



FREEDOM OF TESTATION IN THE CURRENT CONSTITUTIONAL DISPENSATION

By

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To God be the glory.

ABSTRACT

The idea of disposing of property by testamentary bequest has been an enjoyed practice for many years. This mechanism ensured that the wishes of the testator are respected and gave beneficiaries hope and security that after the death of their loved one they would still be taken care of through the bequest, or the estate left by the testator. This was made feasible through a Will which expressed the testator's last wishes for the dissolution of their property after their death. Today this form of disposition is known as freedom of testation which emanates from the law of succession. However, due to developments in South Africa's legal system, particularly, the influence of the final Constitution of 1996, freedom of testation was affected. In light of South Africa's constitutional dispensation, this study shall analyse how the Constitution of the Republic of South Africa, common law and legislation have changed and reshaped how the courts interpret the provisions of testamentary instruments and freedom of testation.

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I INTRODUCTION

The idea of disposing of property by bequest has been an enjoyed practice for many years.¹ Many found comfort in the expectation that after the death of a loved one they would still be taken care of through the bequest left by the testator.² Currently, this form of disposition is known as freedom of testation.³ Under the current constitutional dispensation, freedom of testation is regarded as a basic right emanating from section 25 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).⁴ It affords a testator a prerogative to make whatsoever provisions they deem appropriate on their testamentary instrument specifying how they want their estate to dissolve after their death.⁵ A testator may elect to leave his or her estate to their family or anyone but their family.⁶ However, when there is a dispute, the courts intervene to determine the testator's testamentary provisions. This stems from the existence of a general rule under South African law stating that the intentions of the testator must be complied with.⁷ The courts must ascertain the language used by the testator in their testament during interpretation.⁸ This is an important duty that ensures that the intentions and the wishes of the testator are met.⁹

The testator's testamentary instrument must be valid for it to be obeyed.¹⁰ This is supported by Beinart as follows:

It is clear that a will, before it can be given effect to as such, must be conscious, serious and deliberate statement of intention, and therefore a mere indication of a testator's last wishes or a statement for future use, or a mere note, or instructions for execution of the will is not an act of testation. There must be a serious and complete and final act of testation made *animo testandi*, of such nature as to show testator intended that this declaration to make effect as his will.¹¹

¹ Irene D Johnson 'There's a will, But No Way- Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?' (2011) 4 *Estate Planning Journal* 105 at 105.

² Ibid.

³ Glover Mark 'Freedom of inheritance' (2017) 2 *Utah Law Review* 283 at 284.

⁴ *BoE Trust Ltd NO* 2013 (3) SA 236 (SCA) at para 26. Hereinafter *BoE Trust Ltd*.

⁵ Juanita Jamneck, Christa Rutenbach & Mohammed Paleker et al *The Law of Succession in South Africa* 2 ed (2012) ch 8. Hereinafter *The Law of Succession in South Africa* 2 ed.

⁶ Ibid.

⁷ Ibid.

⁸ *King N.O. v De Jager* 2021 (4) 1 (CC) at para 34. Hereinafter *King v De Jager*.

⁹ Ibid.

¹⁰ Section 1(v) of the Wills Act 7 of 1953 provides that a Will may also be classified as a codicil or testamentary writing. The Act does not differentiate them. For the purposes of this research, testamentary instrument or testament refers to a Will.

¹¹ B Beinart 'Some Aspects of Privileged Wills' 1959 *Acta Juridica* 200 at 200.

Without discounting the importance of the above excerpt, it is worth noting that in the past freedom of testation manifested in a manner that perpetuates discrimination.¹² This was customarily informed by the Roman and Roman-Dutch law standards when coming to succession. They did not believe that freedom of testation can be approached in an egalitarian manner.¹³ The notion of equality nor equal rights was lacking. Given that South African law was influenced by the Roman and Roman-Dutch law, freedom of testation was no exception.¹⁴ Thus, in South Africa, particularly before the promulgation of the Constitution freedom of testation was exercised in a manner that disregarded the importance of equality.¹⁵ If anything, inequality was considerably tolerated.¹⁶

The advent of the Constitution played an important role in so far as freedom of testation is concerned. Amongst other things, it exposed the existence of discrimination and inequalities disguised as an exercise of freedom of testation. Against this backdrop, this study aims to demonstrate the transformation brought by the Constitution on freedom of testation. This will be done by analysing the notion of freedom of testation in pre and post-constitutional dispensation. Also, the study will highlight the limitations affecting freedom of testation and also demonstrate how the courts have dealt with freedom of testation since the advent of the Constitution. In addition, this study shall explore and answer two important questions i.e. how the advent of the Constitution impacted the notion of freedom of testation and the extent to which the courts deal with freedom of testation in light of the Constitution. In doing so, this study shall adopt a non-empirical research method using primary and secondary sources. The primary sources to be used in this study include, but are not limited to, the Constitution and legislation, and secondary sources will include, but also not limited to, journal articles, and other legal writings.

¹² Francois du Toit ‘Constitutionalism, public policy and discriminatory testamentary bequests- A good fit between common law and civil law in south Africa’s mixed jurisdiction?’ (2012) 27 *Tulane European and Civil Law Forum* 97. This is further reflected through the cases that have come before the courts demonstrating that testaments contain clauses that have discriminatory connotations.

¹³ *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) at footnote 112 where the court cites Zaal Origins of Gender Discrimination in SA Law (1995) 34 where Zaal states that ‘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 of its time, and its effects on both the South African legal system and South African society have been enormous.’

¹⁴ P Matsemela ‘Modern freedom of testation in South Africa: its applications by the courts’ (2015) 2 *Journal of Law, Society, and Development* 93 at 94.

¹⁵ Francois du Toit op cit note 12 at 99.

¹⁶ Ibid.

II FREEDOM OF TESTATION PRE-CONSTITUTIONAL DISPENSATION

The law of succession was mostly developed by Romans and their law (Roman Law)¹⁷ and received as such into the Roman-Dutch Law.¹⁸ The Romans exercised freedom of testation which had limited restrictions.¹⁹ This was because Wills was less complex in the early Roman era.²⁰ The Roman law of succession was also patriarchal in nature and promoted inequality, more in particular, against women.²¹ Although Roman women had *sui iuris*,²² they were nevertheless treated unequally.²³ Their legal capacity in Roman society was not equal to that of their counterparts, men.²⁴ They were precluded from holding influential positions in society, including public office, government power, or participation in government processes.²⁵ The same attitude was applied in succession processes. Roman law of succession supported the idea of women as beneficiaries for inheritance purposes, but they were not given direct freedom of testation.²⁶ As a result, wealth accumulation was impossible for them. In addition, because of the existence of the *paterfamilias*, they faced the challenge of being limited by the *paterfamilias* paternal power,²⁷ known as the *patria potestas*.²⁸ The *paterfamilias* was the head of the household and held certain responsibilities and powers i.e. to ensure that the household continues to observe religious requirements, had the right to control the property in the household and the right to control the people in the household.²⁹ The *paterfamilias*'s powers were too extensive and encroached on the lives of the dependents.³⁰ Due to that, women's legal and social rights were constrained and adversely affected.³¹ This extended to testation in that women were denied property ownership and were therefore unable to acquire any property

¹⁷ Franciszek Longchamps de Berier *Law Of Succession: Roman Legal Framework and Comparative Law Perspective* (2011) 23.

¹⁸ P Matsemela op cit note 14 at 94.

¹⁹ F du Toit 'The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch Law' (1999) 10 *Stellenbosch Law Review* 232 at 233.

²⁰ Ibid.

²¹ J Dodds 'The Impact of Roman Law of Succession and Marriage on Women's Property and Independence' (1992) 18 *Melbourne University Law Review* 899 at 899.

²² *Sui iuris* refers to independence or not to be in the power of another.

²³ J Dodds op cit note 21 at 899.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid at 906.

²⁷ John B Kamp 'Patriarchy and Gender Law in Ancient Rome and Colonial America' (2020) 8 *The Iowa Historical Review* 43 at 43.

²⁸ *Patria potestas* refers to the power of the father.

²⁹ S Thompson 'Was Ancient Rome a Dead Wives Society? What Did The Roman Paterfamilias Get Away With?' (2006) 31 *Journal of family history* 1 at 2.

³⁰ BE Breij 'Vitae Necisque Potestas in Roman Declamation' (2006) 6 *Advances in the History of Rhetoric* 55 at 55.

³¹ John B Kamp op cit note 28 at 44.

through testation. This is underscored by the existence of the principle of tutelage or *tutela*. This principle is explained by Rafael Domingo who mentions that a *tutela* was a person appointed through a Will referred to as a *tutor testamentarius*³² to protect and preserve the property of the paternal power.³³ As a requirement, a *tutela* had to be a Roman and male pubescent.³⁴ By tutelage, women had a limited power of control over the property and could not benefit from the property by way of testation.³⁵

Likewise, South Africa's freedom of testation before the constitutional dispensation was also untenable. South African testators were guaranteed freedom of testation which was rarely limited.³⁶ Testators were further given a leeway to include clauses that were discriminatory in their testaments.³⁷ Even though common law principles of limitations on freedom of testation were in existence, South African courts were reluctant to make use of these principles.³⁸ The courts preferred to apply the provisions of the testator as they were regardless of whether the disposition was irrational or problematic.³⁹ This stems from the position that the intention of the testator was of significance and had to be applied as such regardless of whether the provisions were unreasonable or not.⁴⁰ As a result, the courts rarely corrected or set aside testaments that were unreasonable and discriminatory.⁴¹ Furthermore, under common law, it was frequently permissible for a testator to impose a stipulation in their testament that would limit the beneficiary's ability to marry in a particular way.⁴² It was also acceptable for a testator to include restrictions in their testament that would limit the beneficiary from getting married to a particular individual or members of a particular faith. A testator would stipulate in his or her testamentary provisions that his or her beneficiaries must do certain things, such as profess and follow a particular religion or refrain from getting married to people who do not share similar beliefs.⁴³ This was commonly referred to as the 'Dead Hand control' referring to the testator's exercise of freedom where they place conditions on their testament to make

³² *tutor testamentarius* refers to a tutor appointed through a Will.

³³ Rafael Domingo 'The family in Ancient Roman Law' 2017 SSRN Electronic Journal 1 at 4.

³⁴ Ibid.

³⁵ J Dodds op cit note 21 at 909.

³⁶ Ibid.

³⁷ Francois du Toit op cit note 12 at 114.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Alan Watson Law Of Succession In The Later Roman Republic (1971) 2.

⁴¹ Francois du Toit op cit note 12 at 114.

⁴² The Law of Succession in South Africa 2 ed ch 8.

⁴³ CP Joubert 'Jewish Faith and Race Clauses in Roman-Dutch Law' (1968) 85 SALJ 402 at 403.

beneficiaries act in a certain way or abstain from acting in a certain way.⁴⁴ The testator's attempt to regulate the beneficiary's belief system such as the sort of religion they should practice or the spouse they should choose in light of the testator's religious beliefs was the most prevalent type of discriminatory clause.⁴⁵ These clauses were condemned for being against public policy, but the courts sustained them notwithstanding the criticism.⁴⁶ In some instances, the courts tried to recognise the importance of public policy and limited such clauses. However, this recognition was short-lived. In the case of *Wasserzug v Administrators of Estate Nathanson*,⁴⁷ the court found that the condition in the testator's Will which provided that the beneficiary should not marry outside of the Jewish faith was uncertain, and therefore void for vagueness.⁴⁸ On reflection, this clause was discriminatory. Not surprisingly, *Wasserzug* was later overturned by *Aronson v Estate Hart* 1950 (1) SA 539 (A). In this case, the Appellate Division ruled that the condition that required a beneficiary to 'marry a person not born in the Jewish faith or forsake the Jewish faith' in the testator's Will was not void for uncertainty nor against public policy. The court submitted as follows:

A person who is a reasonable, honourable, law-abiding and patriotic citizen may well fear that marriage between what can conveniently be described as Jew and non-Jew will tend as far as the spouses are concerned to increase the tensions and stresses, ordinarily to be expected between them, to such an extent as to lead to irreconcilable differences; in the case of the children of such a marriage he may equally be apprehensive of the unsettling effect on them of inner conflicts which may leave them rudderless and adrift on the sea of life. He may also fear that they may fall between two stools and be acceptable to neither section. I know of no principle in law which would make it contrary to public policy for him to attempt to safeguard his descendants against these perils.⁴⁹

This case illustrates the overall stance of the courts during the pre-constitutional era. It is a clear demonstration that the court sustained freedom of testation even on divisive topics of this sort. Reflecting on this decision, Hahlo criticised it by pointing out that the court failed to address the fundamental issue which is whether it is proper or improper for a testator to be allowed to dictate from the grave which religions or companions a beneficiary or descendant

⁴⁴ Hanna Meeland 'Discriminatory strings attached: Reining in the testator's intent in conditioning Will and Trust Bequest' (2014) 25 *University of Florida Journal of Law and Public Policy* 331 at 336.

⁴⁵ Hanna Meeland op cit note 44 at 344.

⁴⁶ *The Law of Succession in South Africa* 2 ed ch 8.

⁴⁷ 1944 TPD 369.

⁴⁸ At page 381.

⁴⁹ At page 17.

should choose.⁵⁰ He avers that the correct answer should have been a no.⁵¹ This is supported by Lee who posits that freedom of testation is only permissible to the extent that it avoids the harm that would result if freedom of testation was eliminated.⁵² Therefore, it is important to allow the testators to choose their successors to prevent potential harm, but they should not be permitted to control how the beneficiaries behave.⁵³

In testamentary charitable trusts, the same attitude was maintained. This is underscored by cases such as but not limited to, *Ex parte Estate Impey*,⁵⁴ *Ex parte Robinson*,⁵⁵ and *Marks v Estate Gluckman*⁵⁶ in which the courts were unwilling to limit freedom of testation on testamentary charitable bequests even when the bequests were discriminatory based on race, gender, or religion.⁵⁷ The courts were lenient when it came to changing a testator's testamentary charitable trust provisions because bequests of charitable nature were regarded as important bequests dealing with 'sectional interest' in the testator's testament.⁵⁸ The courts opted not to alter them and instead viewed them favourably since they served a public interest. For this reason, they received a special and privileged position in testamentary bequests, and maintaining them was more important than eliminating them. This was confirmed in *Ex parte Robinson* where it was decided that testamentary bequests that were designated for charity purposes are entitled to preferential treatment and must be upheld. Thus, testamentary charitable trusts exclusively meant for Jews as sole beneficiaries and trusts set up explicitly to help non-Europeans found indulgence in South African courts.⁵⁹ In *Ex parte Executor Estate Gluckmann* 1946 WLD 182, Ramsbottom J, for example, disregarded the notion that the charitable trust requirement was uncertain or could not be determined. The litigants argued that the condition mentioned in the testator's charitable trust, which stated that the recipients of the benefit must be Jews or Jewess, caused the trust to fail due to uncertainty.⁶⁰

⁵⁰ HR Hahlo 'Jewish Faith and Race Clauses in Wills' (1950) 67 *SALJ* 231 at 242.

⁵¹ *Ibid.*

⁵² Ruth Sarah Lee 'Over My Dead Body: A New Approach to testamentary Restraints on Marriage' (2012) 14 *Marquette Elder's Advisor law review* 55 at 70.

⁵³ *Ibid.*

⁵⁴ 1963 1 SA 740 (C).

⁵⁵ 1953 2 SA 430 (C).

⁵⁶ 1946 AD 289.

⁵⁷ Francois du Toit op cit note 12 at 115.

⁵⁸ *Ibid.*

⁵⁹ *Ex parte Robinson N.O* 1953 (2) SA 430 (C) at page 434.

⁶⁰ On the contrary, the court was of the view that forfeiture clauses should be the ones construed more strictly than charitable trusts. The court conclusively stated that 'the class whom the testator intended to benefit has a large and well-defined nucleus and the fact that there is a less well-defined fringe does not make the testator's intention uncertain --- upon a benevolent interpretation of the will --- nor even create any real difficulty in giving effect to it. In my opinion, the trust is valid.'

These court proceedings took place before the advent of South Africa's constitutional dispensation. They illustrate that testators abused or misused freedom of testation. Noticeably, even when such testaments were contentious and hurtful to victims of particularly targeted groups, most often persons of a particular race, religion, or gender, the courts were sworn to uphold those testamentary bequests. This was further demonstrated by charitable trust benefits, which were carried out by the courts even when they were discriminatory. Kelly points out that a race condition in a Will that imposes a restriction is against public policy because such restrictions harm victims of discrimination or members of specific targeted groups.⁶¹ Moreover, such discriminatory practices do not adhere to public policy that has now been identified and incorporated into the constitutional framework, as will be demonstrated in the following section.

III FREEDOM OF TESTATION IN POST-CONSTITUTIONAL DISPENSATION

South Africa's constitutional dispensation was introduced by the adoption of the interim Constitution of 1993⁶² which transitioned and positioned South Africa's foundation to radicalism and fundamental change to its legal systems and doctrines of law.⁶³ Its successor, the final Constitution followed thereafter.⁶⁴ The adoption of these two instruments was preceded by a period of political instability and crisis in South Africa.⁶⁵ This was caused and exacerbated by politics of race, political violence, and constitutional change after decades of systemic subjugation of Africans through the system of racialism.⁶⁶ The transition to this constitutional and democratic state was seen as a miracle by many.⁶⁷ Sibanda remarks that 'encapsulated in the idea of a miracle is the 'transmogrification of former "enemies" into co-sponsors" of the "new" South Africa in circumstances few would have imagined possible a

⁶¹ Daniel B Kelly 'Restricting Testamentary Freedom: Ex Ante versus Ex Post Justifications' (2013) 82 *Fordham Law Review* 1125 at 1162.

⁶² Constitution of the Republic of South Africa, Act 200 of 1993.

⁶³ Dion Basson 'South Africa's Interim Constitution' (1996) 2 *Journal of South African Law* 411 at 411.

⁶⁴ The Constitution of the Republic of South Africa, 1996.

⁶⁵ Julio F Carrion & Stuart J Kaufman 'public opinion and the end of apartheid' (2018) 21 *International Areas Studies Review* 1 at 3.

⁶⁶ *Ibid.*

⁶⁷ S Sibanda 'when do we call time on a compromise? South Africa's discourse on transformative Constitutionalism' (2020) 24 *Law, Democracy and Development* 384 at 385.

decade ago.⁶⁸ Indubitably, today just over two decades later, South Africa is unified by this Constitution which is commonly identified as being transformative.⁶⁹

The Constitution embodies transformative constitutionalism. This is a concept generally accepted by various authors.⁷⁰ It is also affirmed and enforced by the courts.⁷¹ Transformative constitutionalism as a concept was brought to the fore by the writings of Klare who posits that transformative constitutionalism is:

A long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.⁷²

Since then, various legal scholars wrote immensely on this concept and a variety of definitions have been attributed to it. For example, Langa notes that transformative constitutionalism is about bringing change which must be attained through the protection of human rights.⁷³ Kibet adds that transformative constitutionalism is a fundamental pillar of South Africa's post-apartheid constitutionalism and at its heart are the courts on which it places its faith to interpret and adjudicate legal matters in a transformative manner.⁷⁴ On the strength of these definitions, this study submits that the Constitution is indeed transformative in nature. Its preamble bears evidence of that as it states that 'South Africa forges a new state, separate from its past, which seeks to heal injustices of the past and establish a new South Africa which is founded on values of democracy, social justice, and fundamental human rights.' Thus, transformative constitutionalism cannot be imagined without incorporating human rights into it. Chaskalson confirmed this in the case of *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (9) BCLR 891 where he submitted that the transformation

⁶⁸ Ibid at 386.

⁶⁹ Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPR/PL* 155 at 155.

⁷⁰ For example, Karin Van Marle 'Transformative constitutionalism as/ and critique' (2009) 20 *Stellenbosch Law Review* 286; Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351; Kibet Eric & Fombad Charles 'Transformative Constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRJ* 340.

⁷¹ Kibet Eric & Fombad Charles 'Transformative Constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *AHRJ* 340 at 348.

⁷² KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

⁷³ Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 352. Pius Langa makes this conclusion based on the Epilogue or the postamble to the interim constitution

⁷⁴ Kibet Eric & Fombad Charles op cit note 68 at 357.

envisaged in the Constitution requires that the constitutional provisions and its Bill of Rights be carried out.⁷⁵ This could be through the promulgation of legislation, the government's adherence to its legislative obligations, or through the courts.

The current dispensation provides a situation dissimilar from the previous regime and its systems where political power and politicians through parliament exercised parliamentary sovereignty. During that time, the courts had no or little power to protect human rights when they were violated through executive decisions or legislation.⁷⁶ For example, the courts could not declare the invalidity of an Act of parliament.⁷⁷ Currently, the Constitution requires the courts to advance human rights, and the rule of law and must declare any provision or Act that is inconsistent with the Constitution invalid and unconstitutional.⁷⁸ Furthermore, the Constitution is now premised on values of human dignity, the advancement of equality, human rights and freedom, non-racialism, and non-sexism which are foundational in South Africa's democratic state.⁷⁹

For want of relevance, this research has already pointed out that freedom of testation is an important legal component within South Africa's legal system which the courts have acknowledged as forming part of a property right. This right is a constitutionally recognised right.⁸⁰ It affords a testator a right to dissolve their property as they deem fit provided that such dissolution is not contrary to the values and dictates of the Constitution.⁸¹ Also, bearing in mind South Africa's transformative Constitution, constitutional values as espoused in section 1, and other constitutional rights as contained in the Bill of Rights, there is no doubt that there is a need to balance freedom of testation and constitutional rights. On the one hand, there is a need to protect freedom of testation while on another, there is also a need to uphold the spirit, values, and purport of the Constitution. This study posits that the advent of the Constitution does not tolerate the tendency of promoting inequality and this extends to freedom of testation. In post-constitutional South Africa, anything that perpetuates these kinds of inequalities comes to be impertinent to the Constitution and what it stands for. This was also echoed by the Constitutional Court where it was held that anything that threatens to take South Africa back

⁷⁵ At para 7.

⁷⁶ Ian Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 3.

⁷⁷ CRM Dlamini 'Parliamentary Sovereignty, A Bill of Rights and Judicial Review' 1989 *De Rebus* 864 at 865.

⁷⁸ Section 2 of the Constitution.

⁷⁹ The values of South Africa's constitutional democracy found on section 1(a)-(c) of the Constitution.

⁸⁰ Section 25(1) provides 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

⁸¹ *BoE Trust Ltd* at para 26; *King v De Jager* at para 65.

to its racist past or past tendencies should not be ‘glossed over, accommodated or excused.’⁸² This means that any legacies having to do with discriminatory clauses in testamentary writings will not be tolerated as they threaten South Africa’s transformative agenda. A similar view is made by Matsemela who notes that as a result of South Africa’s post-constitutional dispensation, the interpretation of freedom of testation is impacted.⁸³ Similarly, du Toit asserts that to ensure the continuance of freedom of testation in modern South Africa, freedom of testation has to be balanced with constitutional rights.⁸⁴ This is because freedom of testation is still relevant in South Africa, however its foundation is foregrounded on patriarchy that promotes inequality. The promotion of patriarchy and inequality has no place in the current constitutional dispensation due to the existence of the Constitution. The Constitution gives rise to constitutional provisions that need to be taken into consideration when dealing with freedom of testation. Therefore, freedom of testation needs to consider the following constitutional provisions:

(a) Section 9 of the Constitution: The right to equality

The Constitution requires that the rights of everyone be respected equally by subjecting everyone to equal benefits of rights and not be discriminated against.⁸⁵ As such no one may unfairly discriminate against another on the grounds of race, gender, or sex.⁸⁶ Section 9 is further given effect by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act)⁸⁷ which prohibits unfair discrimination on grounds of race,⁸⁸ gender,⁸⁹ and other prohibited grounds.⁹⁰ This Act aims to effectively combat discrimination by targeting these disparities.⁹¹

(b) Section 10 of the Constitution: The right to dignity

This section requires that the dignity of everyone be respected. Human dignity ‘informs the content of all concrete rights and plays a role in the balancing process necessary to bring

⁸² *The South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (2) BCLR 241 (CC) at para 7.

⁸³ P Matsemela op cit note 14 at 102.

⁸⁴ Francois du Toit op cit note 12 at 235-236.

⁸⁵ Section 9.

⁸⁶ Section 9(4).

⁸⁷ *Mec for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 36.

⁸⁸ Section 7 of the Act.

⁸⁹ Section 8 of the Act

⁹⁰ Section 1 of the Act.

⁹¹ L Botha & A Kok ‘An empirical study of early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000’ (2019) 19 *AHRJ* 317 at 319.

different rights and values into harmony.⁹² Thus, human dignity is the preferable starting point for defending constitutional rights and fostering justice.⁹³ It asserts the transformative nature of the Constitution which tackles amongst others challenges of inequality.⁹⁴ The right to dignity, just like equality advances justice. According to Christiansen, the importance of this is to strengthen the role of the Constitution, as it reminds South Africans of the historical promises of the Constitution and its relevance to correcting prevailing conditions.⁹⁵ Therefore, freedom of testation and clauses that cause inequality on prohibited grounds as outlined in section 9 must also be scrutinised in terms of the right to dignity.⁹⁶

(c) Section 15 of the Constitution: The right to religion, belief and opinion

This section provides that everyone has a right to associate themselves with any religion of choice, belief or opinion without interference. Thus, a condition on a testator's testament that interferes with the choices of the beneficiaries in terms of which religious affiliations they must follow or not follow trumps their right to religion, and such interference must be contested.⁹⁷

(d) Section 14 of the Constitution: The right to privacy

Privacy is not only limited to home searching,⁹⁸ property searching,⁹⁹ seizure of possessions,¹⁰⁰ or privacy of communications¹⁰¹ but also includes the right of a person to be left alone or a right to personal growth.¹⁰² The link between this right and freedom of testation occurs when the testator's testamentary bequest interferes with the beneficiary's personal growth including interfering with his or her life choices.¹⁰³

⁹² A Chaskalson 'Human dignity as a foundational value of our Constitutional order' (2000) 16 *SAJHR* 193 at 204.

⁹³ Juma L 'Human Rights and conflict transformation in Africa: Some thought on the transformative values of Human Rights' 2012 *Speculum Juris* 1 at 8.

⁹⁴ S Rosa 'Transformative Constitutionalism in a Democratic Developmental State' (2011) 22 *Stellenbosch Law Review* 542 at 542.

⁹⁵ EC Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses Of Constitutional Court Authority To Advance Substantive Justice' (2010) 13 *Journal of Gender, Race & Justice* 575 at 613.

⁹⁶ Francois du Toit op cit note 12 at 236.

⁹⁷ Ibid at 237.

⁹⁸ Section 14(a).

⁹⁹ Section 14(b).

¹⁰⁰ Section 14(c).

¹⁰¹ Section 14(d).

¹⁰² Francois du Toit op cit note 12 at 236.

¹⁰³ Ibid.

On reflective contemplation, it is certainly correct that these rights are competing. On the one hand, we have the right to freedom of testation endorsed in terms of section 25, and on the other hand, are other rights aforementioned. Since all rights are imperative in the Constitution, the Constitutional Court has pointed out that in these cases there is no other choice but to try to navigate the point at which they interact.¹⁰⁴ This suggests that the courts in this regard have a duty of balancing this conflict or finding a way to make them work. This will not only protect freedom of testation but also protect other constitutional rights.

IV LIMITATIONS TO FREEDOM OF TESTATION

The preceding section demonstrated that the Constitution has the power to limit a testator's freedom of testation. In addition, there also exists common law and statutory limitations that limit freedom of testation. These limitations are mostly imposed on freedom of testation to protect beneficiaries. Due to the abuse of freedom of testation some beneficiaries experienced difficult situations such as, but not limited to, restriction from entering into certain marital relations, unreasonable limitation of freedom of movement, and imposition of unreasonable conditions on matters of life choices. Based on this, the limitation of freedom of testation is necessary. This is because absolute freedom of testation would frustrate the enforcement of certain responsibilities and necessities.¹⁰⁵

(a) Common law limitations on freedom of testation

In terms of common law limitations on freedom of testation, the testator's freedom of testation could be limited because their testaments are *contra bonos mores*, vague or uncertain to be enforced. If a court were of the view that the testator's testament is against one of these limiting components of common law limitations, the court would limit the testator's freedom of testation on those reasons.¹⁰⁶ The notion of *contra bonos mores* refers to public policy established based on the community's convictions on what they regard as morally right.¹⁰⁷ As a result, a court could declare a testament null and void for being against what is morally

¹⁰⁴ *King v De Jager* at para 70.

¹⁰⁵ High Elizabeth Travis 'The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain' (1984) 17 *Cornell International Law Journal* 321 at 321.

¹⁰⁶ P Matsemela op cit note 14 at 99.

¹⁰⁷ The Law of Succession in South Africa 2 ed ch 8.

right.¹⁰⁸ However, it is also important to note that what was regarded as against public policy some decades ago may be different from what is regarded as against public policy today. This is the reason we have common law limitations on freedom of testation that is different from that of the Roman era. This was acknowledged in the case of *Minister of Education v Syfrets*.¹⁰⁹ In this case, the court appreciated that public policy does influence freedom of testation, however it is not static.¹¹⁰ It is always influenced by social conditions which necessitate its development. For example, in *Ex parte Higgs: In re Estate Rangasami*,¹¹¹ the testator provided in his Will that the beneficiaries would forfeit their succession benefits if they moved out of the family home. The beneficiaries, on the other hand, argued that this condition was impossible to enforce since the house was too small to accommodate their large family. As a way out, they pleaded before this court that the property is divided so that each beneficiary can take his or her share which would allow them to build their own homes. The court however found that this Will was valid and was not against public policy on the basis that the testator in providing so intended to keep the family intact.¹¹² Today, this provision at face value could reasonably be declared as being *contra bonos mores* or against public policy because of the change in socio-economic circumstances, the current style of living, and the influence of the existing Constitution. For example, the Constitution currently protects the right to freedom of movement and residence in terms of Section 21. This section provides that ‘everyone has a right to freedom of movement.’ As a result, this forfeiture condition could be impacted. As Griesel J in *Syfrets* stated, in our present time of constitutional rule, public policy is now located within the principles or values of the Constitution which guides the courts to stick to its values of human dignity, achievement of equality, and advancement of human rights and freedoms, non-racialism and non-sexism which must be taken into account during interpretation.¹¹³

In the same way, conditions that could be declared to be against public policy are those that put a restraint on marriage. Public policy limits freedom of testation on testaments that include these kinds of conditions. This was underscored by the decision of *De Wayer v SPCA Johannesburg*¹¹⁴ where the court found that a condition in the testator’s Will that provided that the beneficiary will lose his inheritance on the grounds of marriage or if he marries after the

¹⁰⁸ Ibid.

¹⁰⁹ 2006 (10) BCLR 1214 (C). Hereinafter *Syfrets*.

¹¹⁰ At para 24.

¹¹¹ 1969 (1) SA 56 (D).

¹¹² At para 161.

¹¹³ At para 24.

¹¹⁴ 1963 (1) SA 71 (T).

testator's death to be against public policy. The court was of the view that the condition was interfering with the beneficiary's marital relations as the condition positioned a restraint on marriage. Thus, the condition was void.

Alternatively, freedom of testation can be limited by the reasons of the vagueness of the testament or based on the uncertainty of a provision in the Will. This kind of clause is regarded as *pro non scripto*¹¹⁵ because they are so vague or uncertain that it is difficult to determine what the testator intended.¹¹⁶ This was confirmed in the case of *Ex parte Estate Hack*¹¹⁷ where the court declared a clause to be defeasance.¹¹⁸ According to the court, for a defeasance clause to be ascertained it should be free from doubt in such a way that a court can with reasonable confidence or conviction say in what conditions would the forfeiture be applicable. In this instance, this was not the case.

(b) Statutory limitations on freedom of testation

The courts or authorised bodies in South Africa have a statutory obligation to limit a testator's testamentary freedom if the provisions within the testament are against legislative frameworks. This kind of restriction is imposed by legislation and is regarded as a statutory limitation(s).¹¹⁹ At present some of these legislations in South Africa are as follows:

(i) The Pension Funds Act 24 of 1956

The Pension Funds Act deals with regulations and dissolutions of pensions in South Africa. Section 37C regulates the disposition of pension benefits upon the death of a member. This Act requires the testator to nominate someone who will become a beneficiary to the pension funds when they die.¹²⁰ The purpose of this provision is to ensure that dependents of the deceased are not forsaken or left out from inheriting or benefiting for the reason that they were not included in the nomination form.¹²¹ If this occurs, the board of the fund is duty-bound to limit the deceased's freedom of testation to distribute the benefits to the dependents of the deceased who

¹¹⁵ Never been written.

¹¹⁶ MJ De waal & MC Schoeman-Melan Law of Succession 5 ed (2015) 139.

¹¹⁷ 1945 TPD 414.

¹¹⁸ The testator provided in the Will that should any of the beneficiaries enter into a marriage with any person who does not profess the Jewish faith they would forfeit the inheritance. According to the court it was impossible to determine with the clearest conviction that a beneficiary had professed or not to the Jewish faith.

¹¹⁹ Francois du Toit 'The Limits Imposed upon Freedom of Testation by the Boni Mores: Lessons from Common Law and Civil Law (Continental) Legal Systems' (2000) 11 *Stellenbosch Law Review* 358 at 358.

¹²⁰ L Nevondwe, T Malatji & M Rapatsa 'Does freedom of testation supersede the powers of the Board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?' (2011) 16 *Pension: An International Journal* 285 at 287.

¹²¹ Ibid at 288.

were left out, even against the deceased's wishes. This was supported by the pension fund adjudicator in *Hlati v University of Fort Hare Retirement Fund*¹²² where the adjudicator stated that provisions of section 37C place a limit on the deceased's freedom of testation. Similarly, in *Reef Group Pension Plan*¹²³ the adjudicator found that the deceased's nomination form was not equitable on the basis that it excluded the deceased's wife, the de facto dependant. The deceased initially bequeathed the pension benefits solely to his brother. Although the fund's board first obeyed the deceased's wishes, the adjudicator overruled that judgment, enabling the wife to obtain the pension benefits.

(ii) *The Immovable Property (Removal or Modification of Restriction) Act 94 of 1965*

Under Section 2, a beneficiary who has an interest in immovable property of the testator's estate that is subject to a restriction may make an application before a court to have the restriction removed or modified to benefit the applicant. A court may also in terms of section 3 of this Act make an order that removes any restrictions on the testator's Will. In essence, this Act limits a testator's freedom of testation by permitting a court to modify a provision in the Will of the testator if it perpetuates *fideicommissum*.¹²⁴ Section 6 of this Act provides that *fideicommissum* established after the commencement of this Act created by a Will is strictly limited to two successive *fideicommissaries*. The aftermath of this is that the second *fideicommissary* will ultimately become the unqualified proprietor and does not have to pass the property to the next *fideicommissary* according to the Will of the testator.¹²⁵

(iii) *The Trust Property Control Act 57 of 1998*

Section 13 of this Act permits a court to vary provisions in a testamentary trust if the trust hampers the achievement of the objectives of the founder, prejudices the interest of the beneficiaries or if it conflicts with the public interest.¹²⁶ In *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh*¹²⁷ the court applying section 13 found the testator's Will which provided that the established trust should be used for

¹²²[2009] 1 BPLR 37 PFA.

¹²³*Moir v Reef Group Pension Plan* [2000] 6 BPLR 629 (PFA).

¹²⁴The Law of Succession in South Africa 2 ed ch 8. A *fideicommissum* occurs where a testator stipulates that the beneficiaries to his or her estate are to own the estate one after the other. The first heir is known as the fiduciary and the succeeding beneficiary are the *fideicommissary*.

¹²⁵P Matsemela op cit note 14 at 101.

¹²⁶Section 13(a)-(c).

¹²⁷1993 2 SA 697 (CC).

‘funding and maintaining of a home for destitute white children’ to be against the public interest. The court stated that ‘the interest of the public of the country, inhabitants of which are mainly non-white, cries out for the need to house and care for destitute children, whatever the ethnological characteristics may be.’¹²⁸ Section 13 goes beyond the variation of trusts or differing the trust of a testator. This section gives the courts an extended power to terminate a trust and its provisions altogether.¹²⁹

(iv) *The Maintenance of Surviving Spouses Act 27 of 1990*

Section 3 of this Act places a limit on a testator's freedom of testation indirectly as it grants the surviving spouse a right of claim against the estate of the deceased on reasons of maintenance.¹³⁰ The provision provides some factors which must be taken into account in determining reasonable maintenance. These factors are (a) the amount in the estate of the deceased spouse that is available for distribution to heirs and legatees. (b) The existing and expected means, earning capacity, financial needs and obligations of the surviving spouse, and the subsistence of the marriage. (c) The standard of living of the survivor during the subsistence of the marriage and his or her age at the death of the deceased spouse. This means that regardless of the deceased spouse's testamentary Will, his or her freedom of testation may be limited by a court if the surviving spouse can claim a share for maintenance from the testator's estate in terms of this Act. The surviving spouse will either claim for such maintenance until death or until they remarry.¹³¹ As stated by the Constitutional Court in *Volks NO v Robinson*¹³² that the effect of this Act on surviving spouses is to protect their right to maintenance and support from their deceased spouse's estate.¹³³

V JUDICIAL INTERVENTION ON FREEDOM OF TESTATION

The primary mandate of the courts in post-constitutional South Africa is to uphold the Constitution and to apply the law in a manner that is devoid of fear, favour, or prejudice. The emergence of the post-constitutional dispensation as a result infused a paradigm shift in how the courts adjudicate freedom of testation. The courts have strayed from the conventional

¹²⁸ Page 421.

¹²⁹ Francois du Toit ‘An evaluation of the limitation imposed upon freedom of testation by section 13 of the Trust Property Control Act 57 of 1988’ (2005) 30 *Journal for Judicial Science* 39 at 40.

¹³⁰ P Matsemela op cit note 14 at 100.

¹³¹ Ibid.

¹³² 2005 (5) BCLR 446 (CC).

¹³³ At para 90.

judicial adjudication of freedom of testation that thrived on certain dominating practices that saw discriminatory provisions and conditions being upheld even when they were against public policy. In this part, this study reflects on how the courts, as outlined in the following cases, positively advanced the values, spirit, and purports of the Constitution and responded favourably to their mandate of promoting equality and fairness in so far as freedom of testation is concerned.

(a) Minister of Education v Syfrets Trust Ltd 2006 (10) BCLR 1214 (C)

This case was the first case since the dawn of South Africa's constitutional dispensation where a court interpreted freedom of testation in line with constitutional principles.¹³⁴ The applicants before this court contested the validity of the testator's testamentary bequest which established a charitable trust, the Scarbrow Bursary Fund Testamentary Trust. The trust was created by the testator to award bursaries to 'deserving students with limited or no means, of either sex' but exclusively of 'European descent.'¹³⁵

The testator created this Will in April 1920, and sometime in December of that same year the testator added a codicil into the Will which stated that 'by virtue of the power reserved by me ... I now alter my possible bequest ... being the portion of clause 4 ... in so far as it affects persons of Jewish decent (sic), and females of all nationalities, none of whom are to be eligible to compete for the scholarship funded by the University of Cape Town in connection with my bequest.'¹³⁶ The applicants sought an order that the court should delete the discriminatory provisions in the testator's testament. They argued that this court has the power to do so in terms of section 13 of the Trust Property Control Act, and common law which permits a court to limit a testator's testamentary provisions if the testament is against public policy. They also argued that this is also possible through section 9 of the Constitution. The Respondents on the other hand argued against the variation based on the principle of freedom of testation.

The court held that the testator's testamentary conditions were contrary to public policy and unenforceable. First, the provision that the eligible and deserving students should be of European descent constituted indirect discrimination based on race and colour, while the exclusion contained in the codicil excluding Jews and females constituted direct discrimination

¹³⁴ P Matsemela op cit note 14 at 106.

¹³⁵ Para 3 (Clause 4 in the Will).

¹³⁶ Para 4.

on basis of gender and religion. According to the court, this discrimination undermines section 9 of the Constitution. The court applied the criteria outlined in *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC) to establish whether the testamentary provisions were fair or otherwise.¹³⁷

On the strength of this case's inquiry, the court pointed out that the testator's testament encouraged unfairness because ordinarily the excluded persons, that is, the Jews, blacks, and females are groups of persons in society who suffered immensely from the disadvantages of the past regime and its systems. Secondly, the testator in creating this trust was to assist deserving students with limited or no means with bursaries. However, the trust disqualifies those same people who would have been beneficiaries on grounds of race, gender, and religion. The trust thus furthers the marginalisation of certain groups by perpetuating discrimination against them.

Furthermore, the court was of the view that the provisions were vague and uncertain because of the term 'descent'. The application of 'descent' would mean that even Jews who have converted their religion would still be excluded. As a result, the provisions were against public policy and public interest. In this regard, no public policy would allow the exclusion of academically deserving students from acquiring a bursary to study for the mere reason that they are black, women or Jew. Also, it would be against the public interest to halt academically talented students and marginalised persons from accessing education, especially in a country like ours where the Constitution requires the values such as the achievement of equality to be realised. The court in closing recognised the principle of freedom of testation by stating that:

This conclusion does not, of course, mean that the principle of freedom of testation has been negated or ignored; it simply enforces a limitation on a testator's freedom of testation. It does not mean that all clauses in Wills or trust deeds that differentiate between diverse groups of people are invalid;

¹³⁷ In determining the impact of unfairness the following must be considered:

- '(a) The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question ...
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.'

simply that the present conditions which discriminate unfairly on the grounds of race, gender and religion are invalid.¹³⁸

Therefore the court found against the testator's freedom of testation and ordered that the discriminatory words, 'but of European descent only' and the entire codicil be struck out.

On reflection, this case shows that courts are open to altering a testator's charitable testamentary trust to accommodate social changes consistent with the values upheld by the Constitution.¹³⁹ These values, like human rights, promote and ensure that the interests of the vulnerable are considered when interpreting any legal questions. O'Regan J stated in *S v Makwanyane* 1995 (6) BCLR 665 that the Bill of Rights which is entrenched in the Constitution requires the courts to enforce them. The courts must protect the marginalised, the dispossessed, and those who are regarded as outcasts in society through the enforcement of the Bill of Rights.¹⁴⁰ This appears to be consistent with the opinion of Griesel J in this case, who stated that those excluded are Jews, blacks, and women and that these people have already suffered the disadvantages of previous systems. Thus, they must be protected through anti-discrimination directives. Overall, this court was correct in determining that the trust clauses in the testator's testaments were invalid due to public policy considerations and equality requirements.¹⁴¹

(b) Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal 2010 (6) SA 518 (SCA)

In this case, the supreme court of Appeal stated that:

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 imperatives to move away from our racially divided past.¹⁴²

¹³⁸ At para 44.

¹³⁹ L Manie 'A Note on The Misinterpretation of Section 13 of The Trust Property Control Act: A Proposed Solution' (2018) 39 *Obiter* 803 at 807.

¹⁴⁰ Para 332.

¹⁴¹ Michael Cameron Wood-Bodley 'Freedom of Testation and the Bill of Rights: Minister of Education v. Syfreys Trust LTD NO' (2007) 124 *SALJ* 687 at 701.

¹⁴² Para 42.

This was an opinion of the court in light of the testator's Will executed in 1983 which the court found to be invalid. The trust condition in the testator's Will provided that the beneficiaries of the trust must be 'European girls born of British South African or Dutch South African parents who have been resident in Durban for a period of three years' and that the beneficiaries must be 'poor girls' who would ordinarily be 'unable to pursue their studies.' In coming to this decision, the court considered provisions of the Higher Education Act 101 of 1997, the Equality Act, and the Constitution, particularly section 9. According to the Court, these provisions necessitated the University to apply public policy because the clauses were discriminating. The discrimination based on exclusion was against public policy. In this case, public policy requires observance of the founding values in the Constitution which are based on human dignity, advancement of equality and freedoms, non-racialism, and non-sexism.

The court dismissed the version that if the court deletes the racially excluding provisions that would render the objectives of the fund void and vague. According to the court, the objectives of the fund had already fallen because South Africa is now united, there is no British South African nor a Dutch South African. Therefore, the observance of the testator's freedom of testation would render the objectives of the fund unattainable.¹⁴³ The court then applied section 13 (a) and (c) of the Trust Property Control Act which allows the court to vary a provision in a testator's Will. The reason for this was that the testator's charitable trust conditions were racially restraining and for this reason, it prevented the intentions of the testator from being realised. The court found that the appeal brought before this court by the Curator Ad Litem that the words 'British', 'European' and 'Dutch' South African remain should be dismissed on the basis that they are discriminatory. The court thus permitted the words to be deleted.

As pointed out in paragraph 42 of this judgment this court indicated that it is constitutional imperative to impede on freedom of testation when its exercise encroaches on public policy and other fundamental values safeguarded in the Constitution. These values together with the constitutional framework are a work in progress to realign South Africa from its divided past to an equal society. This court was correct in that approach taking into account that South Africa is now a unified society through the constitutional framework which among its various goals is to create a new order and structurally rearrange the dynamics of our previous racially

¹⁴³ Para 44.

prejudiced society.¹⁴⁴ As Modiri puts it, our Constitution must have been intended to deal with the conundrums of practices that were/are undemocratic at all levels.¹⁴⁵ Likewise, in the spirit of transformative constitutionalism which strives for the achievement of equality and human dignity in fulfilling the transformative goal espoused in the Constitution, if clauses of this nature as contained in the testator's testament are not halted in our democratic and constitutional state, this may have an ongoing negative consequence.

(c) *Board of Executors in re: Benjamin Godlieb Heydenrych Testamentary Trust & others 2012 (4) SA 103 (WCC)*

The applicants before this court (the board of executors) brought an application wherein they sought an order that this court deletes certain provisions in the testator's testamentary trusts.

In 1943 Benjamin Heydenrych (first trust) executed a Will which established a trust. The trust provided that it must be for educational purposes. It must provide education to 'European boys of good character of the protestant faith to enable them to qualify for the civil service of the Union or as pharmaceutical chemist.' The testator further stated that 'I do specifically stipulate that at least one half of the boys so assisted shall be of British descent.' The Houghton Trust (second trust) was established by Dorothy, the testator in 1989. The trust created a bursary aimed at assisting 'two or more South African boys to be educated' However, the beneficiaries must be 'members of the white population.' The George King Trust (third trust) was executed by George King, the testator. The testator established the George King Bursary that had to be administered by the University of Cape Town. The purpose of the trust was to provide a bursary to students studying music. However, the applicants selected should be 'white' of 'protestant faith.'

The applicants sought an order that the discriminatory words on grounds of race and colour be deleted by this court in terms of section 13 of the Trust Property Control Act. According to the applicants, those words were: 'European' in Benjamin's Will, 'members of the white group' in George King's Will and 'white population' in Dorothy's Will. In addition, the amicus curia submitted that the court should further delete 'European boys' and the condition that provided that, 'I do specifically stipulate that at least one of the boys so assisted

¹⁴⁴ JM Modiri 'Race As/And The Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to Be Racist in BoE Trust Limited' (2013) 16 *PELJ* 581 at 595.

¹⁴⁵ Ibid.

be of British descent' in Benjamin's Will and be replaced with boy(s) and girl(s) contrary which the testamentary trust be declared invalid.

The court stated that the condition that for a person to become a beneficiary they have to be of British descent was direct discrimination constituted on the grounds of ethnic origin, culture, and birth and also indirect on basis of race and colour. This exclusion was even more detrimental as it was excluding the majority of South Africans who are black. The inclusion of 'white', 'British' and 'European' in the trust as qualifying factors disqualified blacks from attaining means to access education. Thus, the exclusion was against public policy.

On the provision of 'boys' in the testamentary provision, the court dismissed the applicant's argument that the limitation on grounds of gender 'outweighs the societal harm.'¹⁴⁶ According to the court, the exclusion of girls was unfairly discriminating. The court however accepted that the testator could not have foreseen a challenge of this nature because by then there was no Constitution like the current one in South Africa. Nonetheless, the clauses were discriminating and conflicted with section 9 of the Constitution. Likewise, the conditions were against the public interest. As such the court struck down the discriminating terms and replaced 'boys' with 'persons' and ordered that the reference to gender as stipulated in Dorothy's Will be read to incorporate females.

The outcome of this case displays a distinct normative approach taken by the courts in the post-constitutional dispensation.¹⁴⁷ Precisely, racially or gender-based limiting provisions can never be commended in South Africa's constitutional jurisprudence considering the non-discriminatory rights protected in the Constitution. If anything, this case is a typical example that courts in South Africa's constitutional dispensation are resolute in denouncing testamentary trust that restricts potential beneficiaries based on their race.¹⁴⁸ As adjudicated, the provisions of the testator's freedom of testation are a clear contradiction to Section 9 of the Constitution which opposes discrimination. As Griesel J stated in *Syfreets*, women (including people of particular races) are one of the vulnerable members of society who have been disadvantaged in the past.¹⁴⁹ As such, they have to be protected through the constitutional transformative agenda and equality directives. As Langa pointed out, equality, more so

¹⁴⁶ Para 18.

¹⁴⁷ Francois du Toit op cit note 12 at 124.

¹⁴⁸ Francois Du Toit 'Re the Esther G. Castanera Scholarship Fund and Recent South African Judgments on Discriminatory Bursary Trusts' (2017) 40 *Manitoba Law Journal* 141 at 146.

¹⁴⁹ Para 34.

substantive equality should be one of the tenets used to support the transformation.¹⁵⁰ Substantive equality ensures that laws respect the differences among people to prevent the subjugation of groups that are already subject to social, political, or economic disadvantage.¹⁵¹

VI CONCLUSION AND RECOMMENDATIONS

Conclusion

The purpose of the study was to analyse how the Constitution has impacted the notion of freedom of testation and to what extent the courts dealt with freedom of testation in light of the Constitution. This study revealed that since South Africa's constitutional dispensation as inaugurated by the adoption of the final Constitution, freedom of testation has been exponentially impacted from an application and interpretation perspective. This was not the case before this current dispensation. In pre-constitutional South Africa, freedom of testation was applied to an extent that even discrimination was acceptable or tolerable. Testators enjoyed too much freedom of testation which led to its abuse or misuse. However, since the advent of the Constitution, a stop was put to this abuse through the Constitution itself as supported by other legislations.

The Constitution also postulates transformation, a concept which is popularly known as transformative constitutionalism which did not exist before South Africa's constitutional dispensation. As shown, transformative constitutionalism plays a key role in ensuring that the transformation envisaged in the preamble and the founding constitutional values as pointed out in section 1 is realised. Concerning it, it aims to eradicate challenges or struggles of the past and work towards building a new South Africa where not only social and economic changes take place but also where the law is transformed to speak to the spirit of the constitutional framework in its entirety. In addition, the Constitution embodies the Bill of Rights as set up in chapter 2. These rights are known as a cornerstone of South Africa's democracy. They affirm democratic values of human dignity, equality, and freedom.

Equally, public policy has also been recognised as a concept that affects freedom of testation. As emphasised by the courts, public policy is now rooted in the Constitution. The impact thereof is that the Constitution permits the courts to declare testaments invalid on common law reasons. On the whole, this study demonstrated how testaments that cause

¹⁵⁰ Pius Langa op cit note 70 at 355.

¹⁵¹ A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 AHRJ 609 at 613.

discrimination or encroach on common law principles, statutory framework, and the Constitution can be declared invalid. This is a step in the right direction because it means that human rights and the rule of law are safeguarded.

Recommendation

It is important to encourage people to use the services of professionals when drafting their Wills. This should also apply to those who are still alive and have already drafted their Wills, in particular testators who did so before South Africa became a constitutional state. They should seek the services of a professional who will assist them in interpreting the existing Will to ensure that it is valid and complies with constitutional principles. This is because professionals are well-versed with the limitations that exist as far as freedom of testation is concerned. This is doable as several legal practitioners are available to assist in drafting and updating Wills for free during National Wills Week which typically takes place every year. Equally, those who have not yet drafted a Will may also take advantage of this opportunity to have a compliant and valid Will drafted for them at no cost by legal practitioners during National Wills Week.

The promotion of this initiative is therefore essential if we are to accomplish this. Higher Education Institutions, particularly the law faculty and law firms in general, can assist in raising this awareness as part of a community participation project. During this community participation, they can visit communities and make them aware of National Wills Week. By spreading the word and making communities aware of this type of initiative the influx of cases in court dealing with the validity of a Will could be alleviated or averted.

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