IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **9581 /2015**

In the matter between:

DULCIE HELENA HARPER	First Applicant
DAVID LOUIS AYSCOUGH WILKINSON	Second Applicant
AMANDA BRIDGET TRUTER	Third Applicant

V

GEORGINA ELIZABETH CRAWFORD N.O.	First Respondent
PETER DAVIS N.O.	Second Respondent
ANNE-MARIE VIVIENNE STEVENS	Third Respondent
GEORGINA ELIZABETH CRAWFORD	Fourth Respondent
GERALDINE MARLAND	Fifth Respondent
ANTHONY LEWIN	Sixth Respondent
MASTER OF THE HIGH COURT	Seventh Respondent
RUTH JESSICA DRUIFF	Eighth Respondent

JED MICHAEL DRUIFF Ninth Respondent

Coram: ***Dlodlo J***

Date of Hearing: **16 May 2017**

Date of Judgment: **30 June 2017**

JUDGMENT

DLODLO, J

INTRODUCTION

[1] The applicants in this matter seek an order (a) declaring that words '*children', 'descendants', 'issue'* and '*legal descendants'* used in the Trust Deed include the second and third applicants; alternatively (b) that in terms of Section 13 of the Trust Property Control Act, 57 of 1988, the Trust Deed be amended, declaring the words *'children'*, '*descendants'*, *'issue'* and *'legal descendants'* used in the Trust Deed to read second and third applicants. The application is opposed by all respondents save the Master.

[2] On 28 January 1953 the late Louis John Druiff ('the *Donor*') executed a Notarial Deed of Trust. But on 23 May 1953 the Donor executed a Notarial Deed of Amendment of Trust which varied only clause 5 of the Notarial Deed of Trust. For the sake of convenience the Notarial Deed of Trust and the Amended Deed of Trust will be referred to collectively as the '*Trust Deed'*. Clause 4 of the Trust Deed provided that:

> *'The Trustee or Trustees shall stand possessed of the Trust Fund and shall invest and re-invest the capital of the Trust Fund, the nett revenue and income derived therefrom, or part thereof, shall either be allowed to accumulate, and the amount so accumulated added to the Capital of the Trust Fund, or the whole of the nett income and revenue, or part thereof, shall be applied for the benefit of the following persons, who may be alive at the time'.*

The income and capital beneficiaries of the Trust were the Donor's four children, namely: (a) Gladys Elizabeth Clark (born Druiff); (b) Nina Dorothy Lewin (born Druiff); (c) Lester Philip Druiff; and (d) Dulcie Helena Wilkinson (born Druiff), the First Applicant; and (e) Any child or children of the said Gladys Elizabeth Clark, Nina Dorothy Lewin, Lester Philip Druiff and Dulcie Helena Wilkinson. Clause 4B of the Trust Deed provided that upon the death of the Donor the nett revenue and income shall be divided equally between and paid to the said four children of the Donor. If any child has died at such time, his or her share shall devolve upon his or her descendants *per stirpes*.

[3] The amended Clause 5 (dealing with the life of the Trust) read as follows:

"If the whole of the capital has not been applied for the benefit of the beneficiaries, as provided in paragraph 4 hereof, the Trust shall remain in force until the death of the said four children of the donor, namely, as each of the said four children dies his or her one-fourth share of the capital of the Trust shall be paid to his or her descendants per stirpes*, in equal shares. If at such time any of the descendants, who is entitled to receive a share of the capital, is under the age of 28 years, such share of the capital shall continue to be held in trust and the revenue thereof paid to such descendant or beneficiary, or to his or her guardian until he or she attains the age of 28 years, when the capital shall be paid to him or her. If any of the said four children of the Donor dies without leaving issue, his or her one-fourth share shall devolve upon the remaining children and shall form portion of the capital of the Trust and be subject to the terms and conditions of the Trust."*

The original clause 5 provided for the period of the Trust to be one year after the death of the founder in the event that the whole of the capital had not been applied for the benefit of the beneficiaries. Clause 6 dealt with the termination of the Trust and reads as follows:

'At the expiration of the Trust period as hereinbefore provided the Trustees shall realise the capital, or balance of capital, and divide the amount so realised equally between the said four children of the said Louis John Druiff. In the event of any child dying prior to the termination of the Trust, his or her share shall devolve upon his or her legal descendants per stirpes*. If at such time there are no children alive and no legal descendants of such children, then the Trustees shall divide the capital between such persons as may be nominated as the heirs in the will of the Donor, or if the Donor has failed to make a will between the next-of-kin of the said Donor.'*

For sake of completeness the Donor's nominated heirs in his Last Will and Testament *('the will')* were Gladys Elizabeth Clark (born Druiff); Nina Dorothy Lewin (born Druiff); Dulcie Helena Wilkinson (born Druiff) and Lester Philip Druiff. Clause 4 of the will provides further that *'(i)n the event of any of my said children predeceasing me, his or her share shall devolve upon his or her descendants* per stirpes*."*

APPLICANTS' CASE AND A BRIEF COMMENTARY THERETO.

[4] The first applicant is reportedly the only surviving child of the Donor. Accordingly, her one fourth share of the capital of the Trust and its income therefrom remains to be distributed upon her death in terms of the amended clause 5 of the Trust Deed. The first applicant has no biological children. At the time the Trust Deed was executed the first applicant had fallen pregnant but she suffered a miscarriage on more than one occasion. The Donor was aware of the first applicant's difficulties in carrying a pregnancy to term. Apparently the Donor and the first applicant discussed adoption as an option but the Donor informed her not to rush into anything as she was still young. She was 30 years old at the time. In 1955 and 1957 (subsequent to the death of the Donor) the first applicant lawfully adopted the second and third applicants respectively.

[5] The remaining children of the Donor (the first applicant's siblings) were able to bear their own children. The family tree detailing the Donor's children and their children (i.e. the grandchildren of the Donor) is annexed to the founding papers. The applicants seek an order that upon the first applicant's death her one-fourth share will devolve to her adoptive children (the second and third applicants). The applicants base the relief sought on the following grounds: (a) It is not evident from the Trust Deed that the Donor intended to exclude adopted children from benefiting under the Trust. (b) The Trust Deed should be interpreted to include

rather than exclude adopted children which is in line with the spirit, purport and object of the Bill of Rights particularly Section 9 of the Constitution Act No. 108 of 1996 and public policy. (c) The Donor did not definitely know that the first applicant was unable to bear children at the time of execution of the Trust Deed. It is contended on behalf of the applicants that the provisions relating to identification of beneficiaries brought about consequences which the Donor did not contemplate or foresee. On those basis it argued in the alternative that the Trust Deed stands to be varied in terms of Section 13 of the Trust Property Control Act.

[6] The respondents' opposition to this application is essentially premised on the following grounds: (a) The *locus standi* of the first applicant to launch this application. (b) Even if the Donor was aware that adoption was an option for the first applicant (not admitted by the respondents) this imputed knowledge does not justify the inference that the Donor intended adopted children to be included as beneficiaries of the Trust. (c) The Donor did not take steps to make express provision for the inclusion of adopted children and the Donor enjoyed legal assistance in the preparation and execution of the Trust Deed and the Amendment. (d) The applicants' failure to recognise the sanctity of ownership of property, privacy and dignity and that the Donor had a right to dispose of such property as he chose.

The practical effect and consequence of excluding the second and third applicants as beneficiaries, entailing that the first applicant's one-fourth share will devolve on the other grandchildren and great-grandchildren of the Donor (the respondents) is of cause common cause between the parties in this litigation. Therefore, the issues for determination are (a) Whether or not the second and third applicants should be considered '*children',* '*descendants',* '*issue'* or '*legal descendants* for purposes of the Trust Deed; or (b) Whether, upon the first applicant's death, her one-fourth share is to be dealt with as if she had died childless.

[7] The respondents contend that the first applicant does not have *locus standi* to bring this application as she is only an income beneficiary of the Trust. Upon the first applicant's death her one-fourth share of the capital shall be paid to her descendants in equal shares. The second and third applicants (the potential capital beneficiaries are parties to the application. There is no complaint regarding their standing in these proceedings. Maybe one may proceed to put to rest the *locus standi* complaint. This complaint can be described as frivolous in that it does not take the matter any further. This, I say, because the second and third applicants are properly before this court. Even if it were to be held that the first applicant lacks *locus standi*, that will not affect the legitimacy and/or the validity of these proceedings. I point out that obviously the first applicant has a substantial interest in the outcome of this application. That alone would militate

against the argument of lack of locus standi. The second and third applicants are the first applicant's adopted children whom she desires to be made party to the Trust Deed beneficiaries.

DISCUSSION - DEVELOPMENT OF THE LAW

(A) PREVIOUS POSITION

[8] It must be pointed out that at the time the Trust Deed (including the amendment thereto) was executed the Children's Act of 1937 was in force. Section 71 (2) of that legislation provided:

"Subject to the provisions of Section 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption –

(a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument prior to the date of the Order of Adoption (whether the instrument takes effect inter vivos *or* mortis causa*), unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child;"* (the *"deeming provision"*).

The 1937 Children's Act was repealed by the Children's Act of 1960. The provisions of Section 74 (2) of the latter Act are (for practical purposes) in terms, identical to those in Section 72 (1) of the 1937 Act, which are otherwise couched in identical terms to those of the earlier enactments, omits the provisos, and accordingly, the statutory limitations imposed thereby.

[9] In 1991 in the matter of **Cohen N.O v Roetz N.O and Others** 1992 (1) SA 629 (AD), the then Appellate Division dealt with a set of facts similar to this application. The testators executed a mutual will in 1947 in terms of which they bequeathed certain properties to their three (3) children subject to the following conditions: (a) If any of the said children predeceased the testators, without leaving descendants, the testators surviving children or grandchildren would succeed in equal shares *per stirpes* to such deceased child's share. (b) The respective portions of the said farms would devolve on the eldest child of each of the three children after their death. The testatrix died in 1948 and the testator in 1973. The one-third share of the farm which devolved to the testators' son, Andries Johan Adam Heyns *(the "deceased"),* was transferred to him in 1949. The second respondent (born in 1956), was adopted by the deceased on 1 March 1967 under the provisions of the Children's Act 33 of 1960. I hasten to mention that a distinguishing factor in this case is that the testator was alive at the time the second respondent was adopted. The third respondent was born to the deceased and his wife on 6 May 1967 and was the eldest child born of the marriage. In determining whether the second respondent was considered the eldest child for purposes of the will the court held: (a) There were strong indicators that the testators only intended to benefit blood relations, such as reference to the words *"descendant"* in the will. The term *"eldest child" per se* suggests a natural child. The court relied on the golden rule for the interpretation of testaments which is to ascertain the wishes of the testator from the language used. In endeavouring to

do so the will must be read in light of the circumstances prevailing at the time it was made. (b) The will was drawn up by a professional person, probably an attorney, at the time when the provisions of Section 71(2) of the Children's Act, 1937 were operative. If the testators intended the property to devolve to an adopted child, they would presumably have been advised to include same in express terms. (c) That relying on the *ratio decidendi* in ***Boswell en Andere v Van Tonder*** the legislature did not intend to interfere with the freedom of the testator to dispose of his property as he wished. Had the legislature intended to make such a rule one would have expected an express provision to that effect. Although the deeming provision created a legal fiction whereby an adopted child was deemed in law to be a legitimate child it could be displaced if by applying the ordinary rules of interpretation a contrary testamentary intention appeared.

The court held that Section 20 (2) of the Child Care Act 74 of 1983 was to be interpreted in a manner consonant with the interpretation of the deeming provision in Section 74 (2) of the Children's Act, 1960. The court found that it was clear applying the normal rules of interpretation that the testators did not intend to include an adopted child within the meaning of '*eldest child*'.

(B) THE CONSITUTIONAL DISPENSATION AND ITS IMPACT ON RECENT CASE LAW

[10] Mr Beyleveld contended that although the decision in **Cohen** appears to pose a difficulty to the present application, there is a number of developments that have taken place in our law (subsequent to the decision), which indicate an overall shift in public policy. Referring to the decision in **Minister of Education and another v Syfrets Trust Ltd N.O. (in its capacity as trustee for the time being of the Scarbrow Bursary Fund Testamentary Trust and Another** [2006] 3 ALL SA 373 (C) para [24], Mr Beyleveld submitted that it is well accepted that public policy is not a static concept as it evolves over time. He correctly contended that public policy has been shaped since 1994 by the values incorporated into the Constitutions of 1993 and 1996. See in this regard **Ex Parte BOE Trust Ltd** 2009 (6) SA 470 (SCA) para [11]. It is time that courts are enjoined to interpret legal instruments, such as a Trust Deed and a will, in line with the spirit, purport and object of the Bill of Rights. Section 8(3) of the Constitution provides that when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

'(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).'

Indeed the courts have recognised that it was duty-bound to develop the common law so that it does not deviate from the spirit, purport and object of the Bill of Rights. See **Nkala v Harmony Gold Mining Co Ltd** 2016 (5) SA 240 (GJ) para [199].

[11] In **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC), the Constitutional Court considered the impact of the Constitution on contractual law and held as follows:

'I accept the contention that a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue. The refashioning of the common law in accordance with fundamental constitutional values is mandated by Section 39(2) of the Constitution. The common law, like all other laws, must be viewed through the prism of the objective normative system set by the Constitution and, where it is found to fall short, must be reshaped in order to conform with our supreme law.'

According to MJ De Waal and MC Schoeman-Malan (**Law of Succession**, 5th ed), succession and freedom of testation cannot be separated from the fundamental rights of the individual that are guaranteed in the Constitution. Courts will consider conditions attached to benefits which offend the rights afforded in terms of Section 9 (3) of the Constitution. In **Minister of Education and another v Syfrets Trust Ltd N.O** *supra,* the court dealt with a charitable trust and bursary being restricted to persons of '*European descent'*, not of Jewish descent and not female. An argument was presented that the court was empowered to delete the discriminatory provisions in terms of Section 13 of the Trust Property Control Act; the common law and the direct application of the

provisions of the Constitution. The court remarked at para 12 of the judgment as follows:

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

Perhaps one should set out the provisions of Section 9 of the Constitution. The latter section provides as follows:

'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

…

(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.'

[12] The three grounds for the application were found to all be based on the provisions of Section 9 of the Constitution and accordingly did not fall into impermeable compartments. The court acknowledged the imperative that all statutes must now be *"interpreted through the prism of the Bill of Rights"* and that

the *"normative influence of the Constitution must be felt through the common law".* Although the court found that the Applicant had made out a compelling case for relief on each of the three grounds, Griesel J dealt with the application on the basis of the existing principles of the common law, having regard to the spirit, purport and objects of the Bill of Rights. The court considered the *"black-letter rule"* which is the principle of freedom of testation and remarked that South African law had taken the principle further than any other Western legal system. On the aspect of public policy, the court found that like its synonyms, *boni mores*, public interest and the general sense of justice changes over time as social conditions evolve and basic freedoms develop. It is axiomatic that the public policy of 1920 does not necessarily correspond in all respects with public policy of today and it is the public policy of today, not of 1920, that is decisive. Section 9(4) of the Constitution applies horizontally and provides that *"no person"* may discriminate unfairly against anyone which brings all natural and juristic persons within the ambit of the Section. The court held that the limiting condition of *"European descent"* constitutes indirect discrimination based on race or colour. The exclusion of Jews and women constitutes direct discrimination on the grounds of gender and religion. Such discrimination, based on some of the prohibited grounds in Section 9(3) of the Constitution, is presumed unfair *"unless it is established that the discrimination is fair."* In applying the Constitutional Court's guide to fairness the court found the presumption of unfairness to be fortified in the circumstances. In a final analysis the court weighed up the

competing constitutional values, namely, the right to equality and freedom from unfair discrimination and the principle of private ownership together with the corollaries of private succession and freedom of testation, the black-letter rule, and found that the right to equality outweighed the other but emphasised that its finding did not mean that freedom of testation was being negated or ignored but instead was enforcing a limitation on the testator's freedom of testation that has existed since time immemorial. In arriving at its finding the Learned Judge relied on the popular works of: (a) De Waal in the Bill of Rights Compendium who suggests '*that the right to freedom of testation should yield to the other rights mentioned'; and (b)* Cheadle Davis & Haysom stating that '*in the ongoing development of liberal constitutional theory, the right to property has relinquished its status as principal bulwark against the abuse of power in favour of the right to equality and the right to dignity.'* See also **South African Constitutional Law-the Bill of Rights** (2nd ed, 2005 loose leaf updates).

[13] Illustrating a further shift in public policy, Mr Beyleveld also referred this court to **In re Heydenrych Testamentary Trust and Others** 2012 (4) SA 103 (WCC) in which this court considered the implications of Section 13 of the Trust Property Control Act *(the "Act")* and whether the court was empowered to delete or vary provisions in a trust instrument that discriminate directly on the ground of race and colour. The court decided the application based on Section 13 of the Act and not on common law grounds as in the **Syfrets** case. The power of a court

afforded in terms of Section 13 of the Act is wider than the common law ground to void a bequest which is contrary to public policy. See **Ex Parte BOE Trust Ltd** 2009 (6) SA 470 (SCA) para 11 and 19. It is trite that a court has no general power to vary the terms of wills, contracts or other trust instruments, subject to certain exceptions in terms of the common law, direct application of the Constitution and Section 13 of the Act. Section 13 provides:

'*If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of the Trust did not contemplate or foresee and which –*

(a) Hampers the achievement of the objects of the founder; or

(b) Prejudices the interests of beneficiaries; or

(c) Is in conflict with public interest,

The court may, on application of the Trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary such provision or make in respect thereof any order which the court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

[14] If a provision in a trust infringes a constitutionally protected right to equality or freedom, the offending provision may be deleted or varied by the court. Of course, the principle that the courts will refuse to give effect to a testator's directions which are contrary to public policy is a well-recognised common law ground. The right to equality is a core value of our Constitution. The enactment of

the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is indicative of public policy and the community's legal convictions. See **Heydenrych** case *supra.* The court held that the general public would find such a scholarship unreasonable and/or offensive and the limiting provisions, relating to gender, were unfairly discriminatory and unforeseen by the testator. Accordingly, it was found that the trust unfairly discriminated on the grounds of gender and race and were in conflict with Section 9(4) of the Constitution and public interest. The court held that it was satisfied that provisions of all the trusts brought about consequences which the founders did not contemplate or foresee.

(C) THE CURRENT (STATUTORY) POSITION OF ADOPTED CHILDREN

[15] The current statutory position of adopted children is certainly indicative of the legislature and the court's willingness to place adopted children on the same footing as biological children. The Children's Act 38 of 2005 presently regulates the rights of children including that of adopted children. The aim of adoption law is to provide a permanent, secure and healthy family life for children whose biological parents have either died or are unable to provide such children with care that is required. It is common cause that prior to the current Children's Act, adoption law was contained in chapter 4 of the Child Care Act 74 of 1983. It is further common knowledge that the latter Act did not entirely conform to the constitutional imperatives and several provisions thereof were declared

unconstitutional. The Child Care Act was ultimately repealed and replaced with the current Children's Act. The current Act is said to incorporate the constitutionally based decisions that have been laid down by the courts and also infuses a democratic and child-centred ethos in South African adoption law. See CJ Davel & AM Skelton, **Commentary on the Children's Act**, Revision Service 7, 2015. Section 242(3) of the Children's Act provides that '*an adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adoptive child.'*

[16] The legislature, by introducing Section 242(3) of the Children's Act (which equalises adoptive children with natural children) has been mindful of the Constitutional imperative placed on it. Mr Beyleveld contended that on a purposive interpretation the relevant Section should be applied retrospectively, namely to the provisions of the Trust Deed notwithstanding the common law presumption against retrospectivity. He submitted that the court should be mindful that any finding which brings about the result of not acknowledging the equal footing of adoptive children will (in present terms) fall foul of public policy and the equality clause in the Constitution. I undertake to deal fully later in this judgment with Mr Beyleveld's submissions and contentions.

[17] It is true that at common law intestate inheritance is based on blood relationship. The legislature has of course, in keeping with its constitutional imperative,

recognised the right of adopted children and altered the law of intestate succession. In terms of Section 1(4)(e) and 1(5) of the Intestate Succession Act 81 of 1987:

'1(4) In the application of this Section –

…

(d) an adopted child shall be deemed -

(i) to be a descendant of his adoptive parent or parents;

(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of adoption, married to the adoptive parent of the child.

(5) If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.'

Of course there are no problems in applying these provisions in the context of the law of intestate succession as the adopted child is regarded for all purposes as the natural child of his or her adoptive parent. However, an important exception is found in Section 1 (4) (e) (ii) of the Intestate Succession Act. In terms of this the links between natural parent and the adoptive child are not broken if the natural parent is also the adoptive parent or was married to the adoptive parent at the time of the adoption. An adoptive child can be the testate beneficiary of his or her adoptive parents or natural parents or anyone else if he is included in the will concerned as a beneficiary.

[18] Section 2D of the Wills Act 7 of 1953 introduced a rule of interpretation which was aimed at addressing uncertainties arising in respect of *inter alia* adopted children. 2D1 reads:

'2D(1) In the interpretation of a will, unless the context otherwise indicates –

(a) *An adoptive child shall be regarded as being born from his adoptive parent or parents and, in determining his relationship to the testator or another person for purposes of a will, as the child of his adoptive parent or parents and not as the child of his natural parent or parents or any previous adoptive parent or parents, except in the case of a natural parent who is also the adoptive parent of the child or who was married to the adoptive parent of the child concerned at the time of the adoption;'*

The above Section creates the presumption that in interpreting a will an adopted child is considered the child of the adoptive parent and not the child of the natural parent, unless another intention is evident from the context of the will. Section 2D was added to the Wills Act in terms of Section 4 of the Law of Succession Amendment Act 43 of 1992. These provisions are not applicable to a will of a testator who died before the commencement of the 1992 Act (1 October 1992). Mr Beyleveld contended that although it is conceded that the presumption in the Wills Act is not applicable in the present instance as the Donor died prior to 1 October 1992 and the written instrument is a Trust Deed and not a will, the court should have due regard to the status of adopted children in succession law because this is an aspect which is indicative of present public policy. In his

contention, as the potential benefit will only accrue upon the death of the first applicant (who is still alive), and not the Donor, this court is faced with the enquiry in present day where adopted children have been equalised with biological children and where the use of the words such as '*descendants', 'child' 'grandchild'* no longer indicate an intention to exclude an adopted child. This remains a persuasive argument indeed. But as promised I shall deal with such submissions later in this judgment.

APPLICATION OF LAW

[19] In terms of the wording of the Trust Deed a beneficiary is described as the Donor's *'children'*, and their *'children'*, '*descendants', 'issue'* and *'legal descendant'*. There is no provision which is expressly made for adopted children. In Mr Beyleveld's contention in the event that the terms of the Trust Deed are interpreted only to include the Donor's biological descendants in accordance with the **Cohen** case, the exclusion of the second and third applicants will amount to unfair discrimination falling foul of Section 9 (4) of the Constitution. Mr Beyleveld argued that in determining whether there is a violation of the equality clause, the principles enunciated in **Harken v Lane** 1998 (1) SA 300 (CC) and he detailed the applicants' argument as follows:

(a) *Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate*

government purpose? If it does not, then there is a violation of Section 9(1).

Providing an answer to the above enquiry, Mr Beyleveld reasoned as follows:

(i) There is indeed a differentiation between biological children and adopted children. (ii) The differentiation does not bear a rational connection to a legitimate government purpose as impugning provisions dealing with adopted children have been remedied by legislative intervention. (iii) It therefore cannot be said that the status of adopted children, (applicable at the time the Donor died) has a rational or legitimate purpose, consideration being had to the constitutional jurisprudence.

(b) Does the discrimination amount to unfair discrimination, which involves a two-stage analysis? Firstly does the differentiation amount to *'discrimination'.* If it is on specified ground, the discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(i) According to Mr Beyleveld, the second and third applicants are differentiated from the respondents solely on them having been adopted by the first applicant. (ii) In his contention, this differentiation is based on a

listed ground contained in Section 9 (3) of the Constitution, namely, birth. He pointed out that in accordance with Section 9 (5) of the Constitution, the differentiation is deemed unfair discrimination. (iii) The submission was made that the attribute and/or characteristic of adoption is beyond the second and third applicants' control. Of course bearing mind that the aim of adoption law (to provide a permanent, secure and healthy family life for children whose biological parents have died or are unable to provide them with the care that they require), it is evident that a differentiation based solely on this ground would impair their fundamental dignity as human beings. See Section 10 of the Constitution: Everyone has inherent dignity and the right to have their dignity respected and protected. That the right to dignity is intricately linked with other human rights is apparent from **S v Makwanyane** 1995 (3) SA 391 (CC) at para [144] which, *inter alia*, reads as follows:

'Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in …[the Bill of Rights].

(c) If the differentiation amounts to *'discrimination'*, does it amount to *'unfair discrimination"*?

In answering the above postulated enquiry, Mr Beyleveld submitted that the discrimination is deemed unfair in accordance with Section 9 (5) of the

Constitution as the second and third applicants have been discriminated against on the basis of their birth. Mr Beyleveld referred me to **AB v Minister of Social Development** (Centre for child Law as amicus curiae) [2015] 4 ALL SA 24 (GP) where the court accepted that infertility has the potential to impair human dignity reasoning as follows at para [74]:

'Infertility is often painful and complicated emotional experience for both sexes and across cultures; it has a profoundly negative effect on some of the core elements of a person's being, such as self-worth, sense of identity and autonomy.'

In Mr Beyleveld's submission it is only if the application is granted that it will bring the provisions of the Trust Deed in line with the purposes sought to be achieved by the Donor. He contended that if the application is unsuccessful and the second and third applicants will not receive their mother's (the first applicant's) one fourth share of the capital and interest thereon. He was at pains to point out that the benefit will devolve to the first applicant's nephews and nieces (the respondents) for no ground other than they are the biological grandchildren and great-grandchildren of the Donor.

PUBLIC POLICY AND DEVELOPMENT OF THE COMMON LAW

[20] I agree that public policy is not static but that it is ever changing. Section 8 (3) of the Constitution enjoins the courts to develop the common law and interpret

legislation in line with public policy. In **Blower v Van Noorden** 1909 TS 890 at 905 the court articulated the principle as follows:

'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important and radical that they should be left to the Legislature.'

It is of importance to mention that this court is called upon to engage in policy-making and to consider public policy today and not at the time of execution of execution of the Trust Deed or the death of the Donor which is more than 60 years later. I accept that (as I must) currently there is no distinction between biological children and adopted children. Section 242 (3) of the Children's Act equalised adopted children with natural children. Indeed legislation has been amended in order to bring its provisions in line with the spirit and object of the Bill of Rights which recognises the centrality of human dignity in our Constitution. See **Carmichele v Minister of Security** 2001 (4) SA 938 (CC) para [56]. In Mr Beyleveld's contention any interpretation placed on the Trust Deed which is not in line with the relief sought in the present application will not be consistent with current public policy.

SECTION 13 OF THE TRUST PROPERTY CONTROL ACT

[21] According to Cameron, De Waal and Wunch, Honorès **South African Law of Trusts** (5th ed) page 315, the criteria under Section 13 is both subjective and

objective and must be satisfied before the court will intervene. The first applicant, at the time of the execution of the Trust and at the Donor's death, was still attempting to bear her own children. The second and third applicants were adopted after the death of the Donor. Mr Beyleveld opined that had the adoption taken place prior to the Donor's death, the Donor would have had an opportunity to amend the Trust Deed and will in order to make provision for their inclusion of the second and third applicants. This, however, cannot be said with certainty. I say so because the Donor was quite confident that the first applicant would be able to carry a pregnancy to term. He even advised the first applicant not to rush into adoption as she was still young. He was very much alive to the option of adoption. Mr Beyleveld contended that given the apparent close relationship between the Donor and the first applicant, there is no reason to believe that he would have wanted to exclude the second and third applicants as beneficiaries of the Trust Deed. In Mr Beyleveld's submission the Donor would have intended to benefit them equally. Mr Beyleveld's last submission in this regard was that the object of the Trust is clearly being frustrated by the archaic legal principles which are (on the respondents' version) applicable to the Trust Deed. In his submission, these principles are contrary to public policy, public interest and the provisions of the Constitution.

RESPONSE TO APPLICANTS' CONTENTION

[22] I mention first and foremost that the relief sought by the applicants is indeed far-reaching. In order to accede to the applicants' request, this court will necessarily be required to intervene in the right of an owner to dispose of his property as he wishes in his will or Trust Deed to a greater extent than any South African Court has previously done. Notably, in earlier cases that served before our courts and where courts have intervened to eliminate discriminatory provisions in the Deeds of charitable educational trust of a public nature, the relief granted did no more than widen the pool of prospective applicants for the bursaries. The relief so granted did not take away benefits conferred on particular beneficiaries nor confer those benefits on other persons. The Trust Deed under discussion in this matter is a private Trust Deed. It has no provisions which affect the public. It benefits no members of the public nor does it benefit public bodies. It is apparent that this court is asked to carry out the balancing exercise between the Donor's constitutionally protected rights to property, dignity and privacy on one hand and the applicants' assertion of their protected rights to equality and dignity on the other hand.

[23] At the risk of repeating what has already been mentioned, the applicant avers that she was already experiencing difficulties in carrying a child to term and that she mentioned to the Donor that she was considering adoption. She further alleges that the Donor's response was to say that she was still young, that she should not

rush into anything and she should want to see what the future holds. She states categorically:

'The deceased therefore was aware at the time of the execution of the trust deed, that adoption was an option.'

Thus the Donor was armed with the knowledge that the first applicant might not be able to bear her own children at the time he formulated the Trust Deed and the amendment thereto. He made express provision in clause 6 for the eventuality that one or more of his children might die without issue.

[24] I was referred to **Bothma-Batho Transport v S Bothma en Seun Transport** 2014 (2) SA 494 (SCA) regarding the approach of our courts to the interpretation of documents. In the latter case the Supreme Court of Appeal guidingly stated the following in paragraph [12]:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise'.

Essentially, in interpreting a Trust Deed, the point of departure is the grammatical or ordinary meaning of the words used. Those words must be read within the context of the Trust Deed as a whole. In **Moosa v Jhavery** 1958 (4) SA 165 (N) at 169 D-F the then Natal bench held that the trust speaks from the time of its

execution and that it must be interpreted as at that time. The court held further that:

'It is the settlor's intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention.'

The above remains the legal position when it comes to testamentary trusts despite the passage of time. Words and phrases used by the testator (the Donor in this case) must be given the meaning which they bore at the time of execution. It is of cardinal importance that in **Cohen NO and Others** *supra* the then Appellate Division was called upon to decide whether a reference in a will executed in 1947 to the *'eldest child'* included an adopted child. The court had regard to all the terms of the will and held as follows (per Smallberger JA), at 639B-640I:

"*There are in my view strong indications in the will that the testators only intended to benefit blood relations. The will commences with a bequest of the properties to the testators' three named children. One must assume, in the absence of any evidence or indications to the contrary, that all three were natural children. Special condition (iii) is a* si sine liberis decesserit *clause which provides for a gift over to the testators' surviving children or grandchildren 'in the event of any of our said children predeceasing us or dying subsequently, without leaving* descendants*' (my emphasis). There is much to be said for the view that the ordinary meaning of the word 'child' or 'grandchild' does not go beyond the testators' own child (his 'bloedkind') or an own child of such child (Boswell en Andere v Van Tonder 1975(3) SA 29(A) at 35 in fine; Corbett, Hahlo, Hofmeyr and Kahn* The Law of Succession in South Africa *at 551-3). If that were so, an adopted child would, in the absence of clear indications to the contrary, be excluded. This is the position in English Law where the word 'child' has been held not normally to include adopted children (Re Marshall (deceased); Barclays Bank Limited v Marshall and Others [1957] 3 All ER 172 (CA) at 178H; Re Valentine's Settlement; Valentine and Others v*

Valentine and Others [1965] 2 All ER 226 (CA) at 229E; Re Brinkley's Will Trusts; Westminster Bank Limited v Brinkley and Another [1967] 3 All ER 805 (CH) at 808E). It is, however, not necessary to reach a firm conclusion on this point. What is significant is the use by the testators of the word "descendants".

West's Legal Thesaurus / Dictionary defines a "descendant" as 'those persons who are in the bloodline of an ancestor, eg children, grandchildren, great-grandchildren (the descendants shared equally in a will)'.

***Black's Law Dictionary** says of "descendant": 'those persons who are in the bloodstream of the ancestor. The term means those descended from another, persons who proceed from a body of another such as a child or grandchild, to the remotest degree …'.*

***The Oxford English Dictionary** 2nd Ed Vol (iv) gives as one of the meanings of "descendant": 'one who descends or is descended from an ancestor; issue, offspring (in any degree near or remote)', and descend means 'to be derived in the way of generations; to come of, spring from (an ancestor or ancestral stock)'.*

***The word** "descendant", in its normal or usual meaning, therefore includes only blood relations in the descending line and excludes adopted children. **The same is true of its Afrikaans equivalent** "afstammeling" (Boswell en Andere v Van Tonder (supra, at 35F – H)). **There is nothing to indicate that the testators** intended to use the word other than in its normal sense. The references in special condition (iii) to the testators' 'said children' or 'our surviving children' are clearly to those children named in the will (i.e. the testators' own children). Having regard to the meaning of the word 'descendant', the reference to 'grandchildren' can, in the context, only be to grandchildren descended by blood from the testators. The gift over provided for in special condition (iii) was accordingly only intended to be to a blood relation….*

… A further consideration is this. It seems fairly apparent from the terms of the will that it was drawn up by a professional person, probably an attorney. At the time the provisions of Section 71(2) of the 1937 Act were operative. The effect of the first proviso thereto

was clear. No child adopted after the execution of an instrument could inherit money devolving on any child of his adoptive parents under such 'instrument' unless it 'clearly conveys the intention that the property shall devolve upon the adopted child'. If the testators had intended to benefit adopted children they would presumably have been advised of the need to include such class of children in express terms in the will (cf Kinloch N.O. and Another v Kinloch 1982 (1) SA 679 (A) at 693G – H). Their omission to do so is indicative of the fact that they had no such intention. All the above considerations lead inexorably to the conclusion (as a matter of pure interpretation) that by the use of the words 'eldest child' the testators intended to benefit a natural child only, i.e. someone in the same bloodline as the testators.'

The Supreme Court of Appeal also considered the legislative provisions set out in para 25 and 26 above in the light of the decision of the same court in **Boswell en Andere v Van Tonder** 1975 (3) SA 29 (A) and proceeded to summarise the findings of the court in the latter case as follows:

'(1) the legislature did not intend to interfere with the freedom of a testator to dispose of his property as he wishes (at 40A);

(2) the deeming provision did not embody a rule of interpretation applicable to all testamentary instruments, namely a rule that words such as "children" or "descendants" appearing in such instruments were not to bear their ordinary, everyday meaning but a wider meaning which included an adopted child (at 38D-E, 39G –H);

(3) had the legislature intended to make such a rule one would have expected an express provision to that effect, in terms at least similar to those of Section 13(2) of the English Adoption Act, 1950 (at 38E-F);

(4) in contrast to the relevant provisions of the English Adoption Act, Section 74 (2) did no more than describe the consequences of an adoption (38G-H);

(5) the deeming provision created a legal fiction whereby an adopted child was for all purposes whatsoever deemed in law to be a legitimate child ("bloedkind") (at 36E-38H); and

(6) the presumption in favour of the operation of such a fiction could be displaced if by applying the ordinary rules of interpretation a contrary testamentary intention appeared (at 40F-G).'

[25] The court held that Section 20 (2) of the 1983 Act was to be interpreted in a manner consonant with the interpretation of the deeming provision contained in Section 74 (2) of the 1960 Act in the **Van Tonder** case. Undoubtedly, the approach of the Appellate Division summarised above would apply equally to an interpretation of Section 71 (2) of the 1937 Act. Even though the Cohen decision did not deal with the meaning of the word *'issue'*, the Oxford Dictionary, (9th ed), gives as one of the meanings of issue: *'children, progeny without the male issue'.* The same dictionary defines '*progeny'* as (a) the offspring of a person or other organism; (b) a descendant or descendants; (c) an outcome or issue. Thus the ordinary meaning of the word *'issue'* also denotes blood descendants. Importantly, the similarity to the language used in the Trust Deed in the present matter is clear. Whether the Donor intended to include adopted children, in my view, falls to be answered by applying the ordinary rules of interpretation to the Trust Deed as amended. Because the Trust Deed falls to be interpreted in accordance with the law at the time of its execution, if the contrary intention appears from the Trust Deed, the operation of the legal fiction will be displaced and the adopted children will be excluded.

[26] In the light of the content of clause 5 of the Trust Deed it is necessary to determine whether the adopted children of the first applicant are considered to be descendants or her issue for the purposes of that particular clause. The **Cohen** decision is binding on this court. In the light of the factual similarities to the **Cohen** decision it would be prudent (in any event) that a similar finding should follow for these reasons: (a) the initial beneficiaries of the Trust Deed were the Donor's own biological children; (b) the words *'descendants'*, *'children'* and 'issue' are used repeatedly their meaning being as described above; (c) the Donor had the professional assistance of an attorney and notary when executing both Trust Deed and Amendment thereto. In the light of the statutory provisions then in effect, the Donor might well be supposed to have been advised of the effect of the statutory provisions and of the need to include adopted children in express terms in the Trust Deed. In any event the Donor was already aware that the first applicant was having difficulty carrying a child to term. His subsequent omission expressly to include adopted children should, in my view, be held to indicate his intention not to include adopted children. Accordingly, the Trust Deed stands to be interpreted in accordance with authorities canvassed in para 24-26 above. It is pertinent that the Trust Deed under discussion has the effect that only the biological descendants of the Donor's children are capital beneficiaries of the Trust.

[27] Before a response to the role of the constitutional rights in the present case (as postulated by Mr Beyleveld), one must, perhaps, first and foremost briefly consider the ambit of ownership. The authors of Silberberg and Schoeman, **The Law of Property** (5th ed) describe ownership as '*the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations in public and private law.'*

The above formulation is clearly influenced by the definitions of Bartolous De Saxoferrato who defined ownership as '*a right of disposal over a corporeal thing, within the limits of the law.'* De Groot stated in his Inleiding 2 3 10 '*ownership is complete if someone may do with the thing whatever he pleases, provided that it is permitted in terms of law.'* Thus the *ius dispossendi* is so central to the concept of ownership in our law that it forms part of the very definition of ownership. Needless to mention that disposing of one's property by means of executing a will or Trust Deed are indeed manifestations of the right of ownership.

[28] A mention must be made that the common law principle of the freedom of testation and its underlying rights has never been absolute. It appears that this position has not changed in the constitutional dispensation. The only question that arises is perhaps, what is the precise status of freedom of testation in our constitutional dispensation? In **Minister of Education v Syfrets Trust Ltd NO**

2006 (4) SA 205 (C), this court accepted, without deciding, that freedom of testation is protected by Section 25 of the Constitution of the Republic of South Africa, 108 of 1998 albeit that the ambit thereof was questioned. However, the Supreme Court of Appeal held in **BOE Trust Ltd & Others NNO** 2013 (3) SA 236 (SCA) that freedom of testation enjoys the protection not only of Section 25 of the Constitution, but also the founding constitutional value of dignity. It was held, in para [26], that Section 25 protects a person's right to dispose of their assets as they wish upon their death. At para [27] it was held that the right to dignity allows the living, and the dying the peace of mind of knowing that their last wishes will be respected after they have passed away. There is no denying that dignity, like equality, is one of the core values on which the Constitution rests.

[29] It is noteworthy that Section 8 (c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 only addresses discrimination in the context of succession on the basis of gender, and then only in respect of discrimination by a system. There is absolutely no reference to private wills or trusts. An example of discrimination by means of a system is that which flows from the indigenous succession law which overtly benefits males through the application of the rule of primogeniture. In **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC), the indigenous succession system was recognised as discriminatory as appears from that judgment and that has been altered by the Constitutional Court. I fully agree with Mr White that the right of freedom of

testation and the fact that such right does not in principle rank lower than the right to equality, falls to be taken into consideration when it becomes necessary to weigh these two rights against one another as in the present case. The freedom of testation is so strongly protected by our law that, for instance, a contract purporting to restrict a person's right of testation is considered to be contrary to public policy. See De Waal and Schoeman-Malan**, Law of Succession** (5th ed).

[30] Contrary to the postulated contentions in the applicant's case, in the constitutional era (in which we are) in cases where the courts have indeed amended discriminatory testamentary or trust provisions, a determining factor in weighing-up process was the public nature of the objectional benefit. In each of these cases the will established a trust which made academic bursaries available to applicants from the public but to the exclusion of persons of a particular gender, religion or race. Public institutions such as the universities were involved in the administration of the bursaries. I do not intend to deal with these cases specifically herein. Perhaps, it suffices to mention that the public nature of the charitable educational trust in curators, **Emma Smith Educational Fund v University of Kwazulu-Natal** 2010 (6) SA 518 (SCA), was contrasted with testamentary trusts of a lesser public nature which may still contain elements of discrimination in paragraph [141] where the court held:

'The curators argued that the judicial amendment of a public charitable trust's provisions will have a chilling effect upon future private educational bequests. I cannot agree. We not called

upon to decide the case of testator who is a member of a congregation wishing to create a trust for members of his faith or a club member intending to benefit the children of fellow members.'

One does need to understand that in the weighing-up process in such cases, the public element of the discrimination in the respective will trusts afforded greater weight to the right of equality than to the right of freedom of testation.

[31] As regards the requirement of Section 13 of the Trust Property Control Act, that the offending provision should, *inter alia*, be '*in conflict with the public interest'*, it was held in **Ex parte President of the Conference of Methodist Church** 1993 (2) SA 697 (C) at 703C that:

*'The phrase 'the public interest' d*oes not permit of a clear and comprehensive definition. As was observed by Herbstein, J in Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd & Others 1952 (2) SA 1 (C) one must adopt, in giving effect to the phrase, a:

"broad common sense view of the position as a whole ... (and it must be considered whether) ... the public would be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs.

(at 10E-G), a view followed in Leicester Properties v Farran 1976 (1) SA 492 (D) at 495A.'

Professor De Waal in his consideration of freedom of testation and the equality provision of the constitution, correctly observes that in our constitutional era there have not been any South African cases dealing with discriminatory '*private'* testamentary provisions. See Bill of Rights Compendium (edited by Mokgoro and

Tlakula). Perhaps, one need to point out that ordinarily, the process of selection of beneficiaries and the inevitable exclusion of other hopefuls is unavoidable. Beneficiaries are often capable of being described collectively using one or another suspect classification of race, gender, religion, language or the like. If our courts were to refuse to give effect to testamentary or trust provisions which are contrary to public policy, the fundamental freedom of testation would become so restricted as to be almost meaningless.

[32] There are significant parallels between testamentary freedom and contractual freedom. While a contract may be declared invalid for being contrary to public policy, this occurs only in the rarest and most extreme of cases. The reason for this, as explained by the Supreme Court of Appeal in **Brisley v Drotsky** 2002 (4) SA 1 (SCA) at 15G-16F, referring to **SA Sentrale Ko-op Graan Maatskappy Beperk v Shifren** 1964 (4) SA 760 (A) at 767A and **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A), is that it is in the public interest to ensure that contracts that have been entered into freely and in all seriousness by competent parties be enforced. Cameron, JA, held as follows at 35D-36B:

'What is evident is that neither the Constitution nor the value system it embodies gives the Courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or determine their enforceability on the basis of imprecise notions of good faith.

On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their tasks of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis, J, has pointed out (in Mort NO v Henry Shields-Chait 2001 (1) SA 464 (C) at 475B-F), is that contractual autonomy is part of freedom. Shorn of its obscene excesses contractual autonomy informs also the constitutional value of dignity:

'If we look at the law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty bearer, a private legislator. He is made competent to determine the course of the law within the sphere within his contracts, trusts, will and other structures of rights and duties which he is entitled to build.'

[HLA Hart, The Concept of Law (1961) at pp40-41]

The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.'

What the Constitution actually primarily guarantees is the freedom of individuals (the citizens of this country) from undue State interference. The Constitutional Court in **Ferreira v Levin NO and Others; Vryenhook and Others v Powell NO and Others** 1996 (1) SA 984 (CC) at 1013E and 104A-C held as follows:

'Conceptually, individual freedom is a core right in the panoply of human rights.'

'Human dignity has little value without freedom; for without the freedom personal development and fulfilment are not possible. Without freedom human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this prospective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breath of freedom for others.'

Mr White argued that it would be anomalous in light of the above cited *dictum* for our courts to utilise the Constitution for the very opposite, i.e as a means to curtail individual freedom. One of those freedoms is the right to dispose of one's property as one chooses. I am persuaded that Mr White is correct in this argument. Any attack on a will or trust instrument based on allegedly discriminatory provisions should be able to give a cogent answer to the following somewhat obvious question: Why should different considerations apply to the distribution of the property of a deceased person than apply to such a distribution by a living person?

[33] Even if it were found that upon a proper interpretation of the trust deed adopted children are discriminated against as envisaged by Section 9 (4) of the Constitution, it is not unfair discrimination and one must then undertake the process of weighing up the right to equality against the right of freedom of testation (or, more broadly, the right to dispose of one's property). This process involves the limitation clause in Section 36 (1) of the Constitution. In **Holomisa v**

Argus Newspapers Ltd 1996 (2) SA 588 (W) at 606C-608D it was necessary for Cameron, J, to weigh the right to reputation against the right to freedom of speech, in the context of defamation. He points out at 607D-E that in addition to both rights being enshrined in the Constitution, the right to reputation is also encompassed in the right to dignity. He formulates the balancing process to be carried out as follows: *'The court must determine the meaning and content of the right sought to be asserted. It must then assess whether rules of the common law or otherwise which protect the one right, curtail or infringe upon the enjoyment of another. If so, it must determine whether, in the light of the constitutional scheme overall and the relative place of each competing right in it, that infringement can be justified under the limitation provision.'* In a more recent judgment in **De Lange v Methodist Church** 2016 (2) SA 1 (CC) the Constitutional Court described the process, with reference to the right to equality, as follows at paragraph [77]:

'Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association. Even values like freedom and equality may compete. Therefore they often have to be weighed, balanced and limited. The limitation clause provides for this.'

Section 36(1) of the Constitution (to be read with Sections 8 (2) and 8 (3) (b)) in the event of horizontal application in respect of private conduct, provides as follows:

'The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

De Waal *supra* deals with discriminatory private testamentary provisions as being instances of out and out disinherison. Using an example where A is disinherited in a will expressly on one of the grounds of discrimination listed in Section 9 (3) (with reference to the balancing process described in **Holomisa,** *supra*) De Waal opines as follows:

'It is suggested that the testator's freedom of testation should limit A's right to equality and that such limitation can be justified in terms of Section 36(1), the general limitations clause. The reasons for this view, taking into consideration the specific factors listed in Section 36(1), are the following:

(a) an opposite conclusion would not only reduce the concept of freedom of testation to a fiction, but would also render the guarantee of freedom of testation in the Bill of Rights meaningless.

(b) Nobody has a fundamental 'right to inherit'. The exclusion of a person as a beneficiary does not therefore result in an encroachment upon or taking away of existing rights. A potential beneficiary at most possesses a spes or hope. And it is in the nature of spes or hope that it can easily be frustrated.

(c) It seems to be a sound proposition, both as a matter of principle and common sense, that a testator or testatrix should, within the limits set by social and economic considerations, be free to institute beneficiaries of his or her own choice.

(d) An opposite conclusion would lead to nearly insurmountable practical difficulties some of which may be mentioned. If somebody in A's position were to succeed with a constitutional challenge, what would the remedy be? ...'

He goes on to conclude that the equality clause does not provide a basis for an attack on the validity of a will on grounds such as the following: (a) the fact that only female descendants have been instituted as heirs; (b) extra-marital children are excluded; (c) a grandchild is excluded on racial grounds; (d) a person is excluded on grounds of sexual orientation, political views or religious convictions. The argument and considerations presented by De Waal are indeed persuasive.

In his article, *The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African Law* 2001 12 Stell LR 222 at pp 241-245, Du Toit also approves and proceeds to embroider on the topic. In a related earlier article: *The limits imposed upon freedom of testation by the boni mores: Lessons from common law and civil law (Continental) legal systems*, 2000 Stell LR 358, Du Toit conducts a comparative survey of the English, Australian,

Netherlands and German law which reveals that, here too, it is conditions imposed upon beneficiaries which may lead to limits being placed upon freedom of testation.

[34] In his article, "*Freedom of testation and the Bill of Rights: Minister of Education v Syfrets Trust Ltd NO 2007*, SALJ 687 at page 691, MC Wood-Bodley correctly points out that the Section 36(1) enquiry must be conducted before there can be a finding that a particular provision or particular conduct is contrary to public policy. In De Waal and Schoeman-Malan, *op cit,* the learned authors conclude, at paragraph 1.4.2.3, in relation to disinherison, that the right of freedom of testation should be given preference. On the basis of the considerations mentioned above, Mr White submitted that the alleged discrimination against second and third applicants in this matter is reasonable and justifiable. The aggrieved persons (the second and third applicants) were not yet born at the time of the execution of the Trust Deed. The Trust Deed provides that the capital benefits are to descend per *stirpes.* This of course has the effect that the more siblings a grandchild of the Donor has, the less capital each such grandchild will receive. The rhetoric question is: Is the Court to interfere here too because each grandchild may not benefit equally? We all know that the distribution of benefits *per stirpes* is a common feature of wills and family Trust Deeds. One must place serious importance to what the constitutional court said in **De Lange** *supra* (albeit in a different context), namely:

'It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preferences.

The closer courts get to personal and intimate sphere, the more they enter into the inner sanctum and thus interfere with our privacy and autonomy.'

I fully associate myself with the above observation. I am of the view that courts have no competency to vary the provisions of the Donor's Trust Deed just as they would have no power or authority to change any testator's will. Effect should, in my view, always be given to the wishes of the testator. Before a will can be changed, it is a requirement, at common law, that there has been a change in circumstances not contemplated by the testator which renders the fulfilment of the directions contained in the will practically impossible or utterly unreasonable. The underlying *ratio* for this exception is not to purport to change the will, but rather to attempt to give effect to the genuine intention of the testator by taking into the account the special and unexpected circumstances which have arisen **(Heymann v Administrators Estate Heymann** 1932 WLD 45 at 47; **Administrators, Estate Richards v Nichol and Another** 1996 (4) SA 253 (C) at 261D-F). Prof De Waal, *supra* after reviewing the comparative German law concludes at paragraph 3G8 at pages 3G-17 that where freedom of testation and equality are in conflict, the German Law draws a distinction between disinherison on the one hand and conditions on the other and this distinction is often decisive. Clearly, in the present matter the Trust Deed contains no conditions and

applicants' complaint is their disinherison on the basis that they are not descendants of the Donor.

[35] It is so that in the alternative the applicants seek relief on the basis that Section 13 of the Trust Property Control Act finds application in this matter. In order for a Court to exercise this statutory power, two jurisdictional facts are required. First, the offending provision must bring about consequences which in the opinion of the Court the founder did not contemplate or foresee. Second, the provision must either hamper the achievement of the object of the founder or prejudice the interests of the beneficiaries or be in conflict with the public interest. In the event that both requirements are met, the Court enjoys wider powers under Section 13 to vary the provisions than the Court enjoyed under the common law. See in this regard **Ex parte President of the Conference of Methodist Church**, *supra*, at 702F-703F.

Neither of the conditions are met in this matter. First and foremost, I am unable to find on the facts of this matter that the provisions of the Trust Deed bring about consequences which the founder (the Donor) did not contemplate or foresee. We are told by the first applicant herself that '*the deceased was aware at the time of the execution of the Trust Deed, that adoption was an option'* . I agree with the submission by Mr White that given the knowledge of the Donor that 'adoption was an option' and the fact that he nonetheless framed the Trust Deed as he did is

equally amenable to the inference that he intended only to benefit his blood descendants. Moreover, and as is apparent from clause 5 of the Trust Deed the Donor made express provision for the eventuality that one of his children might die without *'descendants'* or *'issue'*. I would thus be slow in accepting the suggestion that the provisions bring about consequences which the Donor did not contemplate or foresee. That would clearly be at odds with the facts known to the Donor at the time of the execution of the Trust Deed and with the content of the same Trust Deed.

[36] The object of the donor was clearly to provide income to his children and capital to their descendants. Since the language used in the Trust Deed has exactly that effect, it cannot be suggested that the relevant provisions hamper the achievement of that object. The relevant provisions do not prejudice the interests of the beneficiaries. Clearly this requirement falls to be applied in relation to persons who are indeed beneficiaries. It is not intended to be a means by which non-beneficiaries can seek to be made beneficiaries. The interests of the persons who are indeed the beneficiaries of the trust instrument are not prejudiced by the relevant provisions. **In Potgieter v Pogieter NO** 2012 (1) SA 637 (SCA) Brand, JA after finding that the Court *a quo* had decided the case on the basis of what it felt was fair and equitable rather than on applicable law, held, in paragraph [36] as follows:

'... I do not believe that the Court a quo had any option but to follow the tenets of common law. Its decision to do otherwise in my view offended the principle of legality, which I regard as part of the rule of law, which in turn constitutes a founding value in terms of s 1 of our Constitution. I thus find myself in agreement with Harms, DP when he said in Bredenkamp (par 39):

'A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law'

Harms, DP was referring to Bredenkamp and Others v Standard Bank of South Africa 2010 (4) SA 468 (SCA).'

In my view this application therefore must fail.

ORDER

[37] In the circumstances, the following order is made:

(a) The application is dismissed with costs.

(b) The costs mentioned in (a) above shall, by agreement between the parties, be paid by the LJ Druiff Trust Registration Number T1280.

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Judge of the High Court

APPEARANCES:

For the Applicants:	Adv. Beyleveld
For the Respondents:	Adv. P White