

**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**James King N.O. and Others v Cornelius Albertus De Jager and Others**

**David Louis Ayscough Wilkinson and Another v Georgina Elizabeth Crawford N.O. and Others**

**CCT 315/18 and CCT 130/19**

**Date of hearing: 11 February 2020**

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**MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Tuesday, 11 February 2020 at 10h00, the Constitutional Court will hear two applications that have been consolidated. These are for leave to appeal against the judgments and orders of the Supreme Court of Appeal. The central question concerns the extent to which a court, in our constitutional dispensation, may encroach on the principle of freedom of testation in the context of private wills and trusts through the vehicle of public policy.

The facts and issues pertaining to the first application are as follows. On 28 November 1902, Mr Carel Johannes Cornelius de Jager and Mrs Catherine Dorothea de Jager (deceased’s grandparents) executed a joint will (Will) and bequeathed various properties to their six children – four sons and two daughters, subject to a *fideicommissum*. One of their sons, Cornelius, had three sons, namely, Corrie, John and Kalvyn (deceased). Kalvyn de Jager died testate on 5 May 2015. He had no sons but left five daughters (the second to sixth applicants). His daughters had four sons, the fourth to eighth respondents.

The *fideicommissum* was governed by clause 7 of the Will, which stated that beyond the first generation, the properties would, as far as the second and third generations were concerned, not devolve upon their female descendants. It is clear that until the death of the deceased, the terms of the *fideicommissum* were interpreted, in light of clause 7, as limiting the *fideicommissary* beneficiaries to the sons of the testators’ children and, thereafter, their sons. As such, the terms were interpreted as not applying to any female descendants. Since the deceased had no male descendants, the problem arose after his death. The deceased’s daughters claimed that certain portions of clause 7 of the Will unfairly discriminated against them on the basis of gender as it excludes females from inheriting. They claimed they were entitled to inherit from their father’s estate.

The applicant, one of the executors of the deceased’s estate, then approached the High Court for an order declaring the offending portions of the Will invalid and amending the Will to include a provision that would enable females or the daughters to inherit the *fideicommissary* properties. The application was opposed by the first to third respondents.

The High Court was called upon to determine two main issues: first, to reconcile a potential conflict between the right to freedom of testation and the right to equality; and, second, the correct interpretation of the words “*sons*” and “*male descendants*”in clause 7, insofar as remoteness is concerned. The High Court (per Bozalek J) held that clause 7 was not unreasonable and offensive to the extent that it could be rendered contrary to public policy. A weighty consideration for the High Court was the distinction between public and private testamentary instruments. Since this matter dealt with a private will, the High Court held that it did not have a public character nor indefinite life, and its provisions did not discriminate against one or more sectors of society but, rather, against certain descendants. Thus, the High Court dismissed the constitutional challenge. In the result, the High Court dismissed the claims of the second to sixth applicants and the fourth to eighth respondents with no order as to costs.

The matter was dismissed on appeal by the Supreme Court of Appeal on 13 November 2018, which endorsed the reasoning of the High Court.

Unhappy with the decision of the Supreme Court of Appeal, the applicants then applied for leave to appeal to the Constitutional Court. Firstly, they contend that clause 7 of the Will as it currently stands unfairly discriminates on the basis of gender and ought to be amended by a court on grounds of public policy with the effect of deleting the word “*sons”* and replacing it with the word “*children*”. Secondly, that the High Court erred in its interpretation of “*male descendants*” and “*sons*” as being limited to great-grandsons. The respondents, on the other hand, submit that unfair discrimination on a gender basis in a private will, in the absence of a specific justification for disinheriting potential beneficiaries of a particular gender, cannot be justified under section 36 of the Constitution. The interpretation of the words “*male descendants*” involves the application of trite unchallenged principles of testamentary provisions.

The facts and issues regarding the second application are as follows. Both applicants are the adopted children of the now deceased Dulcie Helena Harper (Harper), who was the only surviving child of the late Louis John Druiff (the donor) at the time of the original application.

On 28 January 1953, the donor executed a notarial deed of trust (trust deed). The beneficiaries of the trust deed were the donor’s four children and their children. The trust deed stipulated that upon the death of the donor, the net revenue and income shall be divided equally between the donor’s children. In the event that any child had died at that time, his or her share would devolve upon his or her descendants *per stirpes.* At the time of execution of the trust deed, three of the donor’s children already had children of their own. Upon the donor’s death, quarter shares of the capital duly devolved upon his children. Subsequent to the donor’s death, Harper lawfully adopted two children.

When uncertainty arose with regard to whether adopted children would also receive her quarter-share of the capital upon her death, Harper approached the High Court for an order declaring that the words “*children*”, “*descendants*”, “*issue*” and “*legal descendants*” used in the trust deed, be interpreted to include Harper’s children, notwithstanding that they were adopted. Alternatively, in terms of section 13 of the Trust Property Control Act 57 of 1988 (Trust Act), Harper sought that the trust deed be amended in order to apply to the adopted grandchildren.

The High Court (per Dlodlo J) conducted an interpretative exercise to ascertain the intention of the donor. The High Court noted that whether the donor intended to include adopted children fell to be answered by applying the ordinary rules of interpretation to the trust deed, in line with the law at the time of its execution. The High Court held that the donor’s subsequent omission to expressly include adopted children should be held to indicate the donor’s intention not to include adopted children. Therefore, only the biological descendants of the donor’s children are capital beneficiaries of the trust deed. The High Court also underscored the distinction between private and public testamentary instruments and found that when dealing with the latter, courts are willing to intervene through the lens of public policy. In the result, the High Court dismissed the application with costs.

Aggrieved by the decision of the High Court, the applicants approached the Supreme Court of Appeal. The Supreme Court of Appeal was split on the matter. The majority judgment was penned by Ponnan JA (Tshiqi, Zondi and Dambuza JJA concurring). Through the interpretative exercise to ascertain the intention of the testator, the majority judgment noted that the trust deed was drawn up by a professional person and if the donor had intended to benefit adopted children, the donor would presumably have been advised of the need to include such a class of children in express terms. The majority judgment noted that this omission was fatal and indicative of no intention on behalf of the donor. In terms of public policy, it is deeply rooted in the Constitution and that some testamentary provisions may not pass muster in light of our Constitution’s equality and non-discrimination imperatives. On the other hand, an analysis of freedom of testation is underscored by the right to property as well as the right to dignity.

The majority judgment held that public trusts are judged more strictly than private trusts – that this matter concerns what occurs in the private and limited sphere of the donor. The majority held that freedom of testation must be given appropriate weight and in this matter we are not concerned with a trust deed that contains “gratuitously discriminatory provisions of an egregious kind”, the applicants are in effect asking the Supreme Court of Appeal to rewrite the trust deed and the Supreme Court of Appeal has no jurisdictional basis to do so. The Supreme Court of Appeal also dismissed the section 13 of the Trust Act arguments. The appeal was thus dismissed.

The minority judgment penned by Molemela JA held that the issue of public policy did not arise because the language of the trust deed coupled with the surrounding circumstances did not reveal an intention to exclude adopted children, and is thus not discriminatory in effect. The minority judgment reasoned that the legal fiction created by section 71(2) of the Children’s Act of 1937 (Children’s Act) was that an adopted child was for all purposes deemed to be a biological child and there is a presumption in favour that can only be rebutted by a contrary intention evident in a will or trust based on the ordinary rules of interpretation. After an interpretative exercise the minority judgment concluded that there was no basis for finding that the donor’s manifest intention was to exclude adopted children from benefiting from the trust deed. Therefore, the impugned words include adopted children.

Aggrieved by the decision of the majority of the Supreme Court of Appeal, the applicants applied for leave to appeal to the Constitutional Court. First, the applicants submit that based on section 71(2) of the Children’s Act, the lower courts misinterpreted the facts and the donor’s intention regarding natural and adopted children. The applicants seek an interpretation that brings the provisions of the trust deed in line with the purposes sought to be achieved. Second, the applicants contend that the High Court and the Supreme Court of Appeal neglected developments in public policy regarding the laws concerning adopted children, and failed to recognise that public policy evolves pursuant to the advent of the Constitution. Third, the applicants also contend that based on section 8(3) of the Constitution, the Court ought to develop the common law to give effect to a right in the Bill of Rights. The current Children’s Act should be applied retrospectively and public policy at the time of vesting should prevail. Fourth, the applicants contend that differentiation on the basis of birth infringes section 9(1) and section 9(3) of the Constitution. While freedom of testation is a core principle, it is not absolute, and the right to equality ought to outweigh freedom of testation. Finally, the applicants submit that the High Court and Supreme Court of Appeal also erred in dismissing their section 13 of the Trust Act argument.

The respondents submit that, for the purposes of the trust deed, the donor did not intend to include adopted children. Since the trust deed was executed before the adoption, the adopted children were not entitled to inherit unless the intention of the donor was clearly conveyed. The respondents argue that the donor’s intention and meaning of the trust deed ought to be discerned in light of the surrounding circumstances at the time of its execution, in the context of the deed as a whole, consistent with the law applicable at the time of execution, and that subsequent statutes cannot alter the donor’s original intention. The respondents submit that since the donor had professional assistance, the donor could have expressly provided for adopted children. The respondents submit that the applicants cannot rely directly on the Bill of Rights, due to the non-retrospectivity rule, rendering the section 9(3) argument irrelevant. The respondents further challenged the argument put forward by the applicants to develop the common law pursuant to section 39(2) of the Constitution. The respondents contend that freedom of testation does not rank lower than equality. Finally, the respondents submit that the jurisdictional facts for section 13 of the Trust Act are absent.