss *Harper v Crawford* 2018 (1) SA 589 (WCC), a matter involving a testamentary disposition with no public character, where it was held that courts should only interfere with choices made by individuals in a private law context in rare or exceptional cases and where the Court concluded that it had no competency to vary the provisions of that private trust deed.

[10] The High Court held that the will did not have a public character or an indefinite life and its provisions did not discriminate against one or more sectors of society but rather, against certain descendants. Furthermore, it analysed the terms of section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act[9] (Equality Act), and its prohibition of unfair discrimination on the grounds of gender, which is stated to include "the system of preventing women from inheriting family property"[10] and "any practice . . . which impairs the dignity of women and undermines equality between women and men".[11] The High Court considered that this issue did not engage any testamentary "system" or "practice" as contemplated by the Equality Act, and that it would be strained to view it as such, as opposed to a once-off, private testamentary disposition by the testators.[12]

[11] The High Court concluded that in balancing the right to equality and the right to freedom of testation, allowing the former to trump the latter would produce an arbitrary result and would constitute a broad incursion into the fundamental constitutional right to property.[13] The High Court directly applied the Constitution to clause 7 and found that the terms of the fideicommissum infringed on the applicants' right to equality. It went on to consider, without finding that clause 7 was a law of general application, whether the discriminatory provision was a justifiable infringement on the right to equality in terms of section 36 of the Constitution.[14] Upon conducting a justification analysis, it held that the limitation of the second to sixth applicants' right to equality effected by clause 7 of the will was reasonable and justifiable given the importance accorded to freedom of testation. It

[9] 4 of 2000.

[10] Section 8(c) of the Equality Act.

[11] Section 8(d) of the Equality Act.

[12] High Court judgment above n 5 at para 53.

[13] Id at para 69.

[14] Id at paras 71-6.

held that the constitutional challenge to clause 7 should fail and that the impugned clause was also not so unreasonable and offensive so as to be contrary to public policy.[15]

[12] The second issue turned on the interpretation of "male descendants" in clause 7. The High Court held that the proper interpretation of clause 7 was that the testators intended to limit the beneficiaries to the third generation, being their great-grandsons.[16] In the result, the High Court dismissed the claims of the second to sixth applicants and the fourth to eighth respondents with no order as to costs.

Supreme Court of Appeal

[13] The applicants appealed to the Supreme Court of Appeal. Their appeal was heard and dismissed on 13 November 2018. That Court gave no written reasons for its order. In this regard, I endorse the statements of my brother Jafta J, that the failure of the Supreme Court of Appeal to give reasons here is unfortunate.[17]

In this Court

Applicants' submissions

[14] The applicants submit that clause 7 unfairly discriminates against women. They contend that when a provision in a private will unfairly discriminate against female descendants in an out-and-out disinheritance clause,[18] it ought to be struck down by a court on the grounds of public policy. Furthermore, they submit that the High Court erred in its interpretation of the words "male descendants" as being limited to great-grandsons.

[15] Id at paras 71-81.

[16] Id at para 103.

[17] Second judgment at [105].

[18] Concisely defined, out-and-out disinheritance means the absolute exclusion of an individual or individuals from inheriting in terms of a will.

[15] In terms of the discrimination issue, the applicants submit that the High Court incorrectly characterised the right to freedom of testation. Particularly, the extent to which it is protected under the Constitution. They contend that the right to equality should be considered as the right which requires greater protection in the circumstances. The applicants also challenge the distinction reinforced by the High Court between public charitable testamentary trusts and out-and-out disinheritance clauses in private wills. They submit that different consequences should not apply between the two instruments, particularly given that courts do indeed strike down discriminatory provisions in private contracts that are against public policy. The applicants posit that the right to equality reflects current public policy in South Africa, while the right to freedom of testation does not serve a similar purpose.

[16] On the interpretation issue, the applicants contend that the words "male descendants" should be given their ordinary meaning and, therefore, include successive generations, which includes the grandsons of the deceased. This would not defeat the purpose of clause 7. Instead, this would give due regard to the context of the will and would not create a departure from the ordinary meaning of the words.

Respondents' submissions

[17] The first to third respondents oppose the application on the following grounds: (a) the history and circumstances of the will do not render this matter appropriate for adjudication by this Court on the issue of the validity of discriminatory provisions in a private will of this nature; (b) granting relief will result in benefits being awarded arbitrarily to one group of female descendants; and (c) this matter gives rise to the typical situation envisaged by the High Court where testators' last wishes "are second-guessed by a court which might have little inkling as to why"[19] the testators provided as they did.

[19]High Court judgment above n 5 at para 61.

[18] In respect of the discrimination issue, the respondents submit that there is no prospect that this Court will conclude that unfair discrimination on gender within a private will, in the absence of a specific justification for disinheriting potential beneficiaries, cannot be justified under section 36 of the Constitution. The respondents aver that there are critical distinctions between how courts should treat public and private testamentary dispositions.[20] In terms of the interpretation issue, this merely involves the application of trite and unchallenged principles of testamentary dispositions.

Issues

[19] The preliminary issue is whether leave to appeal should be granted. The substantive issues are: (a) the proper interpretation of clause 7; (b) whether clause 7 is unfairly discriminatory against women; and (c) whether it is enforceable. These issues usher in the question whether a discriminatory out-and-out disinheritance provision in a private will can be declared unenforceable based on public policy. The final issue is whether clause 7 itself is contrary to public policy as underpinned by our constitutional values and thus warrants this Court's intervention.

Leave to appeal

[20] The issue whether unfair discriminatory provisions in a private will, which discriminate against females in an out-and-out disinheritance clause, should be considered unenforceable on public policy grounds, engages this Court's jurisdiction as a constitutional matter on two fronts.[21] First, this Court has accepted that what constitutes public policy is determined "by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights".[22] Second, in terms

[20] The respondents claim that the strength of the Supreme Court of Appeal's reasoning in *Harvey N.O. v Crawford N.O.* [2018] ZASCA 147; 2019 (2) SA 153 (SCA) strongly weighs against the applicants' prospects of success.

[21] Section 167(3)(b)(i) of the Constitution.

[22] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 29.

of section 39(2) of the Constitution, this Court has recognised that the development of the common law in line with the values of the Constitution also constitutes a constitutional issue.[23]

[21] The next hurdle is whether it is in the interests of justice to grant leave to appeal. This requires balancing an array of factors including reasonable prospects of success, which is not determinative but is a weighty factor.[24] Other relevant factors include: the importance of the issue;[25] whether a decision by this Court is desirable;[26] and the public interest in the determination of the issue.[27] The question whether courts ought to intervene where there are allegations of unfair discrimination in private testamentary bequests that seek to be enforced in the constitutional dispensation, warrants this Court's attention. This Court has never been called upon to grapple with alleged discriminatory private out-and-out disinheritance testamentary provisions whilst balancing freedom of testation against equality under the umbrella of public policy. This balancing act and the determination of the issue at hand is of interest to the broader public. Therefore, it is in the interests of justice that leave to appeal be granted.

[23] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 17; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at paras 3 and 9; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15(b).

[24] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 36.

[25] *De Reuck v Director of Public Prosecutions* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

[26] Id.

[27] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) 2011 at para 53 and *Radio Pretoria v Chairperson of Independent Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2003 (3) BCLR 231 (CC) at para 22.

Analysis

[22] I now deal with the merits of the appeal. The essential question raised by this matter is whether the impugned fideicommissary provision in a private will that bequeaths the property only to male descendants is contrary to public policy and therefore unenforceable. To answer this question, I will begin by considering the current common law position and examples of testamentary bequests which our law has thus far deemed to be contrary to public policy and unenforceable.

The common law position of testate succession in South Africa

[23] Generally, it is accepted that testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on this freedom.[28] It is well established that there are various restrictions on freedom of testation. These include: (a) effect will not be given to testamentary dispositions which are illegal, contrary to public policy or vague;[29] (b) the maintenance and education of a parent's children constitute a claim against such a parent's deceased estate;[30]and (c) restrictions imposed by legislation.[31]

Pre-constitutional dispensation

[24] During the pre-constitutional dispensation, "South African testators enjoyed almost unlimited testamentary freedom and courts were generally loath to interfere with testamentary bequests that were capable of being carried out".[32]

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[28] De Waal and Schoeman-Malan in *Law of Succession* above n 1 at 3.

[29] See for instance *Minister of Education v Syfrets Trust Ltd N.O.* 2006 (4) SA 205 (C) (*Syfrets*) at para 22; and *Aronson v Estate Hart* 1950 (1) SA 539 (A); [1950] 2 All SA 13 (A) at 555-6.

[30] *Ex Parte Insel* 1952 (1) SA 71 (T) at 75; *Glazer v Glazer* 1963 (4) SA 694 at 707; and *Hoffmann v Herdan N.O.*1982 (2) SA 274 at 275.

[31] This includes: The Maintenance of Surviving Spouses Act 27 of 1990; The Trust Property Control Act 57 of 1988; and the Pension Funds Act 24 of 1956.

[32] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" (2012) 27 *Tulane European & Civil Law Forum* at 114.

[25] The common law rule was that testamentary bequests that were considered contrary to public policy were unenforceable. This public policy test was flexible and gave testators considerable latitude to include discriminatory clauses in their bequests.[33] A notable case is *Aronson*, in which the testator provided for a forfeiture of benefits should a beneficiary "marry a person not born in the Jewish faith or forsake the Jewish faith".[34] The forfeiture clause was challenged on various grounds including whether the forfeiture provision was against public policy.[35] The Appellate Division held that it was not contrary to public policy. It reasoned that a marriage of that nature would increase tensions, could lead to irreconcilable differences, and would have an unsettling effect on children. Furthermore, in that case, Greenberg JA went on to state that "I know of no principle in law which would make it contrary to public policy for the testator to attempt (according to his rights) to safeguard his descendants against these perils".[36]

[26] However, in other cases involving private wills, certain conditions attached to bequests were deemed contrary to public policy. For instance, in *Levy*,[37] a testator provided that one of his daughters would only receive benefits if her marriage was dissolved by death or "through any other cause".[38] The Court held that a provision in a will which was calculated to break up an existing marriage was *contra bonos mores* (against public morals) and therefore invalid. In terms of that provision, that Court held "it was difficult to imagine

[33] Id.

[34] *Aronson* above n 29 at 540.

[35] Id at 546. These other grounds outlined were twofold. Firstly, it was void for uncertainty, and, secondly, it amounted to a nude prohibition.

[36] Id. See further the concurrence by Van den Heever JA. This approach was criticised by various academics, see for instance, Hahlo "Jewish Faith and Race Clauses in Wills – A Note on Aronson v Estate Hart 1950 1 SA 539 (A)" (1950) 67 *SALJ* 231 at 239-240 and Corbett et al *The Law of Succession in South Africa* 2 ed (Juta and Company, Cape Town, 2002) at 130-1.

[37] *Levy N.O. v Schwartz, N.O.* 1948 (4) SA 930 (W).

[38] Id at 498.

provisions in a will more repugnant to public policy".[39] The impugned condition was deemed unenforceable and the daughter was able to inherit unconditionally.

[27] In the context of public wills, testators were afforded considerable scope in the realm of charitable trusts to limit certain benefits on various grounds. In *Marks,*[40] the testator created a trust for the payment of bursaries to students at a university but stipulated that the recipient must be a "Jew or Jewess (not a converted)" and the bursary would lapse "if the grantee prove religiously inclined".[41] A challenge on the basis that the condition was vague and contrary to public policy was unsuccessful. The Appellate Division held that there was sufficient certainty and that, regarding the public policy issue, it was not framed in peremptory terms and it was difficult to ascertain the intention of the testator.[42] In doing so, the court in *Marks* reinforced the primacy of freedom of testation in the context of public charitable trusts and consequently, condoned limits on potential beneficiaries on particular grounds.

[28] However, there were outliers, for instance, the High Court's decision in the matter of *William Marsh,* albeit in the context of the Trust Property Control Act, not the common law,[43] where Mr Marsh executed a will in 1899 to create a trust providing for a home for destitute white children. During the 1970's, the Methodist Church began to administer the homes and over time, as a result of changes within the socio-economic landscape, there

[39] Id at 499.

[40] *Marks v Estate Gluckman* 1946 AD 289.

[41] Id at 294.

[42] Id at 310. Tindall JA states that "In my opinion, it cannot be said that the provision in clause 7, giving the administrator this discretion, is contrary to public policy merely because it advises him to cancel the bursary 'if the grantee prove religiously inclined'. There is some difficulty in determining the precise meaning of these words. If they are directed against the use of a bursary for the purpose of qualifying for a religious career, the advice to the administrator is not contrary to public policy. . .".

[43] *Ex Parte President of the Conference of the Methodist Church of Southern Africa: in re William Marsh Will Trust* 1993 (2) SA 697 (C) (*Willam Marsh*) per Berman J and Seligson AJ. At 702 Berman J states that "it is to my mind fortunately unnecessary for the Court to consider the application on the basis of the common law approach".

came to be a dearth of destitute white children.[44] As a result, the Church applied in terms of section 13 of the Trust Property Control Act to delete the word "white".[45] The Court, based on section 13, held that the intention of the testator was frustrated by the racial prohibition and that the racial limitation was contrary to public policy since it would not be in the public interest for children of other races to be excluded from accessing children's homes for the destitute. The Court held that it was in the public interest and in accordance with public policy, that the discriminatory provisions be removed.[46] In light of the discriminatory provision in the will, the court made an order in favour of the applicants to the effect that the term "white" be removed from the phrase "white destitute children". However, it is important to note that these cases were all before the enactment of the Constitution, whereupon the position changed.

Common law position under the constitutional dispensation

[29] Since the advent of the Constitution, testamentary bequests have been challenged on the basis of public policy as infused by constitutional values. In particular, decisions have emerged in which courts have intervened in matters dealing with public charitable trusts.

[30] In *Syfrets*, a will and codicil executed in 1920 created a charitable testamentary trust that was established in the 1960's, under which bursaries to study abroad had been provided for "deserving students with limited or no means".[47] The eligibility of the bursaries was restricted to persons of "European descent" and excluded persons of "Jewish descent" and "females of all nationalities". The High Court was asked to delete the discriminatory criteria (in this case, race, religion, and gender). Applying established common law

[44] Id at 700.

[45] Id.

[46] Id.

[47] *Syfrets* above n 29 at para 1.

principles, the court considered whether the impugned provisions were against public policy. In doing so, it noted that in the constitutional era public policy was rooted in the Constitution and the values it enshrines.[48] The Court, therefore, considered whether the provisions constituted unfair discrimination and if so, whether they were contrary to public policy. The High Court held that the provisions constituted indirect discrimination on the basis of race as well as direct discrimination on the grounds of religion and gender. The Court proceeded to apply the *Harksen*[49] test, and balanced competing constitutional values and principles of public policy.[50] It also noted the public nature of the trust,[51] and concluded that "the testamentary provisions in question constitute unfair discrimination. Accordingly, it concluded that they were contrary to public policy as reflected in the foundational values of non-racialism, non-sexism, and equality".[52] It held that it was therefore empowered to vary the trust and delete the offending provisions.

[31] In *Emma Smith*,[53] a will executed in 1938 created a charitable trust which was designated for the "higher education" of "European girls born of British South African or Dutch South African parents who have been resident in Durban".[54] They had to be "poor" and, but for such assistance, "unable to pursue their studies".[55] The matter hinged on whether the trust could be varied to delete the racially restrictive provision in terms of section 13 of the Trust Property Control Act. The Supreme Court of Appeal focused on whether the impugned trust provisions were in conflict with the public interest. In doing

[48] Id at para 24.

[49] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[50] Id at paras 33 and 39.

[51] Id at para 46.

[52] Id at para 47.

[53] *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) (*Emma Smith*).

[54] Id at para 8. The parties agreed that "'European' is an obsolete reference to white South Africans".

[55] Id.

so, it considered section 9 of the Constitution,[56] the Equality Act and the Higher Education Act.[57] It stated that "in the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster".[58] It noted that the university, in administering the trust, would operate "in the public sphere" and therefore, must act consistently with public policy as well as constitutional values. The Supreme Court of Appeal held:

> "The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as a University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past."[59]

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[56] Section 9 of the Constitution reads:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (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 subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[57] 101 of 1997.

[58] *Emma Smith* above n 53 at para 38. See further para 37 which endorses Cameron et al *Honore's South African Law of Trusts* 5 ed (Juta and Company, Cape Town 2002) 171-2:

> "The Bill of Rights applies to all law including the law relating to charitable trusts. . . the objects of a trust will have to conform with the disavowal of unfair discrimination under the 1996 Constitution and the Equality Act, which envisage equality even in person-to-person relations".

[59] Id at para 42.

[32] Similarly, *BOE Trust*[60] concerned a trust created in a will executed in 2002 in which the testator provided for the trust income to go towards bursaries to assist "white South African students" to study abroad on condition that the recipient "must return to South Africa". The trustees approached the court for an order to delete the word "white" from the trust deed. Although both parties accepted that the condition unfairly discriminated against potential beneficiaries on the basis of race, the High Court held that it was not clearly contrary to public policy. The court went on to state that "it is recognised that discrimination designed to achieve a legitimate government purpose is not unfair".[61] The High Court considered that the testator may have had a legitimate objective – to counter the brain drain,[62] but, there was no firm finding in this regard.[63] The Supreme Court Appeal affirmed the principle of freedom of testation but held that it was "not absolute".[64]

[33] From this analysis, it is evident that discriminatory testamentary bequests in public trusts have been tested against the robust yardstick of public policy. However, our courts to date have only applied this to: (a) testamentary forfeiture clauses (even in the private context, often in the form of resolutive or negative potestative conditions); and (b) public charitable trusts. A public policy challenge to out-and-out disinheritance cases in the private sphere is, therefore, novel. The question that arises is whether these types of provisions are contrary to public policy under our constitutional dispensation. This, in turn, begs the question, whether the common law should be developed to address discriminatory

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[60] *BOE Trust Ltd N.O. (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)* [2012] ZASCA 147; 2013 (3) SA 236 (SCA) (*BOE Trust* Supreme Court of Appeal judgment).

[61] *BOE Trust Ltd N.O.* 2009 (6) SA 470 (WCC) (*BOE Trust* High Court judgment) at para 14.

[62] Id at para 15 where it stated:

> "During the post-constitutional years must has been said and written about the increasing trend amongst white graduates of our universities to emigrate, upon the completion of their education, thereby depriving the country of benefit of their skills obtained at the expense of the South African tertiary-education system."

[63] Id at para 17.

[64] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 28.

provisions in out-and-out disinheritance testamentary provisions in private wills. I will consider the first issue for determination namely, the interpretation of clause 7.

The golden rule of interpretation

[34] The point of departure when interpreting wills is "to ascertain the wishes of the testator from the language used in the will".[65] Courts are obliged to give effect to the wishes of the testator unless they are prevented by some law from doing so. The "golden rule" for the interpretation of wills and this inherent limitation is famously described as follows in *Robertson*:

> "The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so."[66]

[35] If one considers clause 7 of the will, the clear interpretation of "male descendants" is to provide for sons only, after the first generation. No armchair or extrinsic evidence was put before this Court to consider otherwise. Therefore, in giving effect to the wishes of the testators from the language used it is clear that as far as the second and third generations are concerned, they intended for the fideicommissary beneficiaries to be male descendants, and thus, for benefits not to devolve upon any of their female descendants.

[36] The next question to consider is whether this Court is barred from giving effect to the testators' intention by any rule or law. The analysis above canvassed some of our

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[65] *Robertson v Robertson Executors* 1914 SA 503 (AD) at 507. This dictum was quoted with approval in the context of a *fideicommisssum* by Watermeyer JA in *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 183.

[66] *Robertson* id at 507.

The common law has developed additional rules to guide courts when using the golden rule. These include, the "general scheme of the will," and the dominant clause must be ascertained. "The plain meaning rule" stipulates that ordinary words must attain their ordinary meaning and technical words their technical meaning. See further Corbett, Hofmeyr (eds) and Khan *The Law of Succession in South Africa* 2 ed (Juta and Company, Cape Town 2001) at 454-455.

jurisprudence both before and after the advent of the Constitution. It revealed that whilst freedom of testation is a central principle of testate succession, it is a trite rule of the law of succession that clauses which are contrary to public policy are unenforceable. But, our courts have, up until now, only dealt with this in respect of conditions attached to private bequests or in the cases of public charitable testamentary bequests as opposed to out-and-out disinheritance bequests. Our courts have not been faced with a set of facts such as this to be tested against public policy. Specifically, an out-and-out disinheritance bequest where the testators had no personal relationships or interactions with the lineal descendants,[67] yet excluded these descendants that they had never met (unknown lineal descendants) on the sole basis of their immutable characteristics.[68] This ushers in the pivotal question whether this matter warrants the development of the common law, as infused with our constitutional values.

Direct versus indirect application of the Bill of Rights

[37] Before turning to this point, I wish to dispose of the question whether this Court ought to consider the enforceability of clause 7 on the ground that it amounts to discrimination on the basis of gender and sex[69] in contravention of section 9 of the Constitution (direct application of the Bill of Rights) or whether we should consider

[67] Only blood relations in the descending line.

[68] The potential beneficiaries in question are the lineal descendants of the testator and succeed the testator's own generation and that of their children's generation and so on. "Excluded" in this context connotes an implicit exclusion of one group of potential beneficiaries by proximity to a similarly placed group of potential beneficiaries who have been expressly "included" solely due to immutable characteristics. The status of the applicants before us is as follows: unknown (meaning they had no personal relationships or interactions with the testator, as they were born after the death of the testator) lineal descendants that are excluded as potential beneficiaries on the basis of immutable characteristics.

Immutable characteristics are defined as those enshrined under section 9(3) of the Constitution including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[69] It is critical to mention that our courts have used the grounds of gender and sex interchangeably but it is nonetheless important to note that they are distinct. On one hand, "gender" can be understood as the "socially and culturally constructed differences between men and women" while, in contrast "sex" is described as the "biological differences between men and women". See Woolman and Bishop *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2013) at 2665.

enforceability through the lens of public policy, as infused with constitutional values (an indirect application of the Bill of Rights).

[38] In *Barkhuizen*, Ngcobo J held that the proper approach to constitutional challenges to contractual terms is "whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[70] This was, among other things, due to various concerns with directly applying the provisions in the Bill of Rights to the contract. First, that the impugned clause in *Barkhuizen*, the time-bar clause, did not constitute a law of general application which could limit a right under section 36 of the Constitution.[71] Second, that the time-bar clause did not amount to a "law" or "conduct" which a court could declare invalid under section 172(1)(a) of the Constitution.[72]

[39] Various parallels can be drawn between contractual and testamentary provisions. Clause 7 is a clause in a private will, it is not a law of general application for purposes of section 36, nor does it amount to "law" or "conduct" for the purposes of section 172(1)(a). In *Barkhuizen*, it was also noted that this approach "leaves space for the doctrine of *pacta sunt servanda* to operate".[73] Equally, this approach allows for the principle of freedom of testation to flourish alongside and subject to our constitutional values. For this reason, coupled with the fact that this approach is primarily pleaded by the applicants, I shall, therefore, resort to an indirect horizontal application of the Bill of Rights through the vehicle of public policy.

[40] I have had the benefit of reading the judgments penned by my brother Jafta J (second judgment); and my sister Victor AJ (third judgment). While the second judgment

[70] *Barkhuizen* above n 22 at para 30.

[71] Id at para 24.

[72] Id.

[73] Id at para 30.

determines the matter by directly applying the Constitution and Equality Act, and the third judgment applies the Equality Act directly to clause 7 in accordance with the principle of constitutional subsidiarity, I am resolute that this matter should be determined from a common law viewpoint through the lens of public policy as imbued with our constitutional values.

[41] In both written and oral argument, the applicants predominantly pleaded that the matter should be determined in terms of the common law, and its development.[74] Since time immemorial, courts have considered the common law rule that clauses that are contrary to public policy are unlawful and are unenforceable. Our law reports are teeming with examples of what is against public policy and therefore unenforceable. These matters are not limited to unfair discriminatory issues. It would be remiss of us to take a detour and neglect engaging with this body of jurisprudence and not attempt to bring it in line with a constitutionally infused common law approach. In my view, there is no bar to applying the common law instead of the Equality Act, because the Equality Act gives effect to section 9 and the right to equality and does not purport to codify the common law public policy standard or the limits of freedom of testation.

Duty to develop the common law

[42] Section 39(2) of the Constitution obliges courts to develop the common law to "promote the spirit, purport and objects of the Bill of Rights". This principle is bolstered by section 173 of the Constitution which endows this Court with "the inherent power to . . . develop the common law, taking into account the interests of justice".

[43] In *Carmichele*, this Court considered the nature of the section 39(2) obligation as follows:

[74] The applicants submit that "This Court is compelled to consider whether section 39(2) of the Constitution mandates a change to the common law notion of freedom of testation."

> "It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2).
>
> . . .
>
> The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."[75]

[44] The importance of developing the common law in light of our constitutional values was underscored in *Du Plessis* when Mahomed DP stated:

> "the common law is not to be trapped within limitations of the past . . . it needs to be revisited and revitalised with the spirit of constitutional values. . . defined in chapter 3 of the Constitution and with full regard to the purport and objects of that chapter ".[76]

[45] This Court has accepted that "the normative influence of the Constitution must be felt throughout the common law".[77] It has been said that "the mission of section 39(2) is to carry out the audit and re-invention of the common law".[78]

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[75] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 39 and para 54.

[76] *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 CC) at para 86 in the context of the interim Constitution.

[77] *K* above n 23 at para 17. See also *S v Thebus* [2003] ZACC 12; 2003 (2) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28.

[78] Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 at 426.

[46] Section 1 of the Constitution provides for our cherished founding values.[79] Notably, the constitutional normative value system has been sketched as follows:

> "The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society which breaks clearly and decisively from the past and where institutions which operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system."[80]

[47] The duty of the courts to develop the common law, in true fidelity to the ethos of the transformative constitutional project, is well articulated by Cameron J in *Fourie*:[81]

> "Developing the common law involves a simultaneously creative and declaratory function in which the court puts the final touch on a process of incremental legal development that the Constitution has already ordained . . . This process also requires faith in the capacity of all to adapt and to accept new entrants to the moral parity and equal dignity of constitutionalism. Judges are thus entitled to put faith in the sound choices the founding negotiators made on behalf of all South Africans in writing the Constitution. And they are entitled also to trust that South Africans are prepared to accept the evolving implications that those choices entail. The task of applying the values in the Bill of Rights to the common law thus requires us to put faith in both the values themselves and in the people

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[79] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[80] *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 at 728. Also, the term of art "an objective normative value system" is imported from German law, see further *Carmichele* above n 75 at para 54.

[81] *Fourie v Minister of Home Affairs* [2004] ZASCA 132; 2005 (3) SA 429 (SCA).

whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all."[82]

[48] This prompts the question: when is section 39(2) triggered? O'Regan J proffered laudable guidance on this in *K*:[83]

"It is necessary to consider the difficult question of what constitutes 'development' of the common law for the purposes of section 39(2). In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

The question we should consider is whether one characterises such cases as development of the common law for the purposes of section 39(2). The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution

[82] Id at paras 23-5.

[83] *K* above n 23.

> are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."[84]

[49] Based on what was said by this Court in *K*, determining whether a novel set of facts falls within the ambit of an existing common law rule is within the domain of section 39(2). Therefore, should we choose to extend the existing common law rule (that clauses contrary to public policy are unenforceable) to private out-and-out disinheritance testamentary provisions, which unfairly discriminate between unknown included and excluded lineal descendants on the sole basis of immutable characteristics, this would be an incremental, yet significant, development of the common law. As I see it, the second judgment applies the broad existing common- law rule as it stands,[85] without acknowledging that, given the novel facts, a development is warranted in light of section 39(2) coupled with what was said by this Court in *K*.

[50] When considering these novel facts, this Court has a constitutional obligation to craft and mould the common law in accordance with the spirit, purport and objects of the Bill of Rights. It is worth noting that in *Mighty Solutions*, this Court cautioned that before a court proceeds to develop the common law it must consider various steps.[86] The purpose

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[84] Id at paras 16-7. See also *Carmichele* above n 75 at para 40.

[85] See second judgment at [90].

[86] In *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) at para 39, this Court noted that before a court proceeds to develop the common law it must:

> (a) Determine exactly what the common law position is;
>
> (b) Consider the underlying reasons for it;
>
> (c) Enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development;
>
> (d) Consider precisely how the common law should be amended; and

of this is not to impugn the principle of freedom of testation. Rather, the purpose of applying some of these steps is to allow us to re-evaluate the weight attached to freedom of testation when juxtaposed with other constitutional considerations such as balancing a public policy enquiry.

Principles underlying the current common law position

[51] The common law position has been outlined in detail above. The common law rule in effect aims to respect the wishes of the testator through the principle of freedom of testation.[87] This is inherited from, among others, the English approach of unlimited freedom of testation, notwithstanding the distinct economic and social developments that have taken place in both England and South Africa.[88] Hahlo remarked:

> "The principle of unlimited freedom of disposition by will which South Africa took over from England during the nineteenth century was the product of the individualistic and *laissez faire* attitude which prevailed in English law at that time, but has since given way to a socially minded approach."[89]

[52] It is evident that the primacy of freedom of testation in testate succession, as it currently stands, is based on our law's respect of freedom, to act as one wishes in the private sphere. Our mixed legal system, with all its historical nuances, has clasped onto the importance of the English law view, as it was at the time of its adoption into our law, of autonomy, private property and unfettered freedom to bequeath one's property as one

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(e) Take into account the wider consequences of the proposed change on that area of the law.

The respondents contend that the applicants in *King* have not met the factors outlined in *Mighty Solutions*. However, they do not expand on this. Rather, the respondents list 8 reasons why it is not in the interests of justice to deal with the discrimination issue.

[87] Corbett et al above n 36 at 39.

[88] Hahlo "The Case against Freedom of Testation" (1959) *South African Law Journal* 76 (435) at 442.

[89] Id.

wishes, whilst retaining some of the Roman and Roman-Dutch law exceptions to this.[90] The question that then arises is to what extent must this primacy of freedom of testation be balanced against other key constitutional values (including equality and non-sexism) which underpin our constitutional dispensation? Similarly, it is important to question whether there may be certain types of bequests, beyond the current exceptions, that should be unenforceable because they are *contra bonos mores*. Before dealing with these questions, I will briefly highlight the patriarchal manifestations of the law of testation as well as the status of freedom of testation in other jurisdictions.

The patriarchal manifestation of the law of testation

[53] Testate succession, and in particular the principle of freedom of testation, while facially neutral, has traditionally manifested in a patriarchal manner. Roman private law was based on the idea that each family had a male head. Families residing in one household were centred patriarchally with their roots firmly lodged in the notion of the *paterfamilias.*[91] The move towards freedom of testation was seemingly brought about with an expectation that the predominantly male testators would dispose of their property through the reasonable man[92] standard, for which the social expectation at the time was to ensure the well-being of one's family.

[54] In *Bhe*, this Court acknowledged:

> "Roman-Dutch law, like the Roman law upon which it was founded, was neither humanitarian nor egalitarian. In its gender bias, it was similar to other European systems

[90] For example, the common law position in our current law that conditions attached to bequests that seek to break up marriages are *contra bonos mores* appear directly related to the Roman law position that conditions which encouraged an immoral act were against public policy. See Du Toit "The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch Law" (1999) 10(2) *Stellenbosch Law Review* at 240.

[91] Leage and Ziegler *Roman Private Law: Founded on the 'Institutes' of Gaius and Justinian* 2 (Macmillan, 1906) at 1.

[92] I use "man" consciously because that was the "reality" of the time.

> of its time, and its effects on both the South African legal system and South African society have been enormous."[93]

[55] Therefore, it must be accepted that the genesis and development of freedom of testation have undeniable layers of patriarchy, deeply rooted in notions that women cannot own property as well as be commercially active, and thus cannot inherit property. As I will demonstrate below, these underlying social and economic considerations are not static and are inimical to the values of the Constitution.

Comparative analysis

[56] It is useful to consider the role of the principle of freedom of testation in other jurisdictions. In Canada, freedom of testation is a deeply entrenched common law principle. The Supreme Court of Canada has recognised the importance of testamentary autonomy,[94] maintaining that this right may only be limited in certain instances.[95] Most recently, in *Spence v BMO Trust Company*,[96] the Ontario Court of Appeal (ONCA) considered the exclusion by Mr Spence, a Jamaican man, of his daughter and grandson from his will. The testator stated in his will that the reason for the exclusion was that his daughter "has had no communication with him for several years and has shown no interest in him as her father".[97] However, extrinsic evidence indicated that the true reason for the exclusion was that his daughter had had a child with a white man, and her son was

[93] *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at fn 112 cites Zaal "Origins of gender discrimination in SA Law" in Liebenberg (ed) *The Constitution of South African from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Phillip, Cape Town 1995) at 34.

[94] *Tataryn v Tataryn Estate* [1994] 2 SCR 807.

[95] For example, in *Canada Trust Co. v Ontario Human Rights Commission* 1990 CanLII 486 (ONCA) (*Canada Trust*), the Ontario Court of Appeal found certain terms of an educational trust, which included racist and religious qualifications, to be discriminatory. However, at 25 the ONCA held that it is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.

[96] 2016 ONCA 196.

[97] Id at para 10.

accordingly of "mixed-race". While the Ontario Superior Court of Justice set aside the will in its entirety, based on contravention of public policy, the ONCA upheld an appeal. Of significance is that the ONCA held that judicial interference with Mr Spence's testamentary freedom was not warranted. The will was not facially discriminatory and therefore did not offend public policy. However, the ONCA stated that even a facially discriminatory will would have been valid as it reflects a testator's intentional and private disposition of his property, with which the Court was not entitled to interfere.[98]

[57] The applicants in *Spence* relied on the decision in *McCorkill* which confirmed that courts are authorised to examine the validity of a bequest on grounds of public policy.[99] However, the ONCA in *Spence* held that this decision to strike down an absolute (unconditional) bequest was exceptional.[100] It is worth noting that Ontario's Succession Law Reform Act, unlike that of other Canadian provinces, places a strong emphasis on will formality and adherence to the testator's intentions. Additionally, private individuals in Canada are not subject to the Charter of Rights and Freedoms. It is therefore difficult to challenge a will based on suspicion of discrimination in Ontario.[101]

[58] A curious position arises in the United States of America's federal legal system relating to testamentary freedom. Most states recognise that "the right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and it is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by

[98] Id at para 73.

[99] *McCorkill v McCorkill Estate,* 2014 NBQB 148, aff'd 2015 NBCA 50. The testator in *McCorkill* had bequeathed the residue of his state to a neo-Nazi organisation, and the court struck this down on the basis of public policy. Also, in *Fox v Fox Estate,* 1996 CanLII 779 (ONCA), a trustee's actions were prohibited because they represented bad faith, and not because they were discriminatory.

[100] Based on the illegal activities of the organisation that would have been funded by the residue of the testator's estate. The implementation of the testator's intentions would have facilitated the financing of hate crimes.

[101] Spiro "Could the Charter be Extended to Prohibit Discrimination in a Will?" *CanLII Connects* (2019). Available at https://canliiconnects.org/en/commentaries/67792.

statute".[102] The courts of Wisconsin, however, have "dissented sharply from this theory"[103] in several cases, deeming the right to make a will as a "sacred right" and one that is guaranteed by the Constitution".[104] These courts consider it "more sacred than the right to make a contract", and an "inherent power and not a statutory power".[105] However, in *Estate of Ogg*, the Wisconsin Supreme Court noted that this position goes against the majority opinion of the United States' legal authority, where the "right to make a will is in no sense a property right or a so-called natural right".[106]

[59] I now turn to consider civil law jurisdictions.[107] Germany provides for constitutionally protected rights of private ownership and private succession in terms of article 14.1 of the German *Grundgesetz* (Basic Law),[108] which states that "property and the right of inheritance are guaranteed. Their content and limitation shall be determined by the

[102] *Fullam v Brock*, 155 SE 2d 737, 739 (NC 1967).

[103] *Estate of Ogg v First National Bank of Madison*, 54 NW 2d 175 (Wis. 1952) at page 177.

[104] Id at 177-78 wherein *Estate of Ogg* cites the following cases: *Will of Rice* (1912), 150 Wis. 401, 136 NW 956, 137 NW 778; *Upham v. Plankinton* (1913), 152 Wis. 275, 140 NW 5; *Will of Ball* (1913), 153 Wis. 27, 141 NW 8; *Duncan v. Metcalf* (1913), 154 Wis. 39, 141 NW 1002; *Will of Schaefer* (1932), 207 Wis. 404, 241 NW 382.

[105] *Estate of Ogg* above n 103 at 177.

[106] Id.

[107] On 8 April 2020, this Court, as it has previously done, sent a request to the World Conference on Constitutional Justice (Venice Commission) to determine other jurisdictions' constitutional stance on the freedom of testation. In contrast to common law jurisdictions, civil law jurisdictions often explicitly enshrine freedom of testation under their constitutional property right provisions and consequently the right of succession, which is frequently framed as "the right to inherit is guaranteed" or similarly (where the right to inheritance is not expressed in the Constitution, it is enshrined under the jurisdiction's civil code). See also Article 48 of the Constitution of the Republic of Croatia, 22 December 1990; Article 11(1) of the Czech Charter of Fundamental Rights and Freedoms, 16 December 1992; Article 64 of the Constitution of the Republic of Poland, 2 April 1997; Article 60 of the Constitution of the Republic of Armenia, 5 July 1995; Article 29 of the Constitution of the Republic of Azerbaijan, 12 November 1995; Article 46 of the Constitution of the Republic of Moldova ; Article 20 of the Constitution of the Slovak Republic, 1 October 1992.

[108] Germany: Basic Law for the Federal Republic of Germany, 23 May 1949. According to the most recent decision of the German Federal Constitutional Court, that Court characterizes the freedom to make a will as a key element of the guarantee of the right to inheritance. This freedom includes "the right of the testator in [their] lifetime to order a transfer of [their] assets after [their] death … to one or several legal successors, in particular to exclude a statutory heir from participation in the estate and to restrict his or her inheritance to the [monetary] value of the statutory compulsory portion (see BVerfGE 58, 377 (398)). The testator is thereby afforded the possibility to arrange the terms of the succession [themselves] by last will largely in accordance with [their] personal wishes and idea s. In particular, *the testator is constitutionally not forced to treat his or her descendants equally*. See BVerfG, Order of the First Senate of 19 April 2005, 1 BvR 1644/00, para. 63. And BVerfGE 67, 329 (345) - Official Digest (Entscheidungen des Bundesverfassungsgerichts – BVerfGE) 112, 332 (348), ECLI:DE:BVerfG:2005:rs20050419.1bvr164400, available in English on that Court's website at http://www.bverfg.de/e/rs20050419_1bvr164400en.html.

laws".[109] As a result, the *Privaterbrecht* (law of private succession) is expressly enshrined and the state is thus restricted, to an extent, from interfering.[110] The nexus between private ownership and freedom of testation has been recognised by the German Constitutional Court.[111] In doing so, the Court considered freedom of testation as an element of the transferability of ownership. German law thus provides a guarantee of freedom of testation by the express provision for private ownership and private succession.[112] However, the Basic Law in Germany does not have horizontal application and so the equality clause cannot directly restrict freedom of testation.[113] Regardless, "the Legislature must ensure the fundamental content of the constitutional guarantee contained in article 14.1 of the Basic Law, keep in line with all other constitutional provisions, and must, in particular, adhere to the principles of proportionality and equality".[114]

[60] In addition, the role of good morals operates in German law.[115] A testamentary provision would be, objectively, *Sittenwidrig* (contrary to good morals) "if it offends the legal convictions of all reasonable and right-minded people"[116] which is determined by the

[109] Translation by Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?" above n 32. The original stipulates "Das Eigentum und das Erbrecht warden gewährleistet. Inhalt und Schranken warden durch die Gesetze bestimmt".

[110] De Waal "*Bill of Rights Compendium: The Law of Succession and the Bill of Rights*" (Butterworths, Durban 2012) at 3G-4.

[111] Id at 3G-8 citing BverfGE 67, 329 (341). See also BVerfGE 26, 215 (222); BVerfGE 50, 290 (340).

[112] Id at 35-5 citing *Erbrecht* 24. Leipold contends:

> "freedom of testation plays an important part with regard to [the] power of disposition and functions as an essential element of private ownership. The relationship between freedom of testation and private ownership is established by the guarantee of private ownership in article 14(1) of the Basic Law."

[113] De Waal above n 110 at 3G-8.

[114] BVerfG, Order of the First Senate of 19 April 2005 – 1 BvR 1644/00 at para 62.

[115] Dutch law does not recognize a constitutional guarantee of private ownership and private succession, however the concept of *goede zeden* (good morals) plays a role. Although little judicial exploration has been conducted into the impact of rights such as equality, freedom of association and religious beliefs and their impact on freedom of testation. Du Toit above n 32.

[116] Paragraph 138 (1) of the Civil Code.

"opinion of the decent average person".[117] Consequently, any testamentary provision that conflicts with good morals is void.

[61] Similarly, the Dutch Civil Code, in terms of article 4:44, determines that a "testamentary bequest is void if the decisive motive for making the will or bequest is contrary to the public order or good morals, provided such motive is evident from the will itself".[118] More specifically, a condition or testamentary obligation imposed by a will that is contrary to, amongst others, the public order or good morals, is deemed not to have been written.[119] It is noteworthy that testamentary dispositions that conflict with article 4:44 are fairly rare in modern Dutch wills.[120] This is likely attributable to article 21(2) of the Dutch Notaries Act which obliges a notary to refuse to provide their services when, according to reasonable conviction, the service would contravene the law or public order or would amount to the assistance of an act that will have an unlawful purpose or consequence.[121] Notaries will therefore caution testators against including potentially discriminatory provisions in wills.[122] There are, however, established Dutch authorities confirming that prescriptive (conditional) testamentary provisions can constitute an infringement on the fundamental rights of a beneficiary.[123]

[62] Based on this analysis, while some jurisdictions, whether common law or civil, tend to defer to freedom of testation, it is clear that testamentary freedom is never completely

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[117] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" above n 32 at 105.

[118] Id at 105.

[119] Id at 106.

[120] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" above n 32 at 105.

[121] Id at 108.

[122] Id at 108. Civil Law notaries cannot represent any person in the Netherlands, but rather act for the public good. Notaries will therefore caution testators against including potentially discriminatory provisions in wills.

[123] *HR* 21 June 1929 *NJ* 1325 1327-1328. For example, the *Hoge Raad* in the case of Elisabeth invalidated a testamentary forfeiture clause which obliged a beneficiary to baptise her children in a particular denomination, based on a violation of good morals.

unfettered. A noticeable trend is that the public policy yardstick is exercised to different extents and in various contexts to limit deference to testamentary freedom.

Public policy and private wills under the constitutional dispensation

[63] I turn now to consider whether the common law position which prioritises freedom of testation in the context of private wills ought to be extended as set out in *K*, and in line with the spirit, purport and objects of the Bill of Rights, so that courts may test private out-and-out disinheritance provisions against the public policy standard and weigh the principle of freedom of testation against other constitutional considerations.

Constitutional protection of freedom of testation

[64] While not expressly enshrined in the Constitution, freedom of testation garners constitutional protection from a concatenation of rights in the Bill of Rights including the right to property, dignity and privacy.

[65] This Court has accepted that freedom of testation "is fundamental to testate succession".[124] It has been said that freedom of testation implicitly forms part of section 25(1) of the Constitution in that it protects a person's right to dispose of her assets, upon death, as she wishes.[125] In *Syfrets*, it was accepted, albeit obiter, that while no express mention is made of freedom of testation in the Constitution "it forms an integral part of a person's right to property, and must therefore be taken to be protected in terms of section 25".[126] This was revisited in *BOE Trust* in which the Supreme Court of Appeal stated that this view is "well held". It went on to state that were the inverse held to be true, it would entitle the state to effectively "infringe a person's property rights after he or she

[124] *Moosa N.O. v Minister of Justice* [2018] ZACC 19; 2018 (5) SA 13 (CC); 2018 (10) BCLR 1280 (CC) at para 18.

[125] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[126] *Syfrets* above n 29 at para 18.

has passed away, unbounded by the strictures which obtain while that person is still alive".[127] That Court endorsed Du Toit's account of the centrality of freedom of testation and its connection with the right to property.[128]

[66] However, in *Syfrets*, that Court was circumspect on whether testamentary wishes that are contrary to public policy curtail section 25(1). Firstly, deprivation of property engages a considerably high threshold as it constitutes a "substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment".[129] Secondly, "for deprivation to be arbitrary, it must be procedurally unfair or must take place without sufficient reason . . . there can be no question of procedural unfairness . . . given that any order would be granted only after a full hearing by a court".[130] That Court went on to state that "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".[131] In other words, limiting freedom of testation, due to contravention of public policy, is by no means an arbitrary deprivation – it is for good cause. I endorse this view that the unenforceability of testamentary bequests that are contrary to public policy for being impermissibly discriminatory does not constitute an *arbitrary* deprivation for the purposes of section 25(1).

[127] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[128] Id. The Supreme Court Appeal endorsed the view that "freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property."

[129] *Syfrets* above n 29 at para 20.

[130] Id at para 21.

[131] Id at para 22.

[67] The principle of freedom of testation has been held to warrant constitutional refuge through the right to privacy[132] coupled with the right to dignity.[133] In *BOE Trust*, the Supreme Court of Appeal espoused:

> "Not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."[134]

[68] Autonomy and moral agency underscore the importance that freedom of testation affords to the right to privacy.[135] Also, this Court has recognised that the right to privacy and dignity are closely related as "the right to privacy, through the constitutional order, serves to foster human dignity".[136]

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[132] Section 14 of the Constitution reads:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[133] Section 10 of the Constitution reads: "everyone has inherent dignity and the right to have their dignity respected and protected".

Our courts have indicated that freedom of testation can be shielded by these rights in *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 27 and *Syfrets* above n 29 at para 41.

[134] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 27.

[135] De Vos et al *South African Constitutional Law in Context* (Oxford University Press, Cape Town 2015) at 463 note that privacy and dignity are closely related and note further that "where a person's privacy is breached, that person will often not be treated with concern and respect". Steyn "Limiting Freedom of Testation: Evaluating 'Discriminatory' Stipulations in Testamentary Charitable Trusts" (LLM, NWU 2018) at 19.

[136] *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 44 and in *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27 this Court stated—

> "there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."

[69] Therefore, the principle of freedom of testation is at the heart of testate succession and cloaked in constitutional protection by virtue of the rights to property, dignity, and privacy. Freedom of testation thus informs public policy and carries significant weight in any analysis of what public policy, as infused with our constitutional values, dictates.

[70] However, one cannot ignore that there are competing values at play. Our Constitution also envisages and promises a democratic State based on "human dignity, the achievement of equality . . . non-racialism and non-sexism . . . and the supremacy of the Constitution".[137] Furthermore, it protects all persons from direct or indirect unfair discrimination, both in the public and private sphere. It is therefore evident that the common law position – where out-and-out disinheritance clauses in private wills have seemingly been out of reach of the courts' powers to declare them unenforceable on public policy grounds – cannot be maintained. This is because, in a constitutional dispensation based on the supremacy of the Constitution, we are enjoined to recognise both freedom of testation as well as recognise the principle of non-discrimination even in the private sphere. We, therefore, have no choice but to navigate the point at which they interact.

Retrospectivity

[71] Before addressing the question whether public policy, infused with our constitutional values, would find the impugned clause 7 unenforceable, it is critical to dispose of an issue raised by the respondents concerning retrospectivity. The respondents submit that the Constitution cannot reach backwards so as to invalidate actions taken under then valid laws, even if those laws are contrary to fundamental rights. The practical implication of this view is that a litigant can only seek constitutional relief for a violation of human rights by conduct that occurred after the commencement of the Constitution.

[137] Section 1(a)-(c) of the Constitution.

[72] I disagree. Public policy is considered in light of the *boni mores* (good values) of today, as infused with our constitutional values and "it is axiomatic that the public policy of 1902 does not necessarily correspond in all respects with the public policy of today".[138] Since this matter focuses, via the common law, on the question of public policy, this elusive concept[139] is by its very nature ever-evolving – so too the common law is ever-evolving. These types of enquiries involve, by virtue of the doctrine of precedent, a backwards and forwards process of adjudication.[140]

[73] Before the advent of the Constitution, courts in this country had the power to develop the common law through their jurisprudence in light of public policy and adjust it to the ever-changing needs of society.[141] It has been said that "determining the content of public policy was once fraught with difficulties".[142] Now, however, we have instructive guidance since public policy is deeply rooted in our Constitution and its ingrained values.[143] Therefore, applying the public policy of today does not raise the question of the

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[138] *Syfrets* above n 29 at paras 25-6 and noted at para 23 "the position in this regard is analogous to the principle in the law of contract regarding contractual provisions which are contrary to public policy and it would appear that identical considerations apply to both fields".

[139] Along with *boni mores*, legal convictions of the community, norms of conduct required by the society and the general standard of reasonableness.

[140] Davis "How Many Positive Legal Philosophers Can Be Made To Dance on the Head of a Pin? A Reply to Professor Fagan" (2012) 129 *SALJ* 59 at 70 said:

> "In order to determine the ambit of the rule, we move backwards to divine the meaning of the past. In this way judges decide a case by considering a past rule, the application of which holds implications for the future. The court may deviate from the past in order to develop the rule for present or future application. In evaluating past decisions as a means by which to confront the future, courts are guided by some normative idea which informs the legal system, past, present and future."

[141] Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" (1987) 104 *SALJ* 52 at 59 and 67 said that:

> "When the court is confronted with a legal problem in the common-law for which there is no precedent or authority and whether the judge has thus to step into the unknown; or when the court is asked to depart from the common law precedent and strike out in a new direction."

[142] *Barkhuizen* above n 22 at para 28.

[143] Id and above n 11. *Syfrets* above n 29 at para 24 states that "since the advent of the constitutional era, however, public policy is now rooted in the Constitution and the fundamental values it enshrines, thus establishing a normative value system".

retrospective application of the Constitution. Rather, it is consistent with the role of courts to develop the common law to bring it in line with the Constitution.

[74] In any event, we are dealing with the enforcement of the testamentary provisions, which occurred in 2015 on the death of Mr Kalvyn de Jager, and not the drafting of the provisions which dates back to the early 1900's. It is perspicuous that public policy is determined or measured as it is at the time that the will, or any provision therein, is enforced, not the point at which it is executed. Thus, the issue of retrospectivity that the respondents are concerned with, must fall to be dismissed as devoid of merit.

[75] Our Constitution affords our society the opportunity and duty to jettison overt and covert patriarchal practices that still remain prevalent. Given our past and present, coupled with our entrenched constitutional values, the common law must be developed to give effect to the spirit, purport and objects of the Bill of Rights. In other words, it must establish a "constitutionally-founded *boni mores* criterion"[144] to tackle out- and-out disinheritance clauses of this nature where they appear in the private sphere. I expand below on discriminatory testamentary bequests on the grounds of gender and sex and whether the clause before us, and those similar to it, ought to be declared unenforceable based on public policy.

Is clause 7 contrary to public policy?

[76] It is common cause that the impugned clause is unfairly discriminatory.[145] The respondents acknowledge that there may be testamentary provisions in the private sphere that are so fundamentally against public policy as to be "abhorrent" and should, therefore, not be enforceable by courts. They submit that discrimination on the basis of gender and

[144] Du Toit "The Constitutionally Bound Dead Hand – The Impact of Constitutional Rights and Principles on Freedom of Testation" (2001) 12 *Stellenbosch Law Review* 222 at 227.

[145] The respondents conceded this point in oral argument before this Court.

sex, without more, is not abhorrent. I disagree. The respondents fail to account for the significance of our entrenched constitutional values, and specifically, the rights to equality and non-sexism.

[77] Equality as an entrenched right and founding value is perspicuously the lodestar of our transformative constitutional project. This Court has said:

> "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."[146]

[78] Similarly, in *Fraser*,[147] this Court stated that "there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised".[148] Equality as a founding value underpins our constitutional democracy and informs public policy.

[79] The historical analysis above illustrates that the facially neutral principle of freedom of testation as it currently stands reinforces patriarchal and outdated ideas concerning sex, gender, property, ownership, family structures and norms. Our courts are aware of the impact of discriminatory testamentary bequests on women. *In re Heydenrych Testamentary Trust*,[149] in the context of a public charitable trust, the applicants submitted that direct discrimination on the basis of sex and gender should be treated "more

[146] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 22 *(Van Heerden).*

[147] *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[148] Id at para 20.

[149] *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC).

circumspectly" than direct discrimination on the basis of race.[150] The amicus curiae[151] took issue with the discriminatory provisions on the ground of gender.[152] The Court found that the impugned conditions in that trust constituted unfair discrimination on grounds of gender and race.[153]

[80] Furthermore, in *Bhe*, Ngcobo J correctly anchored our obligations to counter discrimination against women as stemming from core-binding international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[154] coupled with the African (Banjul) Charter on Human and Peoples' Rights.[155]

[81] In order to answer the question whether the unfairly discriminatory clause in issue is unenforceable, this Court has to consider whether it is inimical to public policy, as imbued with the Constitution's values and rights. As noted above, the principle of freedom of testation gives effect to constitutional rights and these must be borne in mind in determining public policy in this context. At the same time, discriminatory clauses infringe upon the founding value of equality and the right to non-discrimination. Determining public policy in this context requires due consideration of all the relevant rights and values.

[82] It cannot be gainsaid that private testamentary bequests (when juxtaposed to public trusts) relate to our most intimate personal relationships and can very well be based on irrational and erratic decisions which are located in the domain of the "most intimate core of privacy". It is, therefore, apposite for the right to privacy to play an active role in

[150] Id at para 2.

[151] Women's Legal Centre intervened.

[152] *In re Heydenrych Testamentary Trust* above n 149 at para 3.

[153] Id at para 20.

[154] *Bhe* above n 93 at para 51.

[155] Articles 1, 2 and 5(a). South Africa signed the Convention on 29 January 1993 and ratified it on 14 January 1996.

determining whether judicial interference can enter the perimeter of private testamentary bequests. This, in turn, buttresses the point that when courts intervene in private testamentary bequests of this nature there ought to be a lower level of judicial scrutiny.

[83] Bequests that entail fideicommissa are already regulated by the law.[156] Fideicommissa tend to run over a long period and impact successive generations and they often concern beneficiaries unknown to the testator. This influences our decision to allow a court to reach a finding that unfair discriminatory clauses in fideicommissa are contrary to public policy and that it may be justified for a court to declare such provisions unenforceable. Private testamentary bequests are in the truly personal realm. However, some of these bequests discriminate against a testator's unknown lineal descendants, with whom the testator never had personal relationships or interactions, solely based on immutable characteristics. In those instances, there is a shift along the continuum, which warrants a greater level of judicial intervention.

[84] With the above in mind, the immutable characteristic at issue here is womanhood; the testators excluded future lineal female descendants unknown to them simply because they are women. As the applicants submit, "in this instance, a testator is not excluding a particular individual or individuals because their idiosyncrasies are disfavoured by the testator. Here the testator excludes future beneficiaries unknown to him simply because they are women, and includes future unknown beneficiaries simply because they are men". There is no relevant armchair or extrinsic evidence to show the contrary. It is the "unknown lineal descendants" element of this bequest, along with other elements discussed above, that weighs in the direction of favouring the right to non-discrimination over absolute freedom of testation in cases like these. It can never accord with public policy for a testator, even in the private sphere, to discriminate against lineal descendants unknown to her or him purely on the ground of gender. No privacy or property right considerations can ever

[156] In terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

trump that; that is simply the sort of discrimination that our present-day public policy cannot countenance. Any sense that this view is violative of dignity or property interests is not worthy of being countenanced by our constitutional order. This being presumptively unfair discrimination,[157] today's public policy simply cannot admit of the constitutional protection of discrimination of that nature.

[85] All this leads me to the conclusion that unfair discrimination against women in the context of private out-and-out disinheritance clauses against unknown lineal descendants is abhorrent and inimical to our constitutional rights and values. This manner of unfair discrimination is contrary to our constitutionally infused conception of public policy. It has gone on long enough and must be stopped.

Remedy

[86] What remains is the question of remedy, and in particular whether this Court should vary or rectify clause 7. In doing so, it must be borne in mind that courts should be circumspect that amending or varying the terms of testamentary provisions is a last resort in view of the importance of freedom of testation to our constitutional dispensation. On these facts, however, it is not appropriate to vary the provision, since it is the final substitution of the fideicommissum,[158] and in any event, a variation would not be fair in light of the prior generations of women who have already been left out.

[87] A just and equitable remedy will be one where a declaration is made that clause 7 is unenforceable from the date of this judgment coupled with a declaration that, for the

[157] In terms of section 9(5), read with section 9(3) of the Constitution, discrimination on the ground of gender is presumed to be unfair.

[158] According to the Immovable Property (Removal or Modifications of Restrictions) Act, a testator cannot prevent the alienation of land by means of a long-term *fideicommissa*. Sections 6, 7 and 8 of the Act provide that long-term provisions are restricted to two *fideicommissaries*.

purposes of the final substitution, the second to sixth applicants are beneficiaries of equal shares of the fideicommissary property.

Conclusion

[88] It follows that the appeal must be upheld. Clause 7 of the will of the late Mr Carel Johannes Cornelius de Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is unconstitutional, invalid and must be declared unenforceable. Had I commanded the majority reasoning, I would have issued a declaratory order that clause 7 is contrary to public policy. To ensure that the applicants are afforded effective relief, I would have also made a declaratory order that the second to sixth applicants are beneficiaries of equal shares of the fideicommissary property.

JAFTA J (Mogoeng CJ, Majiedt J, Mathopo AJ and Victor AJ concurring):

Introduction

[89] I have had the benefit of reading the judgment of my colleague Mhlantla J (first judgment). I agree that the appeal must be upheld and that the impugned clause of the will should be declared unenforceable. I also think that relief should be granted in favour of the applicants. But my reasons differ materially from those furnished by my colleague.

[90] I do not think that the public policy relevant to this matter must be determined by preferring the value of equality over those of freedom and dignity. Nor do I think that it is necessary to develop the common law. As the common law presently stands, unlawful wills and those that are contrary to public policy are not enforceable.[159]

[159] *Harvey* above n 20 at para 65.

[91] Moreover, as the first judgment illustrates, our courts accept that freedom of testation constitutes a right protected by section 25(1) of the Constitution.[160] This compounds the complex issue of determining whether freedom of testation is contrary to public policy. This is because our public policy rests on the values underlying the Constitution. At the very least it appears that there is a clash of some of those values here. The value of equality, on the one hand, collides with the values of freedom and dignity, on the other.

[92] The first judgment seeks to resolve this difficulty by making reference to the origins of freedom of testation. It concludes that freedom of testation is a neutral principle "steeped in patriarchal and outdated ideals concerning sex, gender, property ownership, family structures and norms".[161] Building on an academic article that concludes that freedom of testation perpetuates discrimination against women who were historically excluded from ownership of property, the first judgment holds that unfair discrimination against women in the context of inheritance is "abhorrent and inimical to our constitutional rights and values".[162]

[93] As I see it, this conclusion conflates the conduct of unfair discrimination with freedom of testation. While unfair discrimination is plainly not in line with the value of equality, it does not constitute freedom of testation. The first judgment acknowledges that freedom of testation is "a neutral principle" and as such, it may not be equated to unfair discrimination which is a consequential act of a particular clause in a will. Freedom of testation should not be confused with the terms of a particular will, nor should it be taken as a licence to unfairly discriminate.

[160] *Syfrets* above n 29; *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[161] First judgment at [79].

[162] Id at [85].

[94] Freedom of testation entails a testator's right to dispose of her estate as she pleases in a will, provided that the disposition is lawful and is not contrary to public policy.[163] Subject to these restrictions she is free to do as she wishes with her property and her wishes must be respected, after her departure from this world. These limitations render freedom of testation flexible. In its current form the principle does not justify testamentary provisions which are illegal or contrary to public policy.

[95] Proceeding from the premise that freedom of testation is a neutral principle, it is difficult to appreciate how at the same time it can be said it has deficiencies of the nature that warrants its development as contemplated in section 39(2) of the Constitution. This Court has emphasised under this section that the common law development is triggered when that law deviates from the spirit, purport and objects of the Bill of Rights.[164]

[96] Since freedom of testation in its present form acknowledges that a will that is contrary to public policy is unenforceable, there is no need to develop it to achieve what is already obtainable. I can think of no deviation of freedom of testation from the objects of the Bill of Rights which warrants development in this matter. With regard to the claim based on public policy, the applicants are entitled to assert that clause 7 is unenforceable for being contrary to the value of equality and for that reason, the clause is contrary to public policy. They do not need the development of the common law in order to succeed in their claim. Nor can the respondents resist the claim on the ground that freedom of testation permits the breach of the equality value.

[163] *Harvey* above n 20 at para 56.

[164] *Carmichele* above n 75 at paras 33-5.

Issue

[97] As I see it, the question that arises for consideration is whether the clause that gives rise to unfair discrimination in the present will may be enforced in light of section 9 of the Constitution. The issue arises here because parties on both sides agree that the impugned clause unfairly discriminates against women. Proceeding from this common cause fact, the applicants ask that, by order of the court, the will be amended by deleting certain words and replacing them with words which are not discriminatory against women.

[98] But before I address the question, I need to clarify one matter. This is the conflation of the public policy claim with the equality claim in the judgment of the High Court and to some extent in the first judgment. These are discrete claims with distinct elements. For example, in an equality claim the complaint is that the right to equality is violated, and not the value of equality. Whereas in a public policy claim the complaint is that certain conduct is contrary to the value of equality. With regard to the latter, the justification analysis under section 36 of the Constitution is inapposite because that section applies to a limitation of rights and not to what is inconsistent with values. Departing from this erroneous premise, the High Court mistakenly defined the issue before it as being whether "the impugned provision of clause 7 of the will, can be justified under the limitation clause in section 36 of the Constitution".[165]

[99] This was plainly in error. Section 36 expressly prescribes that rights in the Bill of Rights may be limited only in terms of law of general application. Clause 7 of the will we are concerned with is not a law, let alone a law of general application. This simply means that clause 7 cannot constitute a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. But this was not the only error committed by the High Court. In the section 36 justification analysis undertaken

[165] High Court judgment above n 5 at para 71.

by that Court, it appears that the Court understood the limitation it was dealing with to have been a limitation of the right to freedom of testation.

[100] The High Court stated:

> "In applying the limitation test it is significant that two of the three values mentioned in section 36, human dignity and freedom, are engaged when exercising one's right to freedom of testation. The right to equality or to equal treatment, although fundamental, is a broadly stated right and must, in appropriate instances, give way to competing rights.
>
> As far as the importance of the limitation is concerned, no material has been placed before the court to indicate whether similar discriminatory provisions in private wills are a commonplace problem which justifies such a potentially far-reaching limitation. The envisaged limitation, namely, that one cannot dispose of one's property without first complying with an equality equation, would make a significant inroad upon the right to freedom of testation and may well produce unintended consequences, including those referred to above.
>
> . . .
>
> Whilst the relationship between the limitation of the right to freedom of testation in the present matter and its purpose is clear, it is difficult to conceive of a less restrictive means to achieve the purpose."[166]

[101] Relying on the minority judgment in *De Lange*,[167] the High Court held that because the discrimination occurred in "the private and limited sphere of testators and their direct descendants", the discrimination "effected by clause 7 of the will is reasonable and justifiable, particularly given the importance accorded to the right to freedom of testation."[168]

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[166] Id at paras 73 and 76.

[167] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC).

[168] High Court judgment above n 5 at paras 75 and 80.

[102] It may well be that the High Court was inaccurate in the articulation of its reasons. What in effect it wanted to say was that the limitation on the applicants' equality right was brought about by the principle of freedom of testation and that clause 7 was authorised by that principle. If this was what the High Court intended to say, the question is whether the requirements of section 36 of the Constitution are satisfied.

[103] But the High Court defined the core issue that confronted it in these terms:

> "[T]he question must be whether public policy has advanced to the extent that courts should be empowered to act as the final arbiter of whether a testator may discriminate, even unfairly so, in his or her private will."[169]

[104] This definition of the real issue as seen by the High Court was influenced by the minority reasoning in *De Lange* which the High Court understood to be saying courts should not interfere in "people's private lives and personal preferences".[170] It was in this context that the High Court concluded that, even if it were to be assumed in favour of the applicants that they had a right to be treated equally with the testator's male descendants, the unfair discrimination that they were subjected to by clause 7 of the will was reasonable and justifiable.[171]

[105] It is unfortunate that, despite all these missteps in the High Court's judgment, the Supreme Court of Appeal merely issued an order dismissing the appeal to it without reasons.[172] This unusual approach in disposing of an appeal meant that the Supreme Court of Appeal endorsed the reasons of the High Court. Courts are under a duty to give reasons

[169] Id at para 78.

[170] Id at para 75; *De Lange* above n 167 at para 79.

[171] Id at para 80.

[172] The order was issued by Cachalia JA (with Tshiqi JA, Saldulker JA, Mokgohloa AJA, and Mothle AJA concurring).

for their decisions and here the Supreme Court of Appeal has failed to discharge that obligation.

[106] In *Mphahlele* this Court affirmed this principle and stated:

> "There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."[173]

[107] Courts of appeal may not furnish reasons only where they decide an application for leave to appeal. Here leave to appeal to the Supreme Court of Appeal was granted by the High Court. This illustrates that the High Court was persuaded that another court might come to a different conclusion. In these circumstances, the Supreme Court of Appeal was not excused from giving reasons for its order.

[108] It is now convenient to consider the claims presented to the High Court by the applicants.

[173] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

[109] The first claim was brought by the first applicant, Mr James King, in his capacity as the executor in the deceased's estate. Mr King is an attorney by profession. The will under which he was appointed executor was that of the late Mr Kalvyn de Jager who died in 2015. In his lifetime, the deceased had inherited and became co-owner of half of the undivided shares in the farms Nieuwdrift Nr 88, Doornkuil and Buffelsdrift Nr 260, all of which are located in the district of Oudtshoorn. But the deceased's co-ownership was subject to the fideicommissum in clause 7 of the will of the deceased's grandparents.

[110] These farms had been inherited by the deceased's father as a fiduciary heir. And upon the death of the deceased's father in 1957, these properties were inherited by the deceased and his two brothers in equal shares, as fiduciary heirs. When one of the deceased's brothers died with no children, his share in the properties devolved in equal shares between the deceased and his other surviving brother. This meant that the deceased and his surviving brother, Mr John de Jager, held equal half shares in the farms in question. The title deed reflected this and stipulated that each share was subject to clause 7 of the grandparents' will.

[111] Clause 7 of that will reads:

> "With respect to the bequest of grounds/land to their sons and daughters, as referred to under Clauses 1, 2, 3, and 4 of this, their Testament, it is the will and desire of the appearers that such grounds/land will devolve, following the death of their children, to said children's sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other Fidei Commissaire heirs from the lineage of the sons of the appearers by representation, in continuity, and in the case of the death of a daughter or a daughter's son without leaving a male descendant, her or his share will fall away in the same way and on the same conditions, and go to the other daughters or their sons, by representation, or the deceased's son's brothers or their sons per stirpes, respectively. And

> they stipulate furthermore that none of their heirs down to the third generation will renounce, by leasing, donating, selling, or in any other way whatsoever, his (or in the first generation, her) life right or any interest therein/on and should any heir who is subject to the Fidei Commissum, attempt such renunciation, or should such life right or any interest therein be arrested or be seized under the order/sentence of a court or as a result of insolvency of the person to whom the above belongs, then his right will, with immediate effect take an end and will be accepted by the hereinafter appointed administrators, who will, as they deem fit and at their discretion, from time to time, pay out the fruits thereof to such person, or invest said capital until his death when the said amount will devolve, together with the grounds/land, to the nearest and next heir in line."

[112] In terms of this clause, the fideicommissary property was supposed to pass from the deceased and his brother to their respective sons only. Indeed, when Mr John de Jager died in 2005, his half share was inherited by his three sons[174] who are the first to third respondents in these proceedings. They were cited as such in the High Court.

[113] The deceased had 5 children at the time of his death in 2015. They are Ms Trudene Forward; Ms Annelie Jordaan; Ms Elna Slabber; Ms Kalene Roux; and Ms Surina Serfontein. All of them are females. And in terms of clause 7 of the grandparents' will, the fideicommissary property that was held by their father could not devolve upon them for the sole reason that they were not sons. Yet in terms of the deceased's will, his five daughters inherited equally from his estate, including the fideicommissary property.

[114] The executor was then confronted by competing claims from the deceased's daughters, on the one hand, and the sons of the deceased's brother, on the other. The claim by the deceased's daughters was based on his will. While the claim by the sons of his brother was based on clause 7 of the grandparents' will which stipulated that on the deceased's death his share shall fall away and devolve upon the sons of the deceased's

[174] These sons were Mr Cornelius Albertus de Jager, Mr Johannes Frederick de Jager, and Mr Arnoldus Johannes de Jager.

brother, just like the share of the deceased's brother who died childless devolved on the deceased and his surviving brother. This was because the deceased had no sons.

[115] As the executor of the deceased's estate, the first applicant was advised to seek guidance from the High Court on who are the rightful heirs of the fideicommissary property. He instituted an application for a declaratory order. But he expressed a view that clause 7 unfairly discriminated against female descendants of the grandparents and therefore could not be enforced on the ground that it was contrary to public policy.

[116] The deceased's daughters joined the proceedings as second to sixth applicants. They did so both in their capacities as claimants and co-executors under the deceased's will. They cited the sons of the deceased's brother as the first to third respondents, the latter parties had laid claim to the fideicommissary property in terms of clause 7. The fourth to eighth respondents are sons of the deceased's daughters, the second to sixth applicants. The latter group had claimed that, as grandsons of the deceased, they were entitled to inherit his share, if their mothers' claims were not successful. They too sought to base their claim on clause 7.

[117] Each group of these claimants sought a decision in their favour from the High Court. The case pleaded by the deceased's daughters was two-fold. First, they supported the contention by the first applicant, the executor, that clause 7 was against public policy. Second, they contended that the clause violated their right to equality which is guaranteed by section 9 of the Constitution. Consequently, they asked the Court to invalidate the discriminatory terms of clause 7 and replace them with terms that cover both male and female descendants of the testators.

[118] For their part, the sons of the deceased's brother asserted that on a proper interpretation of clause 7, the fideicommissary property must devolve on them. They argued that in the past the clause was given the interpretation they were advancing. This

interpretation benefited the deceased and their father on the occasion of the death of an uncle who had no children. They argued that the testators' intention was manifestly that the fideicommissary property would remain in the De Jager family for three generations, devolving upon grandsons and great-grandsons. And where a fiduciary heir has left no son, their share would devolve upon his surviving brothers or their sons if a brother has died before that fiduciary heir. This, they argued, was the wish of the testators and it must be respected.

[119] Having considered a number of decisions on the relevant topics, the High Court concluded that clause 7 was not contrary to public policy. That Court also rejected the equality claim on the ground that the unfair discrimination imposed by clause 7 was reasonable and justifiable under section 36 of the Constitution. It will be recalled that the High Court took the view that the unfair discrimination complained of occurred "in the private and limited sphere of testators and their direct descendants", and thus it affected a limited number of persons for a limited duration.

[120] The High Court proceeded to consider the alternative claim by the sons of the deceased's daughters and concluded that they have failed to make out a proper case for the relief sought. Consequently, the application was dismissed with no order as to costs.

[121] For reasons which are not apparent from the judgment, the High Court failed to determine and declare who of the three groups was entitled to receive the fideicommissary property, as requested by the executor of the deceased's estate. That issue remains unresolved and the Supreme Court of Appeal did not consider it necessary to determine the issue, even though guidance was required by the executor.

[122] At the heart of the process of determining who is entitled to the fideicommissary property is clause 7 of the will. The answer to this question depends on whether the discriminatory part of the clause is presently enforceable.

Is clause 7 enforceable?

[123] The testator's testamentary freedom finds expression in her ability to dispose of her property in whatever manner she considers necessary. It is the freedom of testation right that entitles a testator to put in place whatever conditions she likes upon the disposal of her property by means of a will. And her wishes must be respected and enforced subject to one fundamental condition. That is whatever method she may choose, in the exercise of freedom of testation, must not be unlawful or contrary to public policy.

[124] Therefore, it cannot be gainsaid that freedom of testation, as a right, is protected in our law. It is protected not only because it forms part of our common law, but also because it advances the values of freedom and dignity which are the foundation of the Constitution, our supreme law.[175] The importance of freedom of testation to our law of succession was affirmed by this Court in *Moosa N.O.*[176]

[125] But freedom of testation, important as it is, is not a licence for testators to act unlawfully. This means that a testator may not dispose of her property in a will or trust deed by unlawful methods. Nor can she impose unlawful conditions. If she does any of these things, she renders the will unenforceable to the extent of the unlawfulness. This is because a testator cannot, after departing from this world, do what she could not achieve in her lifetime. The right of ownership, of which freedom of testation forms part, entitles the owner to do as she pleases with her property, as long as what she chooses to do is permissible under the law.

[126] In *Harvey*, the Supreme Court of Appeal captured this principle in these words:

[175] *Syfrets* above n 29 and *BOE Trust* Supreme Court of Appeal judgment above n 60.

[176] *Moosa* above n 124 at para 18.

> "The right of ownership permits an owner to do with her thing as she pleases, *provided that it is permitted by the law*. The right to dispose of the thing is central to the concept of ownership and is a deeply entrenched principle of our common law. Disposing of one's property by means of executing a will or trust deed are manifestations of the right of ownership. The same holds true under the Constitution."[177]

[127] Even before the Constitution came into force, unlawful terms of a will or trust deed were unenforceable on the ground that it was contrary to public policy for a court to enforce unlawful acts.[178] This was a principle of the common law which remains good law even today. But now the principle is reinforced by the Constitution which declares that any law or conduct which is inconsistent with it, is invalid.[179] The supremacy clause of the Constitution together with section 172(1) impose a duty on courts to uphold the Constitution.[180]

[128] This obligation entails that a court may not enforce a will or trust deed which is inconsistent with the Constitution. Instead, such will or trust deed must be declared invalid to the extent of its inconsistency with the Constitution. This means that if clause 7 of the will we are dealing with here is inconsistent with the Constitution, it cannot be enforced and it must be declared invalid.

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[177] *Harvey* above n 20 at para 56.

[178] *Cool Ideas v 1186 CC Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

[179] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[180] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Inconsistency

[129] It is not in dispute that clause 7 limited inheritance of the fideicommissary property to male descendants, to the exclusion of female descendants of the testators. What this illustrates is that, beyond the first generation of the descendants of the original testators, the late Mrs Catherine Dorothea de Jager and the late Mr Carel Johannes Cornelius de Jager, the clause denied female descendants the benefit of inheriting the property. This denial on its own does not lead to an inconsistency with the Constitution, because it may constitute legitimate differentiation when account is taken of the testator's freedom of testation and the fact that no descendants had a right to inherit any of the fideicommissary property.

[130] Even if the denial amounted to discrimination, it would still not be inconsistent with the Constitution. This is because the Constitution does not prohibit fair discrimination. The inconsistency would arise if the discrimination is unfair to the second to sixth applicants. And this enquiry may be determined with reference to the specific facts of this case. Since the discrimination was based on gender, one of the grounds listed in section 9(3),[181] the applicants were assisted by the presumption in section 9(5)[182] in establishing that clause 7 creates unfair discrimination.

[131] This presumption shifted the burden to the first to third respondents to show that the discrimination in question was fair. These respondents have failed to do this. In fact, they admitted that clause 7 had caused unfair discrimination. This admission is crucial to the

[181] Section 9(3) of the Constitution provides:

> "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."

[182] Section 9(5) provides:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

adjudication of this case. It means that the question whether the clause in question is inconsistent with the Constitution must be assessed on the basis that the clause unfairly discriminated against the second to sixth applicants.

[132] Section 9(4) of the Constitution is vital to the enquiry. It provides:

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

[133] Plainly, this provision prohibits every person, including a testator, from unfairly discriminating against another person on one or more of the grounds listed in section 9(3). Evidently this restricts the scope of the right of freedom of testation. In exercising the right to dispose of her property, a testator may not unfairly discriminate against another person. If the manner in which the testator chooses to dispose of her property or the conditions she imposes on that disposal constitutes unfair discrimination against any person, her will becomes inconsistent with section 9(4) of the Constitution.

[134] In addition, the terms of a will must not violate the prohibition against unfair discrimination in the legislation contemplated in section 9(4) of the Constitution. It is not in dispute that the Promotion of Equality and Prevention of Unfair Discrimination Act is such legislation. This Act prohibits unfair discrimination in general and specific terms. Section 6 stipulates that no person may unfairly discriminate against another person, whereas section 8 provides that no person may unfairly discriminate against another person on the ground of gender, including on the specific grounds listed in that section.

[135] The High Court rejected the assertion that clause 7 was unlawful as it violated section 8 of the Act, on the basis that section 8(c) refers to "the system of preventing women from inheriting family property". The High Court reasoned that clause 7 does not

constitute a system in terms of which women were prevented from inheriting family property.[183] While it may be true that the clause does not amount to a system, it cannot be gainsaid that the clause prevented female descendants of the testators from inheriting the fideicommissary property of the De Jager family.

[136] The overly narrow interpretation of section 8 by the High Court is not supported by the scheme and the language of section 8. First, section 8 expressly states that it is subject to section 6 which provides for an overriding general prohibition against unfair discrimination based on gender. The reach of section 8 is not limited to the specific bases listed in section 8(a) to (i). This is so because the opening words of the section state that "no person may unfairly discriminate against any person on the ground of gender, including…". Then specific bases are listed. Properly construed, section 8 prohibits any unfair discrimination on the ground of gender, regardless of whether the discrimination is on the listed bases or not. The prohibition against unfair discrimination on the ground of gender is not limited but includes the listed bases. That this is so is made plain by *New Nation Movement* where, quoting from *New Clicks*,[184] this Court held that "[o]rdinarily, 'the terms "including" or "includes" are not terms of exhaustive definition but terms of extension'".[185]

[137] Consequently, the High Court erred in concluding that clause 7 does not violate section 8 of the Act. It does, and as a result, the clause is unlawful. It is this unlawfulness which renders clause 7 unenforceable, regardless of whether the unlawfulness stems from the inconsistency with section 9(4) of the Constitution or from a violation of section 8 of the Act. From time immemorial, our courts have declined to enforce clauses of wills or

[183] High Court judgment above n 5 at para 53.

[184] *Minister of Health v New Clicks South Africa (Pty) Ltd* (*Treatment Action Campaign as Amicus Curiae*) *(New Clicks)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 455.

[185] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 23.

wills that are unlawful or contrary to public policy. It appears to me that public policy requires no development in this regard.

[138] However, the first to third respondents have argued that when the unfair discrimination in issue here is subjected to a justification analysis in terms of section 36 of the Constitution, it is reasonable and justifiable. With regard to the claim based on public policy, there is no merit in this submission. As mentioned, a section 36 analysis applies to a limitation of a right in the Bill of Rights. It is not applicable to a case of unlawfulness which renders conduct unenforceable on the ground that enforcing it would be contrary to public policy.

[139] For a number of reasons, the proposition that the unfair discrimination arising from clause 7 is reasonable and justifiable, as contemplated in section 36, is misconceived. First, the invalidity attack mounted by the applicants here is not directed at a piece of legislation but at a clause in a will. The first to third respondents, in an attempt to ward off that claim, did not assert that the unfair discrimination complained of was imposed by a particular law and that it was a reasonable and justifiable limitation in terms of section 36. Instead, they contended that the impugned clause expresses the intention of the testators to keep the fideicommissary property in the De Jager family and as a result, it must be enforced, as it had been previously.[186]

[140] Had the respondents relied on a law to justify the unfair discrimination, I have no doubt that the focus of the challenge would have been directed at that law. Then, and only then, would the section 36 standard be applicable. It will be recalled that section 36 permits limitation of rights in the Bill of Rights only if the limitation is imposed by a law of general

[186] High Court judgment above n 5 at paras 22-4.

application. Indeed, it is clear from *Harksen*[187] that the test it lays down applies to an attack against a legal provision or an executive decision. In that matter, this Court said:

> "*Where section 8 is invoked to attack a legislative provision or executive conduct* on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1)."[188]

[141] But even if the *Harksen* test were to apply and that there was a limitation imposed by a law of general application, the respondent's argument would still face considerable difficulties. It is doubtful that unfair discrimination which is expressly prohibited by section 9(4) of the Constitution may constitute a reasonable and justifiable limitation under section 36 of the Constitution. If these two provisions of the Constitution were to be read this way, a conflict between them would arise. What is unlawful under one provision would be lawful under the other. It is a well-established principle of our law that the Constitution must be read harmoniously.[189] In addition, on the respondents' argument, a further conflict will be created between the law that imposes unfair discrimination as a limitation and the legislation envisaged in section 9(4). And for the unfair discrimination to withstand scrutiny, the former must prevail over the latter. Here this would mean that the common law trumps the statute. This does not accord with the principle that in the case

[187] *Harksen* above n 49 at para 54.

[188] Id at para 43.

[189] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 48 and *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party intervening; Institute for Democracy in South Africa as amicus curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83.

of conflict, a statute takes precedence over the common law. However, it is not necessary to determine this issue definitively in this matter.

[142] The second reason that renders the respondents' argument untenable is that the applicants were obliged by the principle of constitutional subsidiarity to base their challenge on the Act. Under the Act, which outlaws unfair discrimination, the applicant is merely required to prove that the conduct challenged amounts to discrimination.[190] He or she is not required to show that indeed the discrimination is unfair. The burden of proof shifts to the respondent who must refute that the discrimination has occurred or that it is unfair. Discrimination which is based on one of the prohibited grounds under the Act is presumed unfair unless the respondent shows that it is fair. Gender is one of the prohibited grounds.

[143] In terms of the Act, once a court is satisfied that unfair discrimination has occurred, the claim must succeed. There is no room for a justification analysis. Here the first to third respondents have conceded that clause 7 unfairly discriminated against the second to sixth applicants. This admission should have driven the High Court to the conclusion that clause

[190] Section 13 of the Act provides:

> "(1) If the complainant makes out a *prima facie* case of discrimination—
>
> (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
>
> (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
>
> (2) If the discrimination did take place—
>
> (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;
>
> (b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair—
>
> (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and
>
> (ii) unless the respondent proves that the discrimination is fair."

7 was unenforceable and that an appropriate order was warranted.[191] In each case where it is claimed that the testator in her will has discriminated against someone, a careful analysis will be essential to determine whether the discrimination was indeed unfair. But where, as here, the unfairness of the discrimination is conceded, the need to decide this issue falls away. In that event, the consequence would be that the discriminatory clauses are unenforceable.

[144] It bears emphasis that in our law, no one has a right to inherit the testator's property. This includes her children. And the testator is free to dispose of her estate in a will in whatever way she wishes, provided that she does not breach the law or public policy. When these principles are kept in mind, a bequeath to some, and not all, of the testator's children does not without more constitute unfair discrimination and cannot be rendered ineffective unless it is established that the will creates unfair discrimination.

[145] The fact that the will we are dealing with was executed in 1902, long before the Constitution and the Act came into operation, is immaterial. Both of them are rendered applicable to this matter by the fact that the first to third respondents seek to enforce clause 7 of the will now. The testators had intended the clause to continue to apply until the third generation of heirs has inherited the fideicommissary property. With regard to this matter, that could only take place upon the deceased's death in 2015.

Remedy

[146] The applicants had asked the High Court not only to declare that the discriminatory terms of clause 7 were not enforceable, but also that those terms be excised from the clause and replaced with non-discriminatory ones. Because the High Court did not consider the clause to be contrary to public policy and the Constitution, it did not reach the severance and reading-in remedies sought by the applicants. Generally, our courts are reluctant to

[191] Section 21 of the Act empowers a court to make an appropriate order if unfair discrimination is established.

change the terms of a will or trust deed. The rationale being that courts are not there to make wills for testators. And that freedom of testation, the foundation of our law of succession, is so important that once the intention of the testator is established effect must be given to it.[192]

[147] While this proposition may be true, it is not the alpha and omega of our law of succession. The respect enjoyed by the testator's intention depends on whether that intention was exercised within the confines of the law. Even at common law, wills which are contrary to public policy, whether they contain unlawful, improper or indecent terms, are not enforceable despite the intention of the testator.[193] And unfair discriminatory terms may be added to this list.[194]

[148] However, our courts have drawn a distinction between public and private trusts. In the case of public trusts, courts have been willing to amend the trust deed to remove terms that are unfairly discriminatory.[195] It appears from the reasoning in both *Syfrets* and *Emma Smith* that the distinction lies on the premise from which the courts departed. This is evident in *Syfrets* where it was stated:

> "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, i.e. the university. As *Du Toit* points out:
>
> > 'State action renders the distribution practice of such an institution with regard to the proceeds of a charitable bequest open to a constitutional

[192] *Ex parte Kruger* 1976 (1) SA 609 (O); *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan* 1967 (4) SA 397 (N); *Jewish Colonial Trust* above n 65; *Ex parte Trustees Estate Loewenthal* 1939 TPD 250.

[193] *Syfrets* above n 29. See also *William Marsh* above n 43 at 703C-704.

[194] *Emma Smith* above n 53 and *Syfrets* above n 29 at para 47.

[195] *Syfrets* id.

> challenge simply on the ground that the Constitution prohibits the State from conducting discriminatory practices.'
>
> Moreover, a trust, though usually created by a private individual or group, is an institution of public concern. This is *a fortiori* the position with regard to a charitable trust such as the present trust.
>
> 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."[196]

[149] Building on this reasoning, the Supreme Court of Appeal in *Emma Smith* said:

> "The curators contended that the amendment of the will would interfere with freedom of testation which, they argued, is not only a fundamental principle of the law of succession but also part of the fundamental right not to be deprived of property in an unjustifiable fashion. The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past. Given the rationale set out above, it does not amount to unlawful deprivation of property."[197]

[150] It is evident from both these cases that the relevant courts, although they referred to the Constitution and its values, put on their common law lens in search for a remedy for a breach of the Constitution. This has resulted in drawing this difference that lacks substance. A public trust deed or will that violates the values of the Constitution or one of

[196] *Syfrets* above n 29 at paras 45-7.

[197] *Emma Smith* above n 53 at para 42.

its provisions has the same impact as a private trust deed or will in breach of the same provisions. Both of them are inconsistent with the Constitution and the supremacy of the Constitution renders them both equally invalid.

[151] To hold otherwise would subvert the supremacy of the Constitution and would suggest that the Constitution does not reach individual conduct in the private sphere, despite the horizontal application of the Bill of Rights.

[152] In *Harvey*, the Supreme Court of Appeal substantiated the distinction between public and private testaments in these terms:

> "There is much to be said for public trusts being judged more strictly than private trusts. Unlike the dispositions in *Canada Trust* and *Curators, Emma Smith Educational Fund*, we are concerned here with what occurs in the private and limited sphere of the donor and his direct family. It affects a limited number of people, is of limited duration and is not manifestly discriminatory. Nor, can it be said that at the time when the deed was executed it was intended to infringe the dignity of the second and third appellants."[198]

[153] I cannot endorse this reasoning. It is difficult for me to appreciate how the sphere where the violation of the Constitution occurs can justify the breach and render valid what is invalid in the eyes of the Constitution. I do not think that freedom of testation empowers a testator to violate the rights of members of his or her family by unfairly discriminating against them. Lest I be misunderstood, the Constitution does not require the testator to treat his or her family equally when gifting them with his or her property. Nor does it oblige him or her to leave any of his or her assets to them. They too have no entitlement to his or her property. But what the Constitution prohibits is unfair discrimination on the part of the testator when disposing of his or her property.

[198] *Harvey* above n 20 at para 62.

[154] The fact that a testator may have decided to exclude some of her children from inheriting her property does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.

[155] Therefore, differentiation or even discrimination that arises from the terms of a will does not violate the Constitution as long as it does not constitute unfair discrimination. This is so because section 9(4) of the Constitution forbids unfair discrimination by one person against the other. In addition, this provision outlaws unfair discrimination that is based on one of the grounds listed in section 9(3). Consequently, a party that impugns the validity of a will on the basis of discrimination must establish that the discrimination complained of is unfair or that it is based on a listed ground, if reliance is placed on section 9(4) or a relevant provision of the Act.

[156] Here both these issues have been established. Clause 7 discriminates against the second to sixth applicants on the basis of gender. And the first to third respondents have admitted that the discrimination is unfair. Consequently, the clause is in breach of section 8 of the Act and as a result it is unlawful. As an unlawful clause it is unenforceable. There is nothing controversial in this proposition, even if it is looked at through the lens of the common law. Since time immemorial, unlawfulness has been recognised as one of the limitations to the exercise of freedom of testation. During the Group Areas Act of the apartheid era, if a testator were to leave her immovable property, situated in an area reserved for whites, to a black person, that testament would be unenforceable on the basis of unlawfulness. The fact that this would have occurred in a private and limited sphere of one testator and that it affected only one beneficiary would not have saved it from invalidity.

[157] Accordingly, the distinction drawn by the courts below between public and private testaments is artificial and cannot be sustained, especially where the challenge is based on the Constitution. Moreover, the search for the appropriate remedy in such matters must be informed by the Constitution itself. This is because section 172(1) of the Constitution, as mentioned, obliges courts to declare that conduct which is inconsistent with the Constitution is invalid. In addition, these courts are empowered to make orders that are just and equitable. Justice and equity require that the interests of parties affected by the order must be taken into account.

[158] But in the present matter the position is that clause 7 which contains the fideicommissary condition is invalid for being contrary to public policy. In our law the effect of this invalidity is that the bequest to the deceased which this clause purported to regulate is regarded as having been without a condition.[199] What this means is that the property concerned was transferred to the deceased, as a fiduciary unburdened with conditions. Therefore, it formed part of his estate that was subject to the will he had executed and in terms of which he had bequeathed that property to the applicants.

[159] This common law principle was lucidly articulated in *Levy*. With reference to common law authorities, on the point Price J distilled the principle that a fideicommissum condition that is contrary to law or public policy is treated *pro non scripto* (as if it was never written) and the heir under the will concerned succeeds unconditionally.[200] This position is altered only where the deletion of the condition renders the remaining bequest meaningless. Here that is not the position. It is clear from the will that the testators wished

[199] *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T) and *Levy* above n 37. See also De Waal, Erasmus, Gauntlett and Wiechers "Wills and Succession, Administration of Deceased Estates and Trusts" in Joubert *LAWSA*, 2 ed (Lexis Nexis, Durban 2011) 31 at 356.

[200] *Levy* id at 937-8.

to keep the fideicommissary property in the hands of their male descendants until the third generation.

[160] The applicants' father received it as such heir and on condition that upon his death, it will pass to his male children. The applicants' father and his brother were the last generation on whom the offensive condition applied. The interim Constitution which came into effect in April 1994 brought about a change to the principles of law relating to public policy. This impacted on the validity of clause 7 which became contrary to public policy. As from April 1994, clause 7 was *pro-non scripto* in the eyes of the common law, as amended by the interim Constitution which changed public policy. Consequently the relevant property, which was still in the hands of the applicants' father, was free of the offending condition and formed part of his estate. Like all his assets, it became the subject of his will upon his death in 2015.

[161] In the special circumstances of the present matter, the application of the common law rule leads to a just and equitable outcome. This is because the respondents had already received the other half of the property from their own father. It would be unjust for them to be entitled to the half that was held by the applicants' father, over and above what they had already obtained

Costs

[162] While the applicants are successful in this Court, I do not think that the principle that costs follow the result is appropriate for the present matter. None of the parties is responsible for the offensive clause in the will and the legal position regarding its enforcement under the Constitution was not clear. Therefore, it became necessary for the courts to be approached to give clarity. It seems to me here that since the testator's estate was wound up a long time ago, it will not be fair to direct that costs be borne by the estate of the applicants' father. The applicants' father was not responsible for the offensive

clause. However, his estate must pay costs of the first applicant who acted in his official capacity as an executor with no personal interest in the matter. In the present circumstances, it would be fair to make no order as to costs in respect of other parties.

Order

[163] In the present result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders granted by the High Court and Supreme Court of Appeal are set aside.
4. It is declared that clause 7 of the will of the late Mr Carel Johannes Cornelius De Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is inconsistent with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and therefore unenforceable.
5. The costs of Mr James King shall be paid from the estate of Mr Kalvyn de Jager.
6. There shall be no order as to costs in respect of other parties.

VICTOR AJ

Introduction

[164] I have had the pleasure of reading the judgment of my sister Mhlantla J (first judgment). Her judgment highlights that the law of testation reinforces patriarchal and "outdated ideas concerning sex, gender, property, ownership, family structures and

norms."[201] I have also had the privilege of considering the judgment of my brother Jafta J (second judgment) who sees no need for the development of the common law because wills contrary to public policy have never been enforceable and thus there is no need to revisit this aspect.

[165] I have benefited from reading both judgments. Why a separate concurrence then with the second judgment? While I agree with the outcome proposed in the second judgment and broadly its reasons, I arrive at the same conclusion from a somewhat multi layered perspective. I endorse the second judgment's conclusion that the common law does not have to be developed, but would rather emphasise the principle of constitutional subsidiarity because of the Equality Act. The Equality Act was promulgated in compliance with section 9(4) of the Constitution and thus constitutes a direct reflection of our public policy on furthering the needs of our constitutional democracy in terms of our fundamental vision of equality. It is within this framework that freedom of testation must be analysed. I would also add further reasons regarding the implementation and interpretation of the Equality Act based on a more constitutionally transformative basis. The applicants also rely to some extent on the Equality Act. They bemoan the fact that the High Court failed to fully interrogate the application of the provisions of section 8(d) of the Equality Act in the context of this matter.[202]

[166] In what follows, I will discuss the need to revisit the principle of freedom of testation in light of the obligation to ensure substantive equality. I will be guided by the principles of transformative constitutionalism to this end.

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[201] First judgment at [79].

[202] Section 8(d) of the Equality provide as follows:

> "Prohibition of unfair discrimination on ground of gender.—Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
>
> (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child."

[167] In applying the principles of the Equality Act it is incumbent on every court to promote the spirit, purport and objects of the Bill of Rights.[203] My concurrence is therefore directed at focusing on the Equality Act and how it should be interpreted in a more robust manner on the issue of testation based on transformative equality. My analysis considers the constitutional framework and section 9 of the Constitution as being the source of the right sought to be enforced without circumventing the Equality Act. The Equality Act seeks to regulate unfair discrimination and the adoption of positive measures in the public and private spheres.

[168] Unless there is a transformative constitutional approach taken by courts when equality rights are affected, the historical and insidious unequal distribution of wealth in South Africa will continue along various fault lines such as in this case, gender. A more robust understanding of substantive equality within our constitutional framework is necessary.[204] Public policy is now deeply rooted in the Constitution and its underlying values. This means that substantive equality must be evaluated within the realm of public policy. The majority in *Barkhuizen* held:

> "[T]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[205]

[169] The concept of taking substantive equality seriously means that it should be a component of the public policy test and if necessary, a basis for restricting freedom of testation. This does not mean that testators can no longer elect to whom they wish to

[203] Section 39(2) of the Constitution.

[204] See generally Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441.

[205] *Barkhuizen* above n 22 at para 30.

bequeath their property; the limitation would only arise if the bequest amounts to unfair discrimination based on a recognised ground such as gender. The purpose of the limitation would be to prevent or prohibit unfair discrimination. It has been accepted that in a democratic society differentiation is permissible and even necessary.[206] However, differentiation becomes impermissible (and consequently results in unfair discrimination) when the right to equality and dignity of the person is violated.[207]

Direct or indirect application?

[170] The first judgment contends that the correct approach would be indirect application of the Bill of Rights because the question of whether the clauses of a will should be enforced is similar to the enforceability of contractual provisions. Relying on *Barkhuizen*, the first judgment argues that direct application of the Bill of Rights is inappropriate in the circumstances.

[171] On the other hand, the second judgment argues that there is no need for the development of the common law because wills contrary to public policy have never been enforceable. The second judgment contends that there is no need to revisit this test. What must rather be established is whether the provisions of this specific will should be enforced in light of section 9(4). The judgment goes through some lengths to explain why the High Court's approach of using a section 36 limitation analysis was wrong. I agree with these remarks. This is not a section 36 analysis.

[172] However, neither judgment answers the question whether direct or indirect application is warranted in these circumstances.

[206] *Prinsloo v van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24.

[207] Id at para 31.

[173] The starting point for the applicability of direct application is the case of *Khumalo.*[208] In that case this Court had to determine the question of horizontality and concluded that this question is determined primarily by section 8(2) and 8(3) of the Constitution.[209] Citing these provisions, the Court found that the right to freedom of expression was "of direct horizontal application" because of: (a) the intensity of the right; and (b) the potential invasion of the right by persons other than organs of state.[210]

[174] In *Daniels,*[211] this Court confirmed that the scheme of the Bill of Rights enables rights to be invoked against private parties in certain circumstances. Importantly, the Court made the following remarks in this regard:

> "I see no basis for reading the reference in section 8(2) to 'the nature of the duty imposed by the right' to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). *Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right?* If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[212]

[208] *Khumalo* above n 136.

[209] Id at paras 31-2.

[210] Id at para 33.

[211] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

[212] Id at para 39.

[175] In the recent decision of *Pridwin*,[213] this Court endorsed this approach and confirmed that direct horizontal application is possible in certain circumstances. Importantly it remarked that:

> "In subjecting private power to constitutional control, section 8(2) recognises that *private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage*."[214]

[176] Although the minority did not apply the same approach it similarly remarked on the importance of horizontal application by stating that "independent schools cannot be enclaves of power immune from constitutional obligations".[215]

[177] The majority went on to apply the Bill of Rights directly to the facts at hand and found that the right to a basic education and the best interests of the child principle necessitated that there be a fair process when an independent school decides to terminate a parent contract.[216] Notably, the majority opted not to follow the two-stage enquiry used for the enforcement of contracts as per *Barkhuizen.*[217] Instead, it used direct application. It based this conclusion in part on the basis that the rights in question formed an independent basis for a hearing that was separate from the contract itself and because a case for direct application had been pleaded by the parties.[218] Notably like in *Pridwin,* the applicants in this case have made out a case for direct application in their papers albeit via the Equality Act.

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[213] *Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC).

[214] Id at para 131.

[215] Id at para 82.

[216] Id at paras 153 and 209.

[217] *Barkhuizen* above n 22 at paras 56-8.

[218] *Pridwin* above n 213 at para 130.

[178] Based on *Pridwin* and *Daniels*, it seems direct horizontal application is applicable here because of: (a) the intensity, history and nature of the right to equality and what it seeks to achieve – it is self-evidently applicable to private parties; (b) there is a danger that not reaching into the private sphere could "perpetuate inequality and disadvantage" and; (c) "letting private persons off the net" in these circumstances would "negate the essential content of the right" by undermining the constitutional goal of achieving substantive equality.

[179] The first judgment's reliance on *Barkhuizen* may need to be reconsidered. First, following from *Pridwin*, indirect application is not always the correct route, even in contract cases. Second, *Barkhuizen* concerned the right of access to courts which if relied on directly would pose certain conceptual difficulties. In this case, however, the impugned right is the right to equality. Section 9 is one of a few sections of the Constitution which mandates that national legislation be enacted to give effect to it. The Equality Act is such legislation.

[180] The present case presents a bit of a quandary. On the one hand, following precedent in *Daniels* and *Pridwin*, it seems that the requirements for direct application have been met and it would be defensible to invoke section 9(4) directly. This is countenanced furthermore by the fact that section 9(4) envisages special legislation to give effect to it. That makes this case distinct from cases in which this Court has gone the route of indirect application. On the other hand, this Court bears a duty under section 39(2) to develop the common law of freedom of testation to address the kinds of deficiencies that have been identified in the first judgment.[219]

[219] It should be noted furthermore that this Court has emphasised that when the common law is found to be deficient there is a duty on courts to develop it in line with section 39(2). See *Carmichele* above n 75 at para 39 where this Court said:

> "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the

[181] There is a seeming tension that must be resolved based on the principle of constitutional subsidiarity, which I address next.

Constitutional subsidiarity

[182] In *My Vote Counts,* Cameron J in a minority judgment defined the principle of subsidiarity as being "the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right".[220] It also "denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and significance of the Constitution".[221]

[183] Constitutional subsidiarity becomes a central consideration in this case. In *My Vote Counts*, it was outlined what subsidiarity means in cases such as this one where legislation (in this case the Equality Act) has been invoked to give effect to a specific constitutional right:

> "Once legislation to fulfil a constitutional right exists, *the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role*."[222]

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section 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."

[220] *My Vote Counts NPC v Speaker of The National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 53.

[221] Id at para 46.

[222] Id.

[184] It is notable that although they reached a different conclusion, the majority per Khampepe J concurred with Cameron J's exposition of the history behind constitutional subsidiarity.[223]

[185] The majority did caution as follows:

> "We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this Court has said that the principle may not apply. This Court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case.[224]

In finding that constitutional subsidiarity is not a hard and fast rule this Court has made it clear that the constitutional enquiry does not cease because there is legislation promulgated to give effect to a specific constitutional right. In other words, subsidiarity does not ringfence the meaning and import of the constitutional right to equality by legislative enactment.[225] In cases such as these, the primary concern of the Court should be whether the legislature has adequately fulfilled its section 9(4) obligation. The litigants in this case do not rely on the "restricted ambit" of the Equality Act.[226] Within the context of this case Parliament has adequately fulfilled this obligation through the enactment of the Equality Act and no suggestion has been made to the contrary.

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[223] Id at para 121, the majority stated, "We further agree with the minority judgment's exposition of the history behind the principle of constitutional subsidiarity".

[224] Id at para 182

[225] Some academic commentators have criticized the Court's jurisprudence on subsidiarity and warned that courts should not delegate the responsibility of giving content to fundamental constitutional rights to the Legislature lest they water down the scope and promise of those rights. See generally Klare "Legal Subsidiarity and Constitutional Rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129.

[226] *My Vote Counts* above n 220 at para 72.

[186] In *My Vote Counts*, three inter-related principles for applying the principle of subsidiarity were illustrated. First, respecting the programmatic scheme and significance of the Constitution.[227] Second, according due respect to Parliament's legislative role in light of the separation of powers.[228] Third, the development of an integrated and consistent rights jurisprudence.[229]

[187] Langa CJ in *Pillay*[230]citing a few decisions of this Court,[231] confirmed that in cases concerning the horizontality of the right to equality, that is cases of unfair discrimination committed by private parties, it is the Equality Act, and not section 9(4) which must be invoked:

> "The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.' The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins."[232]

[188] Section 8(1) of the Bill of Rights provides for direct constitutional scrutiny into private relationships such as between testator and heir or *fideicommissary* as in this case. Section 8(2) provides that:

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[227] *My Vote Counts* above n 220 at para 61.

[228] Id at para 62.

[229] Id at para 63.

[230] *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) (2008 (2) BCLR 99 (CC) (*Pillay*).

[231] *New Clicks* above n 184*; South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

[232] *Pillay* above n 230 at para 40.

> "A provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[189] As explained by Woolman, section 8(2) of the Bill of rights eliminates any doubt about (a) the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general; and (b) about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill of Rights, in particular developing the common law.[233]

[190] Evidently, this case requires direct application as opposed to indirect application. The direct application of the Bill of Rights, however, must be consonant with the principle of constitutional subsidiarity. Therefore, in applying the Bill of Rights directly in this case, reliance must be placed on the Equality Act because its definition of unfair discrimination "covers the field".[234]

[191] It is unassailable in this case and indeed in cases relating to the freedom of testation that the reach of section 8 of the Bill of Rights applies to these private parties. Whilst the Bill of Rights reaches into the private sphere this is perfectly congruent with the competing right to freedom of testation. It also follows, therefore, that the Equality Act which was promulgated pursuant to section 9(4) of the Constitution is the benchmark against which the freedom of testation must be measured within the private sphere.

[192] No case has been made out that the Equality Act does not give effect to the right to equality in testation. The first judgment opts for the development of the common law. But

[233] Woolman and Bishop above n 69 at 73.

[234] Cameron J uses this expression in *My Vote Counts* above n 220 at para 66 to refer to an argument that the scope of the constitutional right in question has been subsumed by a piece of legislation.

it can only develop the common law if the legislation does not give effect to that right. In this case the Equality Act was promulgated pursuant to section 9 (4) of the Constitution and in the absence of an attack on the validity of the Equality Act it must yield to the principle of constitutional subsidiarity.[235] Here there is neither an attack on the constitutional validity of the Equality Act nor is there any suggestion in the applicants' case that the protections do not go far enough. In addition, the respondents also do not attack any provision in the Equality Act.

[193] For all these reasons, in my view the tension between direct and indirect application in the first and second judgments must be resolved on the basis of the principle of constitutional subsidiarity. The Equality Act is now the benchmark for evaluating any conduct of a private person which has an impact on another person's right to equality and to be free from unfair discrimination to this end.

[194] It is necessary to consider a more robust approach to an analysis of what freedom of testation means after the advent of the Constitution. When dealing with freedom of testation it is cumbersome to lurch from case to case when the application of the Equality Act provides the framework in which to determine most matters relating to the freedom of testation going forward.

[235] This point was recently reiterated by this Court in *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25 in which the applicant argued for a convoluted interpretation of the Trespass Act instead of launching a frontal attack on its constitutionality. Mogoeng CJ in dismissing the interpretive argument made the following remarks at paras 74-5:

> "Since PIE owes its breath to section 26(3) of the Constitution, it is not unreasonable or inappropriate to read a reference to PIE as a pointer to the inescapability of the role of section 26(3) as the cardinal reference point in addressing this issue. The way the issue was raised renders it unavoidable that the constitutionality of section 1(1) of the Trespass Act be effectively pronounced upon, even if it might not be expressly referred to as such. Truth be told, this is another way of seeking to have us declare this section unconstitutional. This we will not do. *This approach, foisted upon us by the applicants, is very difficult if not impossible to manage to its intended end. They ought to have launched a frontal challenge to the constitutionality of section 1(1). Nothing stopped them from doing so. But, they chose not to*. Instead, they opted for this intractable interpretive route. They would therefore have to fall by their free choice."

Transformative constitutionalism and the implementation of the principle of freedom of testation

[195] Section 39(2) makes it clear that "*[w]hen interpreting any legislation,. . . every cour*t, tribunal or forum *must promote the spirit, purport and objects of the Bill of Rights*". The Constitution now requires courts to continuously ensure South Africa's transformation into a human rights state. The guiding principles of the Constitution demonstrate that the reach of equality must be substantive. It must advance more than merely formal or *de jure* equality.[236] Whilst the first judgment seeks to develop the common law, this is unnecessary in this case because the Equality Act cannot be circumvented.

[196] In this case the central question remains whether human dignity is enhanced or diminished, and whether the achievement of equality is promoted or undermined by the measure in whatever legal reasoning is to be applied.

[197] If courts fail to adopt a more innovative approach towards transformative substantive equality in its mission, this will entrench formal equality at the expense of substantive equality, and, especially in the private sphere, the deeper dimensions of the constitutional values of justice will be lost.

[198] It is generally accepted that the law both shapes and constructs relationships in society.[237] In addition to the role law plays in constructing societal relationships, it also draws from the *"*underlying moral or value choice*"* of society.[238] In this sense, the law

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[236] See *Minister of Justice and Constitutional Development v SA Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 61 where Madlanga J expressed himself as follows:

> "Throughout the many many years of the struggle for freedom, the greatest dream of South Africa's oppressed majority was the attainment of equality. *By that I mean remedial, restitutionary or substantive equality, not just formal equality*."

[237] Davis and Klare above n 78 at 443-4.

[238] See Froneman J's dissent in *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 106.

should not be regarded as a neutral set of principles that has no bearing on power dynamics in society. So, the essential point here is that the law is not a neutral or amoral enterprise but is based on the interplay between its constitutive role of shaping society and the underlying moral or value choices which also shape our equality jurisprudence. In this case it is amply demonstrated that the law has "distributive" consequences because absent the proper application of the equality jurisprudence the powers, privileges and liabilities of both individuals and groups in society will go unchecked. In this case only male descendants will benefit. In the absence of a male descendant then other males will benefit. Female descendants are excluded simply because of being female.

Legislative framework of the Equality Act

[199] The provisions of the preamble to the Equality Act make its nature and intended purpose clear. The consolidation of democracy requires the eradication of inequalities especially those that are systemic in nature and which were generated in South Africa's history by colonialism, apartheid and patriarchy. The Equality Act also recognises that although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes. This undermines the aspirations of our constitutional democracy and the Equality Act still requires practical application and of course, the development of an appropriate body of jurisprudence.

[200] Section 9 (4) of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; the Equality Act is such a piece of legislation. The Equality Act endeavours to "facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".[239]

[239] Preamble to the Equality Act.

[201] It is clear from the scheme and tenor of the Equality Act that it aims to ensure substantive as opposed to merely formal equality. By ensuring that the right to equality can be invoked against private persons, the Constitution acknowledges that colonialism and apartheid were not only facilitated by a repressive state apparatus but also through the complicity of individuals who benefitted directly from an unjust status *quo*. The Equality Act is an acknowledgement that to those on the receiving end of discrimination, the source of the discrimination (be it public or private) matters not.

Transformative constitutionalism and freedom of testation

[202] A commitment to transformative constitutionalism and enabling substantive equality requires this Court to consider the "distributional and ideological consequences" of common law principles such as freedom of testation.[240] The first judgment provides a useful summary of the history of the principle in our jurisprudence. I will contend that, where appropriate, common law principles such as freedom of testation should be recalibrated towards more egalitarian and *ubuntu* based ends.

[203] The first judgment correctly suggests that by extending the common law there will be a clash between freedom of testation, which constitutes a right protected by section 25 (1) of the Constitution and the right to equality. The different provisions of the Constitution must be read in harmony.[241] By implementing the provisions of the Equality Act there is a recognition that freedom of testation brings with it the values of freedom and dignity and for this reason it must be evaluated against public policy. Freedom of testation is in essence freedom of contract. Freedom of testation cannot now be cloaked with

[240] Davis and Klare above n 78 at 449.

[241] *United Democratic Movement* above n 189 at para 83 this Court stated:

> "A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions and give effect to all of them."

constitutional protection under the guise of "human dignity and autonomy". There is an overemphasis on the use of individualist, libertarian and neo-liberal definitions of freedom of testation as opposed to a definition founded on the countervailing principles of equality and *ubuntu*. There is a failure to consider the appropriate context and the distributive consequences of freedom of testation.

[204] In my view, whilst the first judgment is trailblazing in many ways as it addresses patriarchy and sexism, it does not directly address the enquiry in terms of the common law. There is no need to develop the common law when there is a statute enacted pursuant to section 9(4) of the Bill of Rights to give effect to equality. Our nascent constitutional values are fully embodied in the Equality Act. However, the first judgment seems to conflate the principle of freedom of testation with the rights to dignity, privacy and property as opposed to establishing how the very principle itself must be recalibrated and understood within a constitutional framework based on equality and *ubuntu*. In doing so, it elevates the status of what is merely a common law rule and clothes it with constitutional protection. While the arguments that freedom of testation is supported by the rights to dignity, property and privacy have merit, they de-contextualise and overlook the way freedom of testation actually operates in a society with stark inequalities such as ours.

[205] The approach of the first judgment adopts a libertarian and neo-liberal basis for freedom of testation that imports and constitutionally sanctions market logics, in the problematic way described by Davis and Klare.[242] In addition, despite the first judgment's excellent analysis of the history of succession, it does not provide a contextual analysis which interrogates how freedom of testation sustains unequal wealth distribution in South

[242] See Davis and Klare above n 78 at 479-481 where they evaluate the approach taken by courts in cases involving the scope of the common law principle of *pacta sunt servanda* in light of our nascent constitutional values. Amongst other things, they argue that this line of decisions endorses libertarian and individualist ideas of rights and governance which unwittingly legitimise neo-liberal economic policies that are removed from the extent of deprivation that is the reality for the majority of South Africans.

Africa based on gender, class and so on.[243] The concept of patrimonial capitalism through inheritance continues unchecked.

[206] Piketty critiques what he refers to as "patrimonial capitalism."[244] Essentially this is the tendency for wealth to beget wealth and conversely for poverty to beget poverty.[245] He highlights how inheritance laws sustain and legitimize the unequal distribution of wealth in societies thus enabling a handful of powerful families to remain economically privileged while the rest remain systematically deprived.[246] In my view, this system entrenches inherited wealth along the male line. In applying this critique to the facts in this case, our common law principle of freedom of testation is continuing to entrench a skewed gender bias in favour of men. The Human Rights Commission has noted how patrimonial capitalism functions in the South African context.[247] There is no basis to avoid applying the principles of the Equality Act to eradicate the problems of inequality entrenched by the common law.

[207] Unfettered freedom of testation excludes women, and this results in negative distributive consequences for them. While it may be true that freedom of testation is related

[243] Recent studies on wealth inequality in South Africa illustrate the concerning distribution of wealth in South Africa. A study by the Southern Centre for Inequality Studies estimates that the richest top 10% of South Africans own 85% of all wealth whilst the richest 0.1% own about 25% of all wealth. The same study notes that the majority of the top earners are white. It stands to reason that given the gendered nature of poverty the majority of top earners are male as well. Notably the same study finds that "the bottom 50 per cent of the South African population have negative net worth: the levels of the debts that they owe exceeds the market value of the assets they own." The study concludes that there is no evidence that wealth concentration has decreased since apartheid. In fact, if anything, it is on the rise. See Chatterjee, Czajka, and Gethin *Estimating the Distribution of Household Wealth in South Africa* (Working Paper no 2020/06, April 2020), available at https://wid.world/document/estimating-the-distribution-of-household-wealth-in-south-africa-wid-world-working-paper-2020-06/.

[244] Piketty *Capital in the Twenty-First Century* (Harvard University Press, Cambridge 2014) at 267-302. When referring to patrimonial capitalism he means that the economic elite mostly attain their fortunes through inheritance rather than entrepreneurship or innovation. These inherited fortunes produce a class of rentiers who dominate politics with all sorts of (mostly implied, but very plausible) negative consequences.

[245] Id.

[246] Id.

[247] South African Human Rights Commission *Equality Report: 2017/18* (July 2018), available at:https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf.

to the rights to dignity, privacy and property it also has significant distributive consequences. In a society with stark inequalities based on gender, an unfettered approach to freedom of testation sustains class hierarchies inherited from the colonial and apartheid legacy and frustrates the establishment of a society based on equality and in particular gender equality. In this regard, interpreting the principle of freedom of testation to confer a broad right to disinherit based on gender undermines the constitutional objective to heal the injustices of the past and establish an egalitarian society.

[208] It is incumbent upon this Court to acknowledge that the importance the law has accorded to freedom of testation in the past is precisely what sustains the unearned privileges in society such as male privilege. By maintaining systems of privilege, it simultaneously traps vulnerable groups such as women in a cycle of poverty and entrenches systemic disadvantage.

[209] An analysis of freedom of testation that fails to take seriously its distributive consequences and iniquitous legacy may also result in a form of "colonial unknowing".[248] Decolonial scholars use the latter term to describe situations in which the "afterlife" of colonialism and apartheid and their effects on contemporary society are erased or overlooked when the law provides its unequivocal stamp of approval of the status *quo*.[249] This is the danger if the route of the common law is the determinative factor. It follows

[248] See Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" (2018) 34 *SAJHR* 300 at 308 where he expands on this concept as follows:

> "It is through colonial unknowing that the afterlife of colonial-apartheid can at once remain pervasive in the form of inequality, poverty, violence and suffering but not be 'comprehended as an extensive and constitutive living formation'. Colonial unknowing operates centrally through the disavowal, dissociation and normalisation of the history and horror of colonialism, land dispossession, white domination and racism. By making settler-colonialism illegible as a historical, political and moral problem, colonial unknowing normalizes white hegemony in South Africa, enforces the expiry of colonised people's right to historical justice, and structures the field of sense, knowledge, perception and imagination in such a way as to make substantive decolonisation appear 'unreasonable and unrealistic'."

[249] Id.

therefore that the implementation and application of the Equality Act ensures that the exercise of freedom of testation is consistent with the demands of our Constitution.

[210] It is also necessary to balance freedom of testation against substantive equality as a component of public policy.

Substantive equality as a component of public policy

[211] The first judgment correctly notes that equality is a founding value of essential importance to our new constitutional order and therefore an essential component of the public policy yardstick. It correctly contends that this stems from the constitutional commitment to heal the injustices of the past and establish a non-sexist society. Furthermore, this commitment is bolstered by South Africa's international obligations to advance gender equality.[250]

[212] Our equality jurisprudence has developed an approach where the right to equality has been interpreted to mean that individuals have equal dignity and respect.[251] Albertyn suggests that our equality jurisprudence needs to move beyond "equal concern and respect", towards deeper structural changes.[252] As such, she suggests that our equality jurisprudence to date has been powerfully inclusive, but not transformative nor has it required a fundamental re-ordering of the status quo.[253]

[213] Despite the notable achievements of our current equality jurisprudence in terms of including groups into the social and economic status quo, Albertyn argues that its legacy

[250] South Africa is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, amongst other treaties and covenants which require it to ensure gender equality.

[251] Albertyn above n 204 at 458.

[252] Id.

[253] Id.

"is contested by those who seek to centre ideas of disadvantage, structural inequalities, unequal power relations and more radical ideas of difference and systemic justice".[254] This requires social structures and their taken-for-granted norms to be uprooted and abolished if necessary.[255] It requires political, social and economic conditions, structures, processes and institutions to be radically transformed in society.[256] So substantive equality should pay close attention to the structures, norms and so on which reproduce hierarchies and marginalisation and should seek to dismantle them if necessary.

[214] It is this more robust framework for substantive equality which provides several important insights for this matter. The emphasis on moving beyond social inclusion towards systemic justice is relevant. This would mean that the Court should not only highlight how patriarchal traditions which endorsed women's disinheritance were an injury to their *dignity*, but also how they sustained inequality between men and women in terms of wealth and resources.

[215] As stated previously, allowing for unfettered freedom of testation as embedded in the common law enables these serious distributive consequences to go unchecked, shielding them from constitutional scrutiny. The Constitution requires a decisive break from the past. As it stands, freedom of testation in its private context remains unchecked and the goal of "substantive freedom" has been undermined as described by Albertyn.[257]

[216] This approach demonstrates why the equality enquiry in this matter should therefore extend beyond the failure to treat women with equal concern and respect. Instead, the equality enquiry should highlight the way freedom of testation sustains iniquitous gender-based hierarchies which the Constitution seeks to uproot or abolish.

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[254] Id at 459.

[255] Id at 461.

[256] Id at 462.

[257] Id.

[217] So, a proper contextual analysis in this case should take seriously the wide chasm in both power and resources between men and women in society and how freedom of testation facilitates this unequal distribution. By doing so, freedom of testation threatens the achievement of substantive equality for those groups who are systematically disadvantaged based on their sex, gender or other characteristics.

[218] Context sensitive legal reasoning can advance transformative constitutionalism. However, contextual legal reasoning will only be truly transformative if a court explains what they hope the reformulated norm will accomplish in relation to the social relationships attached to the problem and the impact this will have on the lived experiences of the constituencies which are affected by it.[258]

[219] It is in the private sphere where freedom of testation within the context of transformative constitutionalism needs to be tested. Professor Penelope Andrews in interpreting feminist legal theory within the context of the South African Constitution, points to the false dichotomy between the public and the private sphere insofar as recognizing and protecting women's rights are concerned.[259] To ensure gender equality, a constitution with a Bill of Rights helps but it is not enough. It needs to be bolstered by an overarching vision that seeks to transform institutions, laws, and practices that subjugate women.[260] The Equality Act is that transformative statute that does "bolster" equality for women even in the private sphere where the "overarching vision" ought to ensure that testation is not a form of subjugation of women. It is this consideration which requires this Court's attention when determining the validity of the impugned clause in the will.

[258] Davis and Klare above n 78 at 496.

[259] Andrews *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights* (Ashgate Publishing Company, Burlington 2012) at 108

[260] Id at 174

[220] This matter needs to illustrate with greater clarity what the constitutional value of equality as a component of the public policy yardstick means for the scope of freedom of testation in future. In reformulating the public policy standard, it should indicate how far-reaching the commitment to equality is in the new dispensation. To this end, the attempt to subject private wills to a significantly lower standard of scrutiny than public charitable trusts is concerning. A horizontal application of rights between private individuals is part of our jurisprudence. Rights in the Bill of Rights are capable of horizontal application; in fact, in appropriate circumstances they may even impose positive obligations on private parties.[261]

[221] Equality is a fundamental organizing principle of the Constitution and the kind of society it seeks to bring into being. Our courts have not adopted different levels of scrutiny regarding claims of unfair discrimination based on a public/private distinction.[262] My view here is not that the public/private distinction is completely irrelevant. One could easily imagine a range of considerations that might bear on public charitable trusts as opposed to private wills such as various aspects of public policy.

[222] Equality, however, is fundamentally different from other public considerations in terms of how far-reaching it is. It is not clear therefore, how equality - as a foundational constitutional value – might impose certain obligations on public charitable trusts that it would not similarly impose on private wills. The attempt to establish a bright line between the public/private divide in respect of freedom of testation and the right to equality might risk the establishment of a private domain in which to discriminate.[263] The argument that

[261] *Daniels* above n 211 at para 39.

[262] The United States is notable for its difference in this regard. Its Supreme Court has adopted several different forms of judicial review for racial discrimination, discrimination on the basis of sex, and discrimination based on sexual orientation. By design, the South African Constitution embraces a relatively uniform approach to discrimination and rejects this compartmentalized and arbitrary approach.

[263] See Davis and Klare above n 78 at 416-7 where they argue that attempts to shield the common law from constitutional scrutiny would enable a sphere of private apartheid where gross violations of human rights continue unabated.

drafting a will by its nature includes some element of arbitrariness is not convincing. The above discussion on the distributive consequences of freedom of testation demonstrates why an attempt to shield the so-called private domain from scrutiny frustrates the achievement of a more egalitarian society.

[223] Thus, the second judgment correctly concluded that the distinction which both the High Court and the first judgment draw between the powers of the courts to vary provisions of a public charitable trust as opposed to private wills is misconceived.

[224] I reach this same conclusion based on the importance of achieving substantive equality through the lens of transformative constitutionalism. The second judgment also correctly concludes that the impact of the discrimination is no different depending on where it comes from. Whether the source of the discrimination is public or private, it will undermine the constitutional value of substantive equality.

[225] At paragraph 151, the second judgment makes a particularly powerful remark which I support:

> "To hold otherwise, would subvert the supremacy of the Constitution and would suggest that the Constitution does not reach individual conduct in the private sphere, despite the horizontal application of the Bill of Rights."

[226] This conclusion is important otherwise systems of oppression which manifest in the private sphere, such as sexism, will remain free from the scrutiny of the Bill of Rights.

The application of the Equality Act to the impugned provisions of the will

[227] The starting point in this regard is section 1 of the Equality Act which defines "discrimination" as follows:

> "[A]ny *act or omission*, including a policy, law, rule, practice, condition or situation which directly or indirectly—
>
> (*a*) imposes burdens, obligations or disadvantage on; or
>
> (*b*) *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds*."

[228] Notably section 8 of the Equality Act also prohibits gender discrimination. The relevant provisions read as follows:

> "Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
>
> (c) the system of preventing women from inheriting family property;
>
> (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl child."

[229] In this matter, the impugned clauses of the will constitute "discrimination" in terms of the Equality Act because they withhold a "benefit, opportunity or advantage", namely the right to benefit from the deceased estate. Whilst it is true that no person has the "right to inherit", the reference in the Equality Act to a "benefit" refers to the broad array of privileges, rights and interests a person may not obtain merely on account of their sex, gender or other status. In this regard, the Equality Act recognises that systems of oppression are maintained by accruing certain privileges and opportunities to some groups whilst concomitantly imposing certain burdens or disadvantages on others. Substantive equality requires positive measures to be taken to actively redistribute resources and provide benefits to those who have not had the same opportunities in the past.[264]

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[264] *Van Heerden* above n 146 at para 31 where Moseneke J remarked as follows:

> "Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. *However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to*

[230] The High Court erred when it found that because a will is a once-off testamentary instrument it does not qualify as a "system" in terms of section 8 of the Act. I agree with the second judgment that the words "including" at the beginning of section 8 means that it is not a closed list and other forms of gender discrimination are also prohibited. In addition, the applicant is correct that the impugned clauses would also fall foul of section 8(d) which prohibits any practice which impairs the dignity of women or undermines the equality of men and women.

[231] The Equality Act must be interpreted broadly and purposively to give effect to its fundamental objectives which include amongst others "the promotion of equality"; "the value of non-sexism"; and "the prevention of unfair discrimination and the protection of human dignity". The High Court erred when it construed the provisions of the Equality Act so narrowly that the common law principle of freedom of testation was considered out of reach. The clear and obvious purpose of section 8(c) is to abolish and proscribe the continuance of all forms of gender discrimination including in the sphere of inheritance. Its purpose is to address the distributive consequences of unfettered freedom of testation and its impact on achieving gender equality in terms of both the Equality Act and the Constitution.

[232] Having determined that a prima facie case of discrimination has been made, it remains to be considered if the discrimination is "fair" in terms of section 14 of the Equality Act. Section 14(3) outlines the relevant factors to consider:

> "(3) The factors referred to in subsection (2)(b) include the following:
>
> (a) Whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;

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eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."

(c) the position of the complainant in society and whether he or she suffers from *patterns of disadvantage* or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether *the discrimination is systemic* in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
    (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
    (ii) accommodate diversity."

[233] This Court has noted that the fairness enquiry in section 14 is a hybrid test which incorporates elements of the fairness enquiry from *Harksen* whilst also incorporating elements of proportionality that resemble a limitation analysis.[265]

[234] There is no doubt that women are a vulnerable group in society who merit protection. Furthermore, as the first judgment correctly points out women have historically been discriminated against in the context of inheritance. The earlier discussion on the distributive consequences of unfettered freedom of testation furthermore highlights how the plight of women in this regard is *systemic* and that the continued uneven distribution of wealth sustains *patterns of disadvantage* based on gender, sex and related grounds. The impact of the exclusion of women from inheritance merely on account of their gender is indeed egregious.

[265] *Pillay* above n 230 at para 70.

[235] The only "legitimate purpose" which might be advanced in the present case is freedom of testation. To the extent that one conceives of freedom of testation in broad terms, it follows that excluding any category of individuals from inheriting one's assets is a component of that right.

[236] I do not agree with the second judgment that the definition of freedom of testation excludes the right to disinherit individuals in a way that contributes to unfair discrimination. It is important for this Court to acknowledge that there is indeed a clash of competing principles in this case: freedom of testation on the one hand versus substantive equality on the other. In my view, for the reasons enumerated above, there can simply be no contest between the *raison d'etre* (reason for being) of the Constitution, namely the abolition of patriarchy and sexism, and the "right" to freedom of testation.

Ubuntu and gender equality

[237] I will conclude with the importance of how the now constitutionally integrated value and norm of *ubuntu* applies. As outlined above, the facts in this case demonstrate a disregard for the dignity and value of women heirs. This Court has affirmed *ubuntu* as a principle in our law which should inform all forms of adjudication.[266] At the heart of *ubuntu* is the idea that a society based on human dignity must take care of its most vulnerable members and leave no one behind. It emphasises the adage that none of us are free until all of us are free.

[266] For example, in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC), at para 37, Sachs J said:

> "The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, *suffuses the whole constitutional order*. It combines individual rights with a communitarian philosophy. *It is a unifying motif of the Bill of Rights*, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[238] In *Makwanyane*, Langa J (as he was then) described *ubuntu* as a concept that recognises a person's status as a human being entitled to "unconditional respect, dignity, value and acceptance" from the community.[267] The essence of *ubuntu* and human dignity manifests through the recognition of every person in the community, from the infants to the dying because "the life of another person is at least as valuable as one's own".[268]

[239] In *Makwanyane* Mokgoro J stated:

> "In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence . . . While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."[269]

[240] Mohamed J (as he was then) in *Makwanyane* also described the inclusion of *ubuntu* in our constitutional jurisprudence:

> "The need for ubuntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.[270]

[241] Clearly therefore *ubuntu* is tightly integrated into our constitutional jurisprudence bringing to bear its transformative nature on all aspects of our law. This case illustrates this in an important way. Academic writers point out that in relation to *ubuntu*:

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[267] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 224.

[268] Id at para 225.

[269] Id at paras 307-8.

[270] Id at para 263.

> "Efforts to pin it down and to contain it within overly strict boundaries or definitions are misguided. Proper understanding of this concept calls for wisdom and open-mindedness. This does not, however, mean that *ubuntu* has a mercurial nature that changes according to its context. Rather, it is more like humanity in its diversity, and serves to remind us that our diversity should not cover up our humanity, lest we forget."[271]

[242] Although Davis and Klare similarly argue strongly in favour of *ubuntu* as a principle to inform the development of the common law, this too is relevant to the interpretation of the jurisprudence emerging from the Equality Act. They argue as such that *ubuntu* has already transformed the common law principle of property. They note that property rights have never been absolute but always buttressed by social considerations.[272] The authors argue that such "social considerations" now include *ubuntu* as well.[273] As such, the traditional notion of "private property" is slowly morphing into a constitutionally recalibrated concept of "socially engaged property".[274]

[243] In the context of freedom of testation, *ubuntu* means that the Constitution places a high premium on establishing a compassionate society which does not discard the humanity of any of its members. As such, the right to dispose of one's property upon one's death must be balanced against the discriminatory effect it may have by precluding members of society from an adequate share in the wealth and resources of the nation.

Conclusion

[244] Transformative constitutionalism and the obligation to ensure substantive equality means that the first judgment should take this into account in its assessment of freedom of

[271] Himonga et al "Reflections on Judicial Views of *Ubuntu*" (2013) 16 *Potchefstroom Electronic Law Journal* 370 at 374.
[272] Davis and Klare above n 78 at 485-6.
[273] Id.
[274] Id.

testation. While the argument that freedom of testation is closely related to several rights - such as dignity, privacy and property - may have some merit, this approach de- contextualises what freedom of testation really means in a grossly unequal society such as South Africa. The countervailing values of equality and *ubuntu* require this Court to consider the significant distributive consequences that placing a high premium on freedom of testation has meant. Amongst these consequences is the glaring wealth inequality based on the fault lines of race, gender and class that has endured after apartheid. Balancing freedom of testation against equality both as a right and value should mean more than treating women with equal concern and respect. It should mean more than social inclusion and instead move towards systemic justice that seeks to abolish or root out common law rules which simultaneously sustain women's subordination and prop up male privilege.

[245] Lastly, considerations of *ubuntu* imply that the narrow-minded and self-indulgent understanding of freedom of testation should be tempered by considerations of social justice and equity. In this context *ubuntu* means nothing more than the adage that none of us are free until all of us are free when dealing with freedom of testation within the context of gender equality. The rights to privacy and property should not be used as a smokescreen to shield structural inequality from constitutional scrutiny.

[246] It is for these additional reasons that I concur in the order proposed in the second judgment.

For the Applicants	JA van der Merwe SC and M Adhikari instructed by James King and Badenhorst Incorporated
For the First to Third Respondents	HJ De Waal SC and HL Du Toit instructed by Coetzee and Van Der Bergh