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Fiduciary Matters

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Beware of discriminatory clauses in wills

Estate planning

In 2002 Daphne de Villiers executed a will in which she left the residue of her estate to a testamentary trust known as the "Jean Pierre de Villiers Trust".

The trustees were empowered to apply the bulk of the income for "the provision of small bursaries to assist White South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain".

The selection of these students, the size and duration of the bursaries would be the joint responsibility of the four Organic Chemistry professors of the Universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfrets Trust (later known as BoE Trust Ltd), one of three trustees.

Mrs de Villiers left a sizable estate which would provide a bursary fund in excess of R250 000.

When the estate was distributed to the trust, the trustees contacted the four universities, who all responded that they were not prepared to accept the bequest as a result of the racial selection criterion attached to it, but would participate should the bursaries be open to all races.

Mrs de Villiers' late husband, Jean Pierre, was a leading applied chemist with doctorates in chemistry from the Universities of Pretoria and Oxford and she set up the trust in his memory. It appears from the evidence that she had been advised that the reference to "White" students would possibly not be given effect to as it was discriminatory.

Her response was to provide that, should it "become impossible" for the trustees to carry out the terms of the trust, the income generated by the trust had to be used to provide donations to a number of charitable organisations.

The attitude of the universities left the trustees with no option but to approach the High Court for an order striking the word "White" from the will. The application was based on the provisions of section 13 of the Trust Property Control Act, which provides that the court can vary the provisions of a trust if it brings about consequences which, in the opinion of the court, the founder did not contemplate or foresee and which hampers the objects of the trust or prejudices the interests of beneficiaries or is in conflict with public interest. They contended that the word "White" was discriminatory against potential beneficiaries on the basis of race and that it was therefore inter alia contrary to public policy and the right to equality contained in the Constitution. They argued that it would be preferable to fulfil the primary purpose behind the trust (ie to provide bursaries to Organic Chemistry students), rather than letting the bursary fall away because of a restrictive word.

The High court denied the application, primarily on the ground that it was not convinced that the provisions of the will brings about consequences which, in the opinion of the court, the testatrix did not contemplate or foresee. The alternative arrangement in the will seemed to indicate that the testatrix did in fact foresee a situation where the bursary bequest was rendered impossible by the stance of the universities and catered for such a situation.The trustees then applied for leave to appeal as they were of the opinion that an appeal would succeed in view of the decision in a similar case (Emma Smith Educational Fund). The application was denied, after which they applied directly to the Supreme Court of Appeal.

The Supreme Court held that the Constitution protects a person's right to dispose of his assets on death as he wishes, but this freedom must be balanced with any limitations imposed on it.

It reiterated that the golden rule of interpretation is to give effect to the wishes of the testator unless the court is prevented from doing so by some rule of law. In determining the testatrix's wishes, the court had to decide what meaning should be attributed to the word "impossibility". It held that there was nothing in the will to indicate that she had anticipated any particular kind of impossibility and the alternative arrangement would apply as long as it was for any reason impossible to give effect to the provisions of the bequest. The fact that the universities would not participate because of the inclusion or the word "White" made it impossible and the appeal was therefore dismissed.

The court can vary the provisions of a trust if it brings about consequences which, in the opinion of the court, the founder did not contemplate or foresee and which hampers the objects of the trust or prejudices the interests of beneficiaries

Where to from here?

This judgment is important as it indicates that will drafters must be very careful when giving effect to a client's instructions.

Any provision which may potentially be seen as discriminatory must be pointed out to the client and the will should provide for alternative arrangements in the event that a bequest is deemed to be discriminatory.

This article was written by Ronel Williams, a member of FISA and Legal and Technical Manager at Nedgroup Trust Limited.FISA is a non-profit organisation that represents practitioners in the fiduciary industry and sets high minimum standards to protect the public's interests. Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts, beneficiary funds and estates, tax and financial advice and the management of client funds. FISA has around 700 individual members who collectively manage in excess of R250 billion. Membership is open to any professional who meets the membership criteria.