IN THE HIGH COURT OF SOUTH AFRICA

(DURBAN AND COAST LOCAL DIVISION)

Case No: **17124/2005**

In the matter between:

UNIVERSITY OF KWAZULU-NATAL **First Applicant**

and

MALEGAPURU WILLIAM MAKGOBA
And twenty seven other applicants. **Second to Twenty Ninth Applicants**

JUDGMENT

NICHOLSON J

Introduction

1. The Applicant seeks an order for the variation of a trust instrument. The order sought is as follows:-

"2.

(a) THAT the terms of the Trust created by the provisions of clause 26 (f) of the will of the late SIR CHARLES SMITH and known as the EMMA

SMITH EDUCATIONAL FUND be varied by:-

(i) the deletion of clause 26 (f) (2) of the words "European", "British" and "or Dutch South African";

(ii) by the deletion of the word "Durban" and its replacement by the words "the Ethekwini Municipality".

(b) THAT the costs of this application, including the costs of the *curatores-ad-litem* and those consequent upon the employment by the Applicant of two counsel be paid on an attorney and client scale from the funds of the said Trust."

Factual Background

2. The late Sir Charles George Smith by way of his last will and testament bequeathed, three-tenths (3/10) of the residue of his estate to the Council of the Natal University College.

3. This residual was to be held in a trust fund called The Emma Smith Educational Fund dedicated in perpetuity for education as specified in terms of his will.

4. The relevant bequest is set out in clause 26 (f) of the will, of the late Sir Charles which reads as follows:-

> *"(f) As to three tenths thereof to the Council of the NATAL UNIVERSITY COLLEGE (hereinafter with their Successors in Office called the Council) to be taken and held by the Council in trust to the intent that the same shall be dedicated in*

perpetuity for the promotion and encouragement of education in manner hereinafter appearing namely:

1. The proceeds of this bequest shall form a fund to be called THE EMMA SMITH EDUCATIONAL FUND in memory of my Mother.

2. The Council shall stand possessed of the said Fund and the investments from time to time representing the same upon trust to apply the income thereof in and towards the higher education of European girls born of British South African or Dutch South African parents, who have been resident in Durban for a period of at least three years immediately preceding the grant, payment or allowance hereby authorized.

3. The income shall be applied at the discretion of the Council:-

(a) in the maintenance of Exhibitions for the benefit of poor girls who but for such assistance would be unable to pursue their studies of such value and for such period as the Council may determine in each case, tenable at any institution of higher education or of technical professional or industrial instruction approved by the Council;

(b) In payment at the discretion of the Council of an Allowance for the maintenance of such Exhibitioners for such period as the Council may determine in each case to their parents so long as the Exhibitioners reside with them or to some other person with whom the Exhibitioners may reside with the approval of the Council;

(c) The Exhibitions shall be awarded and held under such regulations and conditions as the Council shall determine;

(d) Subject to the foregoing the Council may at any time make and frame such regulations as they shall in their uncontrolled discretion think fit for the administration and application of the Fund and may at any time amend, alter and repeal any of the said regulations as they shall think fit;

(e) The Council may delegate all or any of the powers, authorities and discretion hereinbefore conferred on them to a Committee of the Council and at any time revoke either wholly or partly the authority conferred on such Committee;

(f) In the event of the Council of the Natal University College being unable or unwilling to undertake the office conferred upon them hereunder I nominate, constitute and appoint the Town Council of the City of Durban, to be the Trustees of the said Fund with the same powers and

> *authority as are hereby conferred upon the Council of the Natal University College."*

5. The Council of the University of KwaZulu-Natal by virtue of the various successions in law, that is, Natal University College to University of Natal and eventually to University of KwaZulu-Natal, holds the fund in trust to administer it for the promotion and encouragement of education as per the manner set out in the late Sir Charles' will.

6. The Applicants, who were represented by Mr Wallis SC and Ms Mahabeer, now seek, in terms of section 13 of the Trust Property Control Act 57 of 1988 (the Act) the relief set out in the notice of motion.

The issues

The provisions of section 13 of the Act read as follows:

> "13. Power of court to vary trust provisions:
>
> If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a 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 the 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 any such provision or make in respect

thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

7. There are fundamentally two main issues which must be addressed by the applicants to entitle them to the relief sought. The first relates to the fact that the trust instrument must be shown to contain a provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee. In addition the applicants must show that such provision hampers the achievement of the objects of the founder; or prejudices the interests of beneficiaries; or is in conflict with the public interest.

8. The founding affidavit of Professor Makgoka sets out the facts relied upon by the applicants and was signed on 5 December 2005. On 4 January 2006 Mr Shaw QC and Ms Gabriel were appointed curators-ad-litem to potential beneficiaries of the class referred to in clause 26(f) of the will for the purpose of investigating how the interests of such persons will be affected by the grant of the order in terms of the second order prayed and to report to the court thereon. I am given to understand that their powers have been widened to include taking this matter on appeal should the judgment be adverse to the interests of the potential beneficiaries.

9. The first report of the curators was signed on 19 April 2006. In this report the curators submitted that certain amendments be made including that reference to British and Dutch South African parentage be deleted. In addition they suggested that reference to residence in Durban be removed and be replaced by a provision that the exhibitioners should have attended school for a period of three years in the Province of KwaZulu-Natal, immediately preceding the application. It was further proposed that the reference to 'poor' should be deleted and that there should be a general reference to assistance to pursue a course of study which the student would not otherwise be able to pursue and those able to receive other loans should not be entitled to receive benefits from the fund.

10. As has been mentioned the bequest speaks of the exhibitions being 'for the benefit of poor girls who but for such assistance would be unable to pursue their studies of such value and for such period as the council may determine in each case, tenable at any institution of higher education or of technical, professional or industrial instruction approved by the council.' The curators point out that the reference is to 'poor' girls and not girls from a poor family. That is undoubtedly correct but given the relevant ages of the potential beneficiaries it would be

unusual to find prosperous girls coming from poor families.

A number of local and overseas authorities were referred to which dealt with 'poor', 'poverty' and 'sufficient means', which ruled out absolute destitution as the standard. The cases suggested that such a condition was one resulting from limited means or one where the person was needy, with few material possessions and in need of financial assistance. The curators interviewed the personnel who administer the fund and examined the budgets and application forms. Poor girls, according to those who administer the fund, appear to be those whose gross family income, before deductions, should not exceed R 130 000 per year.

11. Mr Shaw submitted that women in general are regarded by the Constitution as being previously disadvantaged. The curators propose an amendment to the trust deed to award thirty percent of the income available to white girls. In respect of the balance of this thirty percent (should there be insufficient white applicants, I presume) and a further fifty percent of the income is to be given to girls other than white girls. The remainder should be distributed in whole or in part in the discretion of the trustees or accumulate.

12. The curators further submit in this first report that to avoid any

conflict or embarrassment to the University and its Council, they be replaced as trustees with a recognized trust organization and that the selection of those to benefit should be by a specially appointed selection committee of this trust.

13. Professor Makgoba, filed a further affidavit dated 8 October 2007 and dealt with a number of points raised by the curators. A further report was signed by the curators dated 29 April 2008 and filed with the court on 30 July 2008. The curators have reported very comprehensively and the court is indebted to them.

14. After hearing argument I realized that the papers had not been served on the Master as required by rule 6(9) of the Uniform Rules of this court. As a result I contacted the parties and the curators who arranged for this to take place. The Master reported on 10 March 2009 and has left the matter in the hands of the court.

15. The curators have raised a number of important points and the court will deal with them seriatim. They contend in the first instance that section 13 does not apply and therefore the court has no jurisdiction under the said section.

16. Mr Shaw submitted that the bequest in the will left the residue in question to 'the Council of the Natal University College (hereinafter with their successors in office called the Council) to be taken and held by the council in trust.' The Natal University College is a statutory body that was set up by Act 18 of 1909 which provided in section 3 for control of the College to be vested in a council to be called the Natal University College Council. Section 22 provided that all actions and other proceedings at law by or against the College shall be instituted by or against the Chairman and Registrar for the time being.

17. By Act 12 of 1916 a federal university was brought into being - The University of South Africa - and it was composed of constituent colleges, including the Natal University College. In terms of section 3(4) of that Act the Council of any constituent college had the power to promote legislation providing for the incorporation of such college as a university.

18. By Act 4 of 1948 Natal University College of Pietermaritzburg and Durban was incorporated as a university and in terms of section 7 the government and executive authority of the university vested in the council, in similar fashion to the Natal

University College. In terms of section 3 the university was constituted as a body corporate in the name given it in section 2 namely The University of Natal.

19. This last mentioned Act provides in section 14 that:-

> "All assets, rights, powers and privileges of any kind whatever which immediately prior to the appointed day were vested in the Council of the Natal University College, or which, if this Act had not been passed, would have accrued to or vested in that Council shall, upon and as from that day, without payment of transfer duty, stamp duty or registration charges accrue to and vest in the University, which shall, as from the appointed day, assume and be liable for all debts and liabilities of the Council of the said College, in respect of that institution, subject to the conditions under which those debts and liabilities were incurred: Provided that all funds and rights vested immediately prior to the appointed day, by trust donation or bequest, in the said College, or the Council thereof, shall be applied or exercised by the University in accordance with the conditions of such trust, donation or bequest.."

20. Mr Shaw submitted that if one considered the proviso then the bequest vested in the University as such and not the council and was thereafter subject to the statutory regime, establishing the university and the later merger. That being the case the provisions of section 13 of the Act did not apply. What is clear is that the old Natal University College in terms of the applicable legislation changed from being a statutory college with the council acting as it administrators and trustees to a statutory *legal persona* which could sue and be sued in its own name.

Section 14 provided for the transfer of assets liabilities etc from the erstwhile council to the university itself.

21. The bequest according to the proviso must be exercised 'by the University in accordance with the conditions of such trust, donation or bequest.' There is no suggestion explicitly or by necessary implication that the bequest would be administered by the first applicant in terms of its own statute.

22. I agree that without the provisions of section 14 the council of the University of Natal would have continued to administer the trust as its predecessor. The plain meaning of the proviso read in the context of the section as a whole seems to me to be that the First Applicant would step into the shoes of the council of the Natal University College to administer the trust subject to the conditions of the bequest. The applicants include the University of KwaZulu-Natal and the members of its council. Property can vest in a party purely for the purpose of administration. See *CIR and Others v Sive's Estate* 1955 1 SA 249 AD at 269. I conclude that section 13 still applies to what is plainly a trust when taking into account the definitions of a 'trust' and 'trust instrument' and 'trustee' in the Act. The will is a testamentary writing and the ownership of the residue set aside to constitute the Fund was made over to the University to be

administered and disposed of according to the bequest to the named beneficiaries.

23. Given that Mr Wallis and Mr Shaw for the curators were in agreement that the reference to girls of British and Dutch parentage should be deleted – a view which I would endorse wholeheartedly – the next question to be considered is whether any sum should be reserved for white girls as submitted by Mr Shaw.

Consequences not foreseen by Sir Charles

24. In the founding affidavit Professor Makgoba sets out the personal biography of Sir Charles gleaned from various books. It is clear that he was a very successful businessman and his ventures included C G Smith and Company and the predecessor of Unicorn Shipping. It is clear from the founding papers that Sir Charles was a very generous person with a great concern for the underdog. Apart from the bequest which is relevant in this matter he instituted a scholarship in 1920, also in his mother's name, for painters, sculptors, architects and art teachers. The present fund is substantial and in September 2005 had assets valued at R 27 million and distributed over R 4 million.

25. Broadly stated the generosity in question was directed at poor white girls who were at the time financially disadvantaged and unlikely to have obtained a university education otherwise. The University recognizes that the bequest was enlightened in the 1930s but submits that the South Africa of the present age is a radically transformed one. Apart from the difficulty of identifying who are European girls of British or Dutch South African parents the University points out that more than half of the students attending the University cannot be classified as white. In addition the university has policies that are non-discriminatory and designed to achieve the goals of equality which are enshrined in the Constitution. Although the university does administer scholarships and bursaries that attempt to remedy past discrimination, their general approach is that bursaries should be made available irrespective of race and gender.

26. The present bequest, so it is submitted, is a cause of embarrassment and might expose the university to proceedings in the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. Of the nineteen bursaries and scholarships on the university records, which have racial restrictions, fourteen are in favour of black students - to remedy past discrimination - and five (three for

females and two for males) are limited to white students. The precise amounts disbursed under these bursaries are not stated in the papers.

27. Further allegations are made by the University that it would not desire to administer a scholarship with a racial restriction but, given the time period during which the bequest was established, it has a duty to address the question of this bequest, which is intended to continue in perpetuity. The University explores the reasons Sir Charles restricted the bequest to European girls of British and Dutch parentage and sets out the history of the struggle between these two population groups, since the first British occupation of parts of South Africa. Apart from being a very successful businessman Sir Charles was a Senator for and member of the South African Party from 1921-1930 and a great admirer of General Smuts. The latter's political policies included *inter alia* a great determination to heal the rift between Afrikaner and English speakers and he regarded that as the most important problem in South Africa at the time of the bequest.

28. Sir Charles, so it is alleged by the applicants, would not have directed his mind to people of colour at that time as during the period from 1937-1945 of the 933 graduates only 54 were not

white and very few, if any, women. Sir Charles would not have foreseen the events after his death, including the United Nations Declaration of Human Rights, the sweeping away of colonialism, the rise and fall of Apartheid, and the emergence of what Archbishop Tutu called the 'Rainbow Nation' in the 1990s.

29. Sir Charles would not have foreseen that the problem of British and Dutch antagonism would pass and there would emerge a non-sectarian non-racial South Africa, which was constitutionally committed to equality. Secondly the university argues that Sir Charles would not have foreseen the economic advancement of the British and Dutch descendants and the extent to which their poverty was alleviated. The third consequence that Sir Charles would not have foreseen was that his bequest would no longer be regarded as progressive and showing foresight and that the provision of bursaries for poor white women would at a later age be regarded as sectarian and divisive and preserving privilege for the few and motivated by racism.

30. The university submits that these consequences were unforeseen by Sir Charles and hamper his objectives in benefitting poor girls, who were desirous of attending university or furthering their education. He addressed a problem (lack of

access to education) which at the time was for all practical purposes limited to white girls and he showed his benevolence by extending his largesse, not only to daughters of the British settlers, but also to the Afrikaners, who were perceived as foes of the English speakers. The philanthropy of Sir Charles was not racially directed, so the argument proceeded, but at addressing the poverty of the pool of potential learners of his time. With more than fifty percent not white at the University he would have inevitably addressed the poor regardless of race today.

31. Mr Shaw referred to Cameron et al *Honore's South African Law of Trusts*, Juta, Fifth Ed, 2007 for a proper interpretation of section 13. At 517-8 the learned authors point to the subjective and objective criteria that must be satisfied before the court can intervene. The subjective criteria refer to the provisions which address the consequences which the founder of the trust did not contemplate or foresee. An example cited is helpful in understanding the section. If a testator foresaw an increase in inflation and in the value of an estate but nevertheless restricted the income payable to his widow under the trust to R600 per month, then the court could not do anything about it. I also accept the view of the learned authors that the court cannot use the section to fill lacunae in the trust deed. The objective

considerations relate to the provisions hampering the achievement of the objects of the founder, the prejudice to the interests of the beneficiaries and possible conflicts with the public interest.

32. Mr Shaw submitted that Sir Charles was well acquainted with the term 'European' and 'British' and 'Dutch' and was minded to restrict his bequest to this group of girls. Mr Shaw submitted that sensible meaning could be given to the word 'European' in the South African context today. He referred to cases such as *Dunn v Natal Estates Limited* 1940 NPD 206 at 220 -221, *Moller v Keimoes School Committee and Another* 1911 635 at 642-3, *Gandur v Rand Townships Registrar* 1913 AD 250, *Rex v Padsha* 1923 AD 281 and *Madressa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 which did give meaning to the words 'European', 'native', 'Asiatic' and 'coloured' to give effect to legislation of the time. The purpose of this was that Sir Charles would have had these definitions in mind when he made the bequest.

33. I did not understand Mr Shaw to be holding out for the retention of the word 'European' as defining the group of girls to benefit. I say this for a number of reasons the first being that he referred to 'white girls' and not 'European' when stipulating the division

he advocated. In the second place, while the term 'European' might have required definition especially when it occurred in legislation at the time of the bequest, that position does not obtain today. It is also clear that in modern times we would restrict the meaning of 'European' to persons emanating from the continent of Europe and not a catchall term for those of a lighter pigmentation. In the present context a reference to 'European' is archaic and inappropriate and falls to be deleted.

34. Mr Shaw submitted that Sir Charles would have regarded blacks and whites as destined to remain separate and distinct. He contested that the absence of antipathy to blacks rebutted any serious intention of a creating a bequest which favoured white girls in perpetuity. In other words, so I understood the argument, Sir Charles did foresee a time when his bequest might cause embarrassment and persisted in his intention. Given the objective nature of this enquiry then *cedit quaestio.*

35. Mention has been made of the tumultuous changes that have come about since Sir Charles death. It would be a brave man who would state that given the paucity of information we have that Sir Charles foresaw it all. I do not imagine Sir Charles would have enjoyed the fact that his bequest would become an embarrassment to the institution he nominated to administer it

or that he would be branded a racist or divisively discriminatory. The scanty evidence on his general inclinations seems to point in the other direction. The applicants quote from his biography where even as a boy, he promised that if he made a lot of money, he would not stop working 'but would always labour for the benefit of the poor and needy. This has been the guiding principle of my life, to help the underdog if at all possible.'

36. While the focus of his benevolence might have sharpened with maturity, I am not persuaded that, given his initial targeting of the 'poor and needy' and the 'underdog', Sir Charles intended his racial taxonomy to persist in perpetuity, and that he in fact foresaw the consequences I have mentioned.

37. The second question has now to be dealt with namely whether the consequences are in conflict with the public interest.

In the public interest

38. Mr Wallis argued that the consequences of the bequest are in conflict with the public interest and that the Constitution and Bill of Rights provide a road map as to how to approach that enquiry. It was submitted that it could not be in the public

interest under a Constitution which guarantees equality and non-discrimination to restrict a bursary to white women. Given the steadfast adherence of the University to these values, it would be undesirable for it to administer such a large bursary on this basis. Finally it would not be in the public interest to give up the bursary altogether because of these considerations.

39. Mr Shaw submitted that there was still a pool of needy white girls who were keen to avail themselves of the bursaries in question. He stressed that the abolition of job reservation and the coming of democracy had led to some increase in their numbers. He submitted that the potential beneficiaries to the trust continue to exist and the trust objectives can be met. He stressed the importance of freedom of testation, grounded as it was in the property provisions of section 25 of the Bill of Rights and the rights to freedom and dignity. These freedoms had to be juxtaposed against other freedoms, including the right to equality.

40. The embarrassment of the university was unimportant as the City Council of Durban and failing it another agency could administer it. Given that the City Council is a statutory body with powers derived from the Constitution and various statutes and ordinances, I am not persuaded that it would see its way clear

to administering a racially restricted bequest. I also do not believe that the locating of an agency that is willing to administer the bequest in the manner suggested by the curators should be determinative of what is in the public interest.

41. Mr Shaw also emphasized that the changing of the will to racially neutral terms should not disadvantage the currently named beneficiaries, who might suffer in a selection process, because their numbers were small in comparison to other races. That in itself would defeat the principles of equality and the prohibition on discrimination on the basis of race and gender. The public interest is, of course, tied up very comprehensively with the freedom of testation and the equality debate. I accept that there is a significant public interest in the fact that a testator's desire are carried out. See *Bydawell v Chapman NO* 1953 3 SA 514 A at 521 E-F. I accept that charitable trusts should be benevolently interpreted and upheld as far as legitimately possible. See *Marks v Estate Gluckman* 1946 AD 289 at 311.

42. There are two cases to which counsel referred and which are most helpful in determining this matter being *Minister of Education v Syfrets Trust Ltd NO* 2006 4 SA 205 (C) and *Ex parte President of the Conference of the Methodist Church of*

Southern Africa NO: In re William Marsh Will 2006 (4) SA p225. I have also received great assistance from academic works including De Waal *The Law of Succession and the Bill of Rights (Private Succession and the freedom of testation in the light of the Constitution), The Bill of Rights Compendium*, Lexis Nexis, Butterworths, 3G6 – 3G11 and the standard works including, Corbett et al *The Law of Succession in South Africa,* Juta, Second Edition 2001, 39-40) and Cameron et al *Honore's South African Law of Trusts*, Juta, Fifth Ed, 2007.

43. In the first mentioned case the court dealt with a charitable trust which awarded bursaries to 'deserving students with limited or no means' of the University of Cape Town. However, in terms of the will, eligibility for the bursaries is restricted to persons who are of 'European descent', not of Jewish descent, and not female.

44. The Minister, as the first applicant, approached the Court in that matter as a member of the Executive, which was required by s 7(2) of the Constitution to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, including the right to equality. In addition, the Minister stated that he was responsible for education policy, and in particular higher education policy, in terms of s 3(1) of the National Education Policy Act 27 of 1996 and s 3 of the Higher Education Act 101 of 1997. He also approached the Court in the public interest.

45. The university, as the second applicant, in that matter approached the Court by virtue of the fact that the testator's will envisaged that the university council would play a critical role with regard to administering the bursaries and selecting the bursary recipients. The university claimed that it had been unable to fulfil this role by reason of the perceived discriminatory nature of the conditions in the will. It also had an interest because it is students of the university who are prohibited from applying for the bursary by virtue of their race, gender or religion.

46. The court considered that the limitation of bursaries to candidates of 'European descent' constituted indirect discrimination based on race and colour (see para 33) whereas the exclusion of Jews and women constituted direct discrimination on the basis of religion and gender. The court considered the test formulated in *Harksen v Lane NO* 1998 1SA 300 (CC) and found that the bequest in question constituted unfair discrimination and was 'contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality.' (See para 47).

47. This led the court to delete the offending words on the basis of the common law. It seems to me that the question of public policy is very easily and obviously equated to the public interest

set out in section 13. In the judgment of Griessel J in paragraphs [25] – [46] the learned judge dealt with why considerations of equality were of more importance than the freedom of testation. For the purposes of this judgment it is not necessary to repeat those reasons but some should be highlighted to illuminate the facts in the present matter.

48. The applicants in that matter contended that the Court was empowered to grant an order deleting the offensive provisions in terms of section 13 of the Act, secondly the common law, and by means of a direct application of the Constitution, more particularly, the equality and anti-discriminatory provisions of s 9. Griessel J held at paragraph [16] that the applicants had made out a compelling case for relief on each of the three grounds advanced but restricted his decision to the common law argument.

49. In the second mentioned matter the Court was asked to delete the word 'white' in a bequest in terms of a will executed in 1899 in terms of which the testator bequeathed the residue of his estate in trust to be applied to 'the founding and maintaining of a home for destitute white children'. It was held by Berman J (Seligson AJ concurring) that the clause in question was contrary to the public interest.

50. Miss Gabriel who undertook this portion of the argument on

behalf of the curators challenged the correctness of these decisions on a number of grounds.

Horizontal application

51. In considering whether natural persons and the equality provisions of the Constitution are of application to the present enquiry it is necessary to consider various sections of the Bill of Rights. Section 8(2) provides that a provision thereof binds a natural or juristic person if and to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right. Section 8(3) provides that when applying a provision to a natural or juristic person a court must apply or if necessary develop or limit the common law to give effect to such a right provided that the limitation is in accordance with the limitation clause in section 36.

52. In determining whether the provisions of section 9 relating to equality are binding on private persons or institutions resort has to be had to the provisions in question to determine whether it has an internal application provision which makes it clear that the right does impose burdens on a private person.

53. Section 9(1) of the Constitution provides that 'everyone is equal before the law and has the right to equal protection and benefit of the

law'. Subsections (2),(3), (4) and (5) provide as follows:

> '(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

(5) Discrimination on one or more of the grounds listed in ss (3) is unfair unless it is established that the discrimination is fair.'

54. Section 9(4) does provide that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds set out in terms of sub-section (3). That does seem to be the clearest indication that the provisions apply horizontally. The problem lies with the absence of national legislation to flesh out the principles enacted.

55. It is clear that the need to develop the common law applies especially when it is found to be inconsistent with the Constitution. In the context of this matter such an enquiry would result in a development of the interpretation of the nature of the public interest set out in section 13.

56. Miss Gabriel submitted that the principle of freedom of testation should be linked to the provisions of section 25(1) of the Bill of

Rights who provided that no one may be 'deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property.' Griessel J dealt with the question whether disinherison amounted to a deprivation more especially an arbitrary one and dismissed such argument. At paragraphs [19], [20] and [21] the court deals with this argument and I am inclined to agree with his reasoning.

57. Miss Gabriel submitted that the existence of a public interest in a charitable trust is fortified by the fact that section 29 of the Bill of Rights places duties on the State through reasonable measures to make further education progressively available.

58. It is surely in the public interest, so it was argued, that philanthropy and benevolence be encouraged and it is axiomatic that most charitable bequests favour some distinctive group of beneficiaries, on religious, ethnic, blood relationships or cultural affiliations. I accept that overzealous interference could well result in money not being given to charity but to narrow parochial or family interests. On a conspectus of authority it is fair to say that freedom of testation appears to thrive most vigorously in our fertile South African soil (see Corbett et al *The Law of Succession in South Africa*, Juta,

Second Edition 2001, 39-40) and is linked to the right of a person to freely part with his goods during his lifetime.

59. Miss Gabriel drew my attention to the case of *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) where the court rejected a challenge on equality grounds to the constitutionality of the Maintenance of Surviving Spouses Act. That Act conferred on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they were indigent but did not include the same benefits on persons who cohabited with the deceased but were not married to them.

60. The Constitutional Court in that matter considered the fact that the deceased made a conscious choice in his will as to how his assets were to be disposed of. It was submitted that his right to freedom and dignity would be infringed with if a court were to permit a claim by a cohabitant against his estate. The court stipulated that the Act in question did qualify the freedom of testation where the law provided that while the testator was alive he was obliged to maintain a spouse and his death should not terminate such an obligation. The court held that it was not unfair to make a distinction between surviving spouses and cohabitants.

61. It seems to me that the question of equating the position of those married and those cohabitating to discrimination on the grounds of race is fundamentally unsound. The rights of cohabiting partners are not covered by the foundational values described by Griessel J in the Syfret's matter with which I will deal in a moment.

62. Miss Gabriel also submitted that the central flaw in the judgment of Griessel J was to equate unfair discrimination in section 9 of the Constitution with the necessary consequence that a charitable trust with the said provisions may be contrary to public policy without elaboration. She submitted that the court held that clauses that discriminate unfairly on grounds of race, gender or religion were invalid. She submitted that sections 9(3) and 9(4) are wide ranging and she posed certain questions arising out of this dilemma.

63. Miss Gabriel pointed out that although the provisions of sub-section (4) provide for the horizontal application of the equality provisions national legislation has to be enacted to prevent unfair discrimination. Apart from the Employment Equity Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 provides in sections 7-9 prohibitions against unfair discrimination on the basis of gender

race and disability.

64. Miss Gabriel points out that section 29(1) lists a schedule of unfair practices which are said to 'illustrate and emphasise some practices which are or may be unfair, that are wide spread and that need to be addressed.' One such practice under the rubric of education refers to unfairly withholding scholarships, bursaries etc from learners of particular groups identified by the prohibited grounds.' I accept that section 29(2) points out that the State must ensure that legislative and other measures must be taken to address these practices. The section has not yet commenced and no such measure outlawing charitable trusts discriminating on the prohibited grounds has been passed.

65. Miss Gabriel referred the court to *Maharaj V National Horseracing Authority of South Africa* 2008 4 SA 59 N where the Court dealt with the Equality Court and proceedings brought before it. The court held that the Equality Court was not competent to grant relief claimed by the appellant in regard to events which took place prior to the coming into operation of the Equality Act. In casu the applicants were not invoking any provisions of that Act nor were they relying on that court for relief. The applicants are relying on a statute and the words 'in

the public interest' situated within that statute.

66. In the Syfret's matter Griesel J held that the fact that Parliament had enacted the legislation was indicative of public policy and the community's legal convictions. See page 223 E-F. The fact that the specific provisions relating to prohibited clauses in bursaries had not yet been enacted does not seem to me to detract from a general intention to proscribe racially based stipulations.

67. The fact that the national legislation mentioned in the equality provisions of the Bill of Rights has not been promulgated does not mean that one can ignore the broad prohibition on unequal treatment. The court has to do the best it can in all the circumstances and the provisions of the Equality Act are an indication of how such a process should be carried out.

The limitation clause

68. Miss Gabriel quoted the learned author Corbett at page 48 to the effect that the limitation clause in the constitution will have to be invoked to consider whether the infringement of the one right by a common law rule which serves to protect the other right can be justified. If the right to property in section 25 includes the freedom of testation such a right can be limited 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.

69. The section lists the relevant factors when limiting the right to property. It is important to note that a limitation outlawing racially restrictive clauses would be consonant with the sort of society posited as the lodestone for limitations namely an open and democratic society base on human dignity, equality and freedom.

70. It would seem to be an infringement of the dignity of a racial group excluded on those grounds alone. It would certainly breach the excluded group's right to equality and freedom to have access to the bursaries in question. Looking at the various factors set out I am of the judgment that outlawing racially restrictive clauses is a limitation that is consonant with them. Proscribing racial restrictions is important and sufficiently targeted to constitute the least restrictive means to achieve the purpose in question.

71. Prior to the new Constitutional order in South Africa testamentary conditions which were illegal, immoral or against public policy were struck down by the courts. Examples given by De Waal (op cit page 3G-15) included conditions calculated to break up a marriage or in general restraint of marriage were deleted but those prohibiting persons from marrying members

of a particular religion, race or nationality survived.

Professor Hahlo said that 'times change and the conceptions of public policy change with them', in his contribution to the 1950 67 SALJ 231 at 240 in *Jewish faith and race clauses in wills – a note on Aronson v Estate Hart.'*

72. De Waal (op cit page 3 G-20) records that in German law testamentary provisions that discriminate on racial or religious grounds would be invalid. There are other grounds in that country that would also result in invalidity.

73. De Waal differentiates between bequests that result in an out and out disinherison and those that add a condition such as that the beneficiary will forfeit the bequests if he marries a black person. The learned author is of the opinion that such a condition will be deleted by the court. The sort of bequest that is relevant *in casu* falls into the former category and it is aimed at furthering the interests of white girls. De Waal points out correctly in my view that such bequests do not impose any conditions nor do they compel any personal conduct.

74. Reference was also made to *SABC Ltd v National Director of Public Prosecutions* 2007 1 SA 523 CC more especially paragraphs 10 and 54 – 60. The Constitutional Court acknowledged in those paragraphs that our Constitution does

not posit a hierarchy of rights *in the abstract* but that there are circumstances where one right will take precedence over another right. That case dealt with the competing rights of a fair trial when juxtaposed against those of freedom of expression involved in broadcasting a criminal case of great public interest. In the context of that decision Miss Gabriel submitted that the court in the Syfret's matter did not adequately balance freedom of testation with the rights to equality.

75. Miss Gabriel asked if it would be unfair discrimination and therefore not in the public interest to establish a religiously-based trust which provides assistance to poor people regardless of their race? She also posed the question whether a gender based provision such as a bequest to a daughter, which excluded a son, would not be in the public interest and unfairly discriminatory. It is always useful to posit notional scenarios and to debate them with a view to determining the issue at hand.

76. It seems to me that bequests to individuals and organizations, whether religious or otherwise, would almost invariably be unexceptional. It is easy to understand why a testator would want, quite justifiably, to benefit his daughter who has loved and cared for him all his life. Similarly a testator who wished to

single out a church that has given him religious succour in his darkest days should not have his bequest struck down. I would tentatively suggest that such provisions would provide no problems. While it is always difficult to prescribe situations which might incline a court to strike down a provision it would be telling if none could be envisaged. Should the organization selected espouse principles that are anathema to the foundational values of the Constitution then the courts might adopt a different attitude. It may well be that at some stage the courts will be seized with such problems and will have to grapple with them.

77. The central issue in this matter relates to race and to a lesser extent gender. The court in the Syfret's matter thoroughly examined the values in the constitution and found that that the equality provisions in that regard were foundational. Within the principles of equality are rooted the equality of races as important if not more so than the other values. A perusal of the academic opinion, case law – both foreign and local – cited in the Syfret's case, shows that equality of race is so fundamental that in a sense it trumps all other principles.

78. This principle was emphasized by Moseneke J (as he then was) in *Minister of Finance and Another v Van Heerden* 2004 (6) SA

121 at para [22] footnotes excluded, as quoted by Griessel J in the Syfret's matter at page 221 D-F.

> 'The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.'

79. The financing of education in this country is mostly a governmental function. One could go further and say that the financing of education for poor people is almost exclusively the preserve of the State and rightly so. Having the right and capability to tax attracts an obligation to assist the impoverished to better themselves. Bursaries from private individuals – such as the testator in this matter – and companies who command great fortunes are in a very real sense directed at augmenting and supplementing this governmental role. If these benefactors are permitted to allocate their funds to a substantial group of persons in a discriminatory way it will skew the funds available to the general populace in an unacceptable manner and would not be in the public interest.

State Action

80. There is another dimension to this application which needs to be stressed. The testator in question chose the council of a university to administer the bequest. The present bequest will constitute State action as it has as its trustee the university which is clearly a public or quasi-public body which is in receipt of taxpayers' money. This was an important consideration in the Syfret's case op cit par 45 which considered the unwillingness of the university to administer such a bequest. (See par 34(h)).

81. I do not believe that this case can be distinguished in any material way from the Syfret's and William Marsh matters. The decisions in those matters were well reasoned and I am bound by them unless I believe them to be wrongly decided. I have not been so persuaded. It follows that I am of the judgment that it is in the public interest that the relief sought in the notice of motion be granted.

The deletion of mention of 'Durban' from the bequest

82. The applicants point out that the trust was directed at beneficiaries who were 'resident in Durban' for a period of at least three years immediately preceding the grant. At the time

of the grant what was known as Durban was clearly distinct from other areas such as Westville, Amanzimtoti and Umhlanga Rocks and Kwa-Mashu did not exist. With time the area of what now constitutes Ethekwini Municipality has expanded and includes the areas I have mentioned plus areas considerably further away including Umkomaas to the south, Camperdown to the west and Tongaat and Hambanathi to the north.

83. The applicants submit that Sir Charles could not have foreseen that the City of Durban would cease to exist as a legal entity but continue to be recognized as a geographic area. He would also not have foreseen how local government has changed into more complex metropolitan rule. In the alternative if section 13 is not appropriate the applicants seek recourse in the common law.

84. The curators have gone to great lengths to trace the growth of Durban and in their first report regard the reference to that city as it is used in common parlance. They do concede difficulty in discerning any sensible purpose at present in requiring residence in Durban. I have mentioned the suggestion of the curators that assistance be given to those who have attended school or other educational institution in the province for the requisite period.

85. The applicants reply to these suggestions by pointing out the

affection Sir Charles had for the city of his residence and business interests and the fact that the rest of the province held no real attraction for his beneficence. The applicants in turn point out various additions to the city including those effected under Ordnance 16 of 1931.

86. In the curators second report they have investigated the precise area of Durban in the 1930s and included a number of maps of the areas in August 1932 and also areas incorporated until 1977.

87. It is common cause that 'Durban' must be deleted and I must bear in mind in the light of the principles of benevolent interpretation that I should cut down the bequest as little as possible. Given the factors and circumstances mentioned above I do not believe that the bequest should be varied as contended for by the curators.

88. I am convinced that the extension of the boundaries of Durban in the manner it has occurred and the emergence of the metropolitan area are consequences Sir Charles did not foresee. The inclusion of outlying areas mentioned by counsel and the creation of the metropolitan area has been the result of a number of factors he would not have contemplated arising out of the multifarious political, social and economic factors that have arisen over the last fifty years.

89. The restriction of the bequest to the narrow area of Durban that Sir Charles had in mind has immense practical difficulties arising out of a geographical determination of that area. In addition it is in the public interest that the bequest includes the larger metropolitan area which includes previously racially defined Black townships in which many of the potential recipients of the bequest reside.

Order

90. I make the following order that:-

(a) The terms of the Trust created by the provisions of clause 26 (f) of the will of the late SIR CHARLES SMITH and known as the EMMA SMITH EDUCATIONAL FUND shall be varied by:-

(i) the deletion of clause 26 (f) (2) of the words "European", "British" and "or Dutch South African";

(ii) by the deletion of the word "Durban" and its replacement by the words "the Ethekwini Municipality".

(b) the costs of this application, including the costs of the *curatores-ad-litem* and those consequent upon the employment by the Applicant of two counsel be paid on a party and party scale from the funds of the said Trust.

Date of hearing : 2nd December 2008

Date of judgment : 17th July 2009

Counsel for the Applicant : M J D Wallis SC with S Mahabeer (instructed by Shepstone and Wylie).

Curatores ad litem : D J Shaw QC with A A Gabriel