The current state of freedom of testation in South African law

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FROM HOPE TO ACTION THROUGH KNOWLEDGE.

Ex parte Dessels 1976 (1) SA 851 (D):

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- my spouse and daughter shall not after my death utter or write any derogatory remarks about me;
- my spouse shall under no circumstances follow an immoral lifestyle;
- my spouse, wherever she may reside, shall not permit any stranger to cohabitate with her, except if such a person can be regarded as a mere visitor and, in such a case, the visitor may cohabitate with her for a maximum period of one week per year; male persons will never be accepted as visitors except when they are accompanied by their spouses

Freedom of testation defined

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- Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* (2001) p 39:
  - The right of an individual to dispose of his or her property on death as he or she pleases
- De Waal & Schoeman-Malan *Law of Succession* (2015) p 3:
  - The contents of a will are left to the discretion of the individual testator
  - The testator's wishes in disposing of his or her assets will be carried out

The judicial non-variation rule

Per Caney AJP in *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan* 1967 (4) SA 397 (N) 408E-F:

'The Court cannot make, or re-make a testator's will for him; it cannot vary the will he has made. It cannot change the devolution of his estate as he has directed it, nor add to or subtract from the benefit he has conferred upon each of the beneficiaries. They must be content to take what they are given, when and on the terms on which it is given.'

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Two factors bolster freedom of testation

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(1) The public interest

– *Per* Van den Heever JA in *Bydawell v Chapman* 1953 (3) SA 514 (A) 521E-F:

‘Roman-Dutch law recognises as a matter of public interest, transcending the private interests of beneficiaries under a will, that effect should be given to the wishes of a testator … the “interests” of the testator and the public interest demand that effect should be given to a testator’s last wishes.’

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(2) Constitutional rights

Per Erasmus AJA in *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA) § 26:

‘ Section 25(1) of the Constitution provides that no-one may be deprived of property. The view that s 25 protects a person’s right to dispose of their assets as they wish, upon their death … is … well held. For if the contrary were to obtain, a person’s death would mean that the courts, and the state, would be able to infringe a person’s property rights after he or she has passed away, unbounded by the strictures which obtain while that person is still alive.’

Per Erasmus AJA in *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA) § 27:

'[N]ot to give due recognition to freedom of testation will … also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.'

The limitation of freedom of testation

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- Maintenance claims
  - Common law: minor children
  - Statute: Maintenance of Surviving Spouses Act 27 of 1990
- Other legislative limitations
  - Pension Funds Act 24 of 1956
  - Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965
  - Trust Property Control Act 57 of 1988

South African courts have considered two particular limitations on freedom of testation in recent jurisprudence:

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- A testamentary provision may not contravene the *boni mores* / public policy
- S 13 of the Trust Property Control Act

→ The courts have used the public-policy prohibition and s 13 of the Act to negate the effect of unfairly discriminatory exclusions in testamentary charitable trusts

What is a ‘discriminatory bequest’?

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Harding, *Some Arguments Against Discriminatory Gifts and Trusts*, 31 OJLS 303, 322 (2011):

All bequests that ‘pick out elements of the identity’ of beneficiaries as well as those excluded from benefit and on which the unfavourable treatment of such beneficiaries or excluded persons are based

Elements of identity in recent South African judgments

Minister of Education v Syfrets Trust Ltd 2006 (4) SA 205 (C)

- Students of European descent only, and excluding persons of Jewish descent as well as females of all nationalities

Ex parte BOE Trust 2009 (6) SA 470 (WCC) and *In re BOE Trust* (SCA)

- White South African students

Curators, Emma Smith Educational Fund v UKZN 2010 (6) SA 518 (SCA)

- European girls born of British South African or Dutch South African parents

In re Heydenrych Testamentary Trust 2012 (4) SA 103 (WCC)

- European boys (Heydenrych Trust)
- South African boys, and members of the white population group (Houghton Trust)
- members of the white group (George King Trust)

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The exclusions were struck from the wills in question in –

- *Syfrets Trust* with reliance on the public-policy prohibition; and
- *Emma Smith Educational Fund* and *Heydenrych Trust* through the application of s 13 of the Trust Property Control Act

Even in doing so, the courts still recognised the fundamentality of freedom of testation

Per Griesel J in *Syfrets Trust* § 48:

'This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored; it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions - which discriminate *unfairly* on the grounds of race, gender and religion - are invalid.'

Per Bertelsmann AJA in *Emma Smith Educational Fund* § 41:

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‘The curators argued that the judicial amendment of a public charitable trust’s provisions would have a chilling effect upon future private educational bequests. I cannot agree. We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for members of his or her faith or a club member intending to benefit the children of fellow members. Testators who intend to benefit the underprivileged in the educational field will not be dissuaded … from doing so by the implications of this judgment.’

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In *BOE Trust* the WCC did not strike the racial limitation from the testatrix's will because –

- the jurisdictional fact of s 13 of the Trust Property Control Act was absent (*ratio*); and
- the limitation did not contravene public policy (*obiter*)

The appeal to the SCA was unsuccessful

Per Erasmus AJA § 31:

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‘[I]t is clear that the testatrix intended that … should it prove impossible, for whatever reason, to give effect to the provisions of the educational bequest, the money should go to the charitable organisations … In my view, therefore, the fact, that the universities would not participate as a result of the racial exclusiveness of the bequest, is an impossibility in respect of the bursary bequest. *The result must be that effect has to be given to the wishes of the testatrix* so that the bequest to the named charitable organisations is enforced.’

Conclusions

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- Freedom of testation remains a fundamental principle of the South African law of wills
- Freedom of testation is constitutionally guaranteed
- Freedom of testation can be balanced against constitutional imperatives regarding equality and non-discrimination
- Any limitation of freedom of testation must align with the directives of s 36 of the Constitution, 1996

Recommendations

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- Discuss fully the legal implications (and potential complications) of testamentary bequests with clients

- Alert clients to the dangers associated with attempts to ‘rule from the grave’
  - particularly where testators seek to influence testamentary beneficiaries’ intimate life choices through the impositions of conditions on testamentary benefits
  - *Aronson v Estate Hart* 1950 (1) SA 539 (A)

- Alert clients to the fact that charitable bequests / bequests of a 'public' nature in particular are open to judicial scrutiny to determine whether they pass constitutional muster
- If such bequests occasion unfair discrimination, the constitutional right to equality will likely outweigh freedom of testation in any constitutional balancing exercise

Per Bertelsmann AJA in *Emma Smith Educational Fund* § 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 and administered by *a publicly funded educational institution such as the 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*.’

Thank you

Dankie