

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 9688/08

In the matter between:

THE BOARD OF EXECUTORS **Applicant**

in re:

**THE BENJAMIN GODLIEB HEYDENRYCH
TESTAMENTARY TRUST, THE GEORGE
KING TESTAMENTARY TRUST AND THE
CYRIL HOUGHTON BURSARY TRUST**

WOMEN'S LEGAL CENTRE

Amicus Curiae

JUDGMENT DELIVERED ON 6 DECEMBER 2011

GOLIATH, J:

[1] The applicant, in its capacity as administrators of three charitable testamentary trust instruments, brought an *ex parte* application for the deletion of discriminatory provisions regarding the potential beneficiaries of such trust funds.

The order sought is as follows:-

“1. *Deleting the following words from the trust instruments annexed to the founding affidavit of David Garth Knott:*

1.1 *“European” in the last paragraph on page 3 of the last will and testament of Benjamin Godlieb Heydenrych*

1.2 *“members of the White Group” in clause V(b)(i) of the last will and testament of George King*

1.3 *“I envisage that the bursary will be made available to members of the white population group (known as such at the date of signature hereof)” in the last paragraph on page 3 of the last will and testament of Dorothy Helen Houghton*

2. *Declaring the said trust instruments to be valid, subject to the aforesaid deletions.”*

[2] The applicant therefore seeks an order deleting certain of the provisions of the trusts which discriminate directly on the grounds of race and colour. Although two of the trusts in issue also discriminate directly on grounds of sex and/or gender, and one discriminates indirectly on grounds of race, the applicant sought no order in respect thereof, submitting that such discrimination should be treated “more circumspectly” by our courts than direct discrimination on grounds of race, and that the freedom of testators to impose such discriminatory conditions should remain.

[3] The Women's Legal Centre intervened as *amicus curiae* in order to consider and address the remaining contentious provisions in the wills. The *amicus* takes issue with the discriminatory provisions based on the ground of sex in respect of the Houghton and Heydenrych Trusts and on the further ground of "descent" in respect of the latter Trust. The implementation of these provisions had the effect of excluding girls and women from eligibility for both scholarships. Furthermore the requirement in the Heydenrych Trust Deed that at least one half of the beneficiaries must be of British descent had the effect of disqualifying a broad student base from benefitting from the scholarship. Consequently the *amicus curiae* seeks broader relief than that sought by the applicant namely:-

"1. *The following words are deleted from the trust instruments annexed to the founding affidavit of Garth Knott:-*

1.1 *"European boys" and "I do specifically stipulate that at least one half of the boys so assisted shall be of British descent" in the last paragraph on page 3 of the last will and testament of Benjamin Godlieb Heydenrych.*

1.2 *"members of the White Group" in clause V(b)(i) of the last will and testament of George King.*

1.3 *"I envisage that the bursary will be made available to members of the white population group (known as such at the date of*

signature hereof)" in the last paragraph on page 3 of the last will and testament of Dorothy Helen Houghton.

2. *The following words are replaced in the second last paragraph on page 3 of the last will and testament of Dorothy Helen Houghton*

2.1 *boy with boy/s girl/s*

2.2 *boy with boy/s and girl/s"*

[4] By agreement between the applicant and the *amicus curiae* prayer 2 of the notice of motion was amended as follows:-

"2 *Declaring the said trust instruments to be valid, subject to the aforesaid deletions, alternatively subject to the aforesaid deletions and such further deletions as this Honourable Court deems necessary for the purpose of validity"*

The main purpose of this amendment was to give effect to the applicant's express intention that it is merely seeking a determination by this court of what is required in order to ensure that the trust instruments are legally valid.

[5] The applicant made detailed submissions on the basis on which the court is entitled to vary the trust conditions with reference to **Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C)**. The

applicant further submits that although the court is empowered to vary trust instruments based on public policy and the equality and anti-discriminatory provisions of section 9 of the Constitution, these particular trust instruments

should be varied in terms of section 13 of the Trust Property Control Act 57 of 1988. With regard to the discriminatory clauses based on race or colour, the applicant concedes that it is contrary to public policy and prohibited by section 9(4) read with section 9(3) of the Constitution (See **Minister of Education v Syfrets supra** at 218E-219B; **Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others** 2010 (6) SA 518 (SCA) at 527E-F.)

It is submitted by applicant that the requirements for variation in terms of section 13 of **The Trust Property Control Act** are met in regard to each of the three trust instruments in question, to the extent of the relief sought by the applicant.

[6] The Trusts

The Heydenrych Trust

On 19 June 1943 Benjamin Gotlieb Heydenrych executed his last will and testament. The will stipulates that the residue of his estate be held in trust and after the death of his wife two thirds be invested for the purposes of "*providing for the education of 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. I do specially stipulate that at least one half of the boys so assisted shall be of British descent".

The total distributable income of the Trust was R20 606 in 2006, R23 218 in 2001 and R30 000 in 2008. Bursaries have been granted to medical students in the past, but in 2008 they were awarded to a chemistry student as well as a BA student. Research conducted by the *amicus* confirms that of the students who qualify in chemistry women remain under-represented. Furthermore, it was contended that a 2008 Business Woman's Association survey of women in corporate leadership indicates that while women are over-represented in the lower levels of the civil service, 67.8% of senior civil service positions are held by men.

The Houghton Trust

Dorothy Helen Houghton executed her last will and testament on 9 May 1989 in terms of which she established the Cyril Houghton Bursary Trust. The remainder of the net income of the trust is to provide bursaries to two or more South African boys to be educated at Oundle School, Peterborough, Northhamshire, funds permitting, and thereafter to study at Oxford or Cambridge University on certain conditions. If for any reason it is no longer possible to send boys to Oundle School, the administrators may make the bursaries available for study at Rugby School in Britain and in the event of that not being possible, the bursaries may be

made available for a school such as St Andrews College in Grahamstown or any other school in South Africa having the same aims and objectives as Oundle School as at the date of execution of the will. The bursary is available to members of the white population group. The undistributed trust income available for distribution was R119 360 in 2006, R284 793 in 2007 and R301 651 in 2008. The scholarship is currently awarded to a boy attending St Andrews College in Grahamstown which only admits boys. Research conducted by the *amicus* established that Oundle School has been a co-educational school since 1990. Of 1496 learners at Oundle School 614 are girls. Both Cambridge and Oxford universities admit male and female students.

The George King Trust

George King executed his last will and testament on 13 January 1987. In terms of the will he established a Trust and provided for the George King bursary. The bursary is to be administered by the University of Cape Town to provide financial assistance to promising music students of good character in needy circumstances. The will further provides that "*applicants selected by the said university shall be members of the white group of Protestant Faith*". Other beneficiaries of the trust are the Civilian Blind Society Cape Town; Salvation Army, Cape Town; South African Legion's, Cape Town branch and the South African Red Cross Society, Cape Region.

[7] It is trite that a court has no general power to vary the terms of wills, contracts or other trust instruments. There are however certain exceptions in terms of the common law, a direct application of the Constitution and section 13 of the Trust Property Control Act 57 of 1988.

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."

[8] Section 13 of the Trust Property Control Act empowers the court to delete or vary provisions in a trust instrument in the following circumstances. Firstly, the provision must bring about consequences which in the opinion of the court the

founder did not contemplate or foresee. Secondly, the provision must either hamper the achievements of the objects of the founder or prejudice the interest of the beneficiaries or be in conflict with public interest.

The main issues to be determined are the following:-

- (i) The issue of discrimination based on race which to a large extent is not in dispute in this matter;
- (ii) Sex and gender discrimination and the selection criteria "by British descent" which were raised by the *amicus*;
- (iii) To determine whether the two jurisdictional facts are present to intervene in terms of section 13 of the Trust Property Control Act.

[9] With regard to the issue of race the applicant filed two expert affidavits in support of the application. Dr Colleen O' Ryan, an expert in the field of genetic diversity, concluded that race is scientifically not a meaningful concept and that it is not possible on any scientific grounds to differentiate any two individuals into distinct racial sub species. Dr Hans Hees, a social historian and genealogist, emphasized the arbitrariness inherent in seeking to classify individuals into racial groups. He concluded that no reasonable genealogist would endeavour to classify individuals into specific groups based on race. Applicant therefore

concedes that these provisions are offensive, arbitrary and a concept that is undefined and meaningless. Applicant further concedes that the word "European" is the typical language of race that would have been used in 1943 for a person more usually called "white", in contradistinction to "native" for persons later more usually called black. Hence the word "European" would be associated with white persons at a time when racial division was generally employed in South Africa. Furthermore, Mr King's will's reference to "white group" and Ms Houghton's use of the phrase "white population group" are references to race classification of South Africans into racial groups pursuant to the provisions of the now repealed Population Registration Act 30 of 1950. Hence, there currently exists no white group in South Africa.

[10] **In Ex Parte President of the Conference of The Methodist Church of Southern Africa NO: In Re William Marsh Will Trust 1993 (2) SA 697 (C)**, the court held that a clause in a trust deed that restricted the benefits of a home for destitute children to "white" children is contrary to the public interest. **Berman, J** applied the subjective and objective criterion of section 13 in arriving at the conclusion to delete this provision.

[11] **In Minister of Education and Another v Syfrets Trust Ltd NO and Another (supra)** the court considered the limitation of bursaries to candidates of "European descent" and found that it constituted indirect discrimination based on race and colour. The court held that where a provision in the trust infringes a

constitutionally protected right to equality and freedom the offending provision may be deleted or varied by the court. Further, the court held at paragraph 23 that, "*The principle that the courts will refuse to give effect to a testator's directions which are contrary to public policy is a well recognized common law ground limiting the principle of freedom of testation*". The court deleted the offending words on the basis of common law.

[12] In **Curators Emma Smith Educational Fund v University of KwaZulu Natal and Others** 2010 (6) SA 518 (SCA) in which trust income was to be applied towards the higher education of European girls born of British South African parents, the Supreme Court of Appeal confirmed the deletion of the terms "European" and "British" from the Trust instrument. The court stated the following at paragraph 42:-

"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, administered by a publicly funded educational institution such as a university, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the Constitutional imperative to move away from our racially divided past".

[13] The condition stipulated in the will of Mr Heydenrych that at least one half of the boys to be assisted financially "shall be of British descent" constitutes direct discrimination on the grounds of ethnic origin, culture and birth and indirect

discrimination on the grounds of race and colour, more specifically since it has the effect of excluding most black South Africans. The discrimination is presumed to be unfair. I am in agreement with the *amicus* that the applicant has not introduced any basis on which the presumption of unfairness can be rebutted. The *amicus* referred to **City Council of Pretoria v Walker** 1998 (2) SA 363 (CC) at paragraph 43 where the Constitutional Court affirmed that there is no need to prove an intention to discriminate in order to prove unfair discrimination.

[14] The inclusion of the terms “White”, “European” and “British descent” in the relevant trust instruments has the effect of disqualifying black South Africans from benefiting from the scholarships and constitutes unfair discrimination and is against public policy. The applicant’s argument that the “British descent” provision does not instantly elicit a response of unfairness and that it is not offensive in the context of South African history in the same way that a stipulation regarding race is, cannot be sustained. The reference to the words “European”, “members of the white group” or “members of the white population group” and “British descent” falls to be deleted.

[15] The applicant contends that Ms Houghton’s motivation for limiting the bursary to boys was not motivated by sexism, but other unknown reasons. Similarly it is not clear why Mr Heydenrych favoured boys. The applicant further argued that these decisions are of a personal nature, hence discrimination on the basis of gender should be treated circumspectly. A core value of our Constitution

is the right to equality which is guaranteed by section 9 of the Constitution which provides as follows:-

- "9 (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against any one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that discrimination is fair."*

[16] In compliance with the provisions of subsection 4 the legislature introduced the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). Section 7 and its schedule states:-

- "7 *Prohibition of unfair discrimination on grounds of race*
- Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including*
-
- (b) *the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;*
-
- (d) *the provision or continued provision of inferior services to any racial group, compared to those of another racial group;*
- (e) *the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.*

Section 29 of the Equality Act refers to a schedule which is intended to illustrate some practises which may be unfair and provides as follows:

"Schedule

Illustrative List of Unfair Practices in certain sectors

(section 29)

1.

2. Education

- (a) *Unfairly excluding learners from educational institutions, including learners with special needs.*
- (b) *Unfairly withholding scholarships, bursaries, or any form of assistance from learners of particular groups identified by the prohibited groups. (which includes race and gender – my emphasis)*
- (c) *The failure to reasonably and practicably accommodate diversity in education..."*

[17] The applicant is mindful of these constitutional provisions and the risk of contravening the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in administering these bursaries. The *amicus* correctly argued that the fact that a post constitutional parliament has enacted such legislation is indicative of public policy and the community's legal convictions in this sphere. (See **Minister of Education and Another v Syfrets Trust Ltd NO and Another (supra)**).

[18] The applicant argued that there are many scholarships limited to single sex schools. It was furthermore argued, that the societal benefit of providing students with funds to advance their studies in this instance considerably outweigh the societal harm of doing so on a gender basis. The general public would not find such a scholarship unreasonable or offensive. The *amicus* argued that there is a distinction between a bursary in favour of a specific single sex school, and a bursary to a co-educational institution which is restricted to boys only.

Ms Houghton limited the bursary to boys. This was however a natural correlative of the fact that the bursary was for attendance at what was then a boys school. Significantly Oundle School converted to a co-educational school in 1990, a mere six months after Dorothy Houghton executed her will. In my view limiting the bursaries to boys in circumstances where the educational institution in question is co-educational is unfairly discriminatory (**Harksen v Lane and Others** 1998 (1) SA 300 (CC) at paragraph 53). These are clearly circumstances not foreseen by the testator at the time of execution of the will. The aims and objectives of Oundle had changed and it transformed into a gender inclusive school. She did not apply her mind to the issue of gender since her main objective was to provide financial assistance for an education at Oundle. The testator did not contemplate the transformation of the ethos and values of the school she associates herself with. Furthermore, both Cambridge and Oxford are co-educational institutions.

[19] The will of Mr Heydenrych was executed in 1943. His preference to support boys only to qualify for civil service or as Pharmaceutical Chemists may have been legitimate at the time. At the time of execution of the will he was clearly motivated by his belief that women are incapable or unable to qualify in the civil service or as chemists. I am satisfied that he did not contemplate the change in gender composition in the civil service, nor the advancement of women in the field of chemistry at the time of execution of the will. The applicant correctly concedes that in 1943 positions in the civil service as well in the

profession of pharmaceutical chemists were almost exclusively occupied by men, hence the testator did not give serious thought to the question of gender.

[20] I am accordingly satisfied that the impugned conditions in the Houghton Trust and in the Heydenrych Trust constitute unfair discrimination on grounds of gender and race and are in conflict with section 9(4) of the Constitution and public interest.

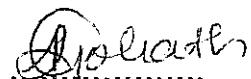
[21] I am further satisfied that the unfairly discriminatory provisions of the trusts brought about consequences which the founders did not contemplate and foresee. All the wills in question were executed before the advent of our democracy and the introduction of the Constitution. The testators would not have foreseen that the allocation of scholarships by the trust on a discriminatory basis would be rendered unconstitutional and unlawful. Furthermore, they did not foresee that the charitable purpose of the trust would be hampered by the discriminatory conditions imposed.

[22] Most of the issues addressed in this judgment were succinctly dealt with in the matters of **University of Kwazulu-Natal and Others v Malegapuru William Makgoba and 27 Others** case no 17124/2005 and **Curators, Emma Smith Educational Fund v University of Kwazulu-Natal and Others (supra)** and **Ex Parte President of the Conference of The Methodist Church of Southern Africa NO: In Re William Marsh Will Trust (supra)**. I abide by those decisions.

[23] It is accordingly ordered that:-

- (1) **The terms of the trusts created by the Late Benjamin Gotlieb Heydenrych, George King and Dorothy Houghton shall be varied as follows:**
 - (a) The words "*of European boys*" and "*I do specially stipulate that at least one half of the boys so assisted shall be of British descent*" in the last paragraph on page 3 of the last will and testament of Benjamin Godlieb Heydenrych dated 19 June 1943 (annexure "DGK1") are struck out.
 - (b) The words "*members of the White Group*" in clause V(b)(i) of the last will and testament of George King dated 13 January 1987 (annexure "DGK3") are struck out.
 - (c) The words "*I envisage that the bursary will be made available to the members of the white population group (known as such at the date of signature hereof)*" in the last paragraph on page 3 of the last will and testament of Dorothy Helen Houghton dated 9 May 1989 (annexure "DGK6") are struck out.

- (d) The following words are replaced in the last paragraph on page 3 of the last will and testament of Benjamin Godlieb Heydenrych (annexure "DGK1"): "boys" with "persons".
- (e) All references to the male gender as reflected in the will and testament of Dorothy Helen Houghton (annexure "DGK6") shall be read and interpreted to incorporate the female gender.
- (2) Applicant's costs of this application be paid on a party and party scale from the funds of the said Trusts on the basis of one third each.


P L GOLIATH
JUDGE