King v De Jager and freedom of testation

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Agenda

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- The public-private distinction
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- King v De Jager – the Cape High Court judgement
- The SCA
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- Freedom of testation – what now?

Freedom of testation

- South Africa has a high degree of freedom of testation – no forced heirship rules
- Practically limited to an extent by certain legislation, e.g.:
  - Act 94 of 1965 – *fideicommissa* limited to three generations.
  - Act 70 of 1970 – cannot bequeath farmland to two or more.
  - Maintenance of Surviving Spouses Act, 27 of 1990.
  - Accrual system indirectly as it creates a claim that would otherwise not have existed.
  - Retirement fund benefits, as these are deemed not to belong to the member of the fund.

Common law limitations

- Limited by the *boni mores, e.g:*
  - A conditional bequest that requires an heir to divorce is *contra bonos mores*.
  - A conditional bequest that requires an heir never to marry is *contra bonos mores*.
- The courts **did not** regard conditions that terminate benefits upon re-marriage as *c b m*.
- The courts **did not** regard conditions that prohibited marriage outside a particular faith or across racial lines as *c b m*.

The trust cases

- ***Minister of Education v Syfrets*** ([2006] ZAWCHC 65)
  - Will from 1920's setting up bursary trust for post-graduate studies overseas for UCT graduates.
  - Limited bursars to male gentiles (i.e. not Jews) from European descent.
  - Since 1969 Syfrets Trust managed the bursary trust alone because UCT refused to participate.
  - In the early 2000's Minister asked court to order the conditions are unfair discrimination.
  - Court ruled:
    - Freedom of testation always limited by boni mores;
    - Boni mores now encapsulated in Bill of Rights;
    - Provisions of will clearly discriminatory on prohibited grounds
    - Conditions struck down

The trust cases (2)

- ***Emma Smith Educational Fund*** ([2010] ZASCA 136)
  - Bursary fund set op for poor white girls from Durban from English or Afrikaner descent.
  - Came from the time when reconciliation between Afrikaners and English were thought important.
  - University of KZN had to administer fund – claims it's discriminatory against people of colour.
  - Supreme Court of Appeals rule the conditions are discriminatory and struck down the conditions.

The trust cases (3)

- ***BoE Trust Ltd NO and Another*** ([2012] ZASCA 147)
  - Trust set up to supply bursaries to white graduates in organic chemistry at four SA universities to study overseas AND return to SA.
  - Universities refuse to participate in process to award bursaries
  - Trustees bring application to Cape High Court to strike the word “white” from the will.
  - Court refuses as it states it is not clear that discrimination is unfair – purpose of the provision
  - SCA on appeal also refuses. Links freedom of testation to constitutional value of human dignity.
  - Alternative provision taken to indicate realisation by testatrix that the conditions may fall foul of Constitution.

The Public-Private Distinction

- The question arises whether there is a distinction to be drawn between a bequest with a public component, e.g. a bursary trust, and a private bequest.
- BoE Trust case linked freedom of testation to human dignity as a constitutional value.
- Freedom of testation and making a will is probably the epitome of a private act w.r.t. property and possessions.
- Should a court interfere here? (De Lange case - *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* ([2015] ZACC 35)

Harvey v Crawford

- Bequest in the 1950's to a private inter vivos trust for the benefit of the "natural descendants" of the testator.
- Testator's daughter had no children and wanted to adopt children. He advised against her being hasty and said she is still young and may still have children.
- Testator died before she adopted two children.
- Daughter asked Cape High Court to strike the condition from the trust deed. Court refused based on adopted children's rights under 1950's legislation.
- On appeal Supreme Court of Appeals also refused on the same basis.
- Case awaiting judgement by the Constitutional Court.

King v De Jager - Facts

- Will executed in 1902.
- Mr & Mrs De Jager bequeathed certain immovable property to their six children – four sons and two daughters.
- Fideicommissum created – upon children's death property to go to male grandchildren and upon their death to male great-grandchildren.
- If a particular fiduciary did not have male descendants the property was to go to the fiduciary's siblings' male descendants.
- In 2015 Mr Kalvyn de Jager (a grandchild) died. He had five daughters only.
- Executor of his estate and the five great-granddaughters asked for order declaring the provisions discriminatory and invalid.

King v De Jager – Western Cape HC

- The court quoted BoE Trust and emphasised the private nature of making a will and freedom of testation.
- The court found that although *prima facie* discriminatory, the provisions are not unfair as in can be justified in an open democratic society (Sec 36 of the Constitution)
- The court held that the provisions in the will are lawful and valid.

King v De Jager – the SCA

- The court gave *ex tempore* judgement, without supplying written reasons.
- This was taken by the Constitutional Court to mean that the SCA agreed in total with the WCHC.

King v De Jager – Constitutional Court

- The court gave three judgements:
  - The minority (Mhlantla, Khampepe, Madlanga and Theron JJ) held that the common law should be developed to limit freedom of testation to prevent bequests which are contrary to section 9 of the Constitution.
  - The majority (Jafta J, Mogoeng CJ, Majiedt J, and Mathopo and Victor AJJ) held that it is not necessary to develop the common law as freedom of testation has never been absolute. It is limited by the *boni mores*, now encapsulated in the Bill of Rights.
  - The third judgement (Victor AJ) does not take the matter any further.
  - Both the minority and the majority held that the bequest to male only descendants is unfair discrimination on a prohibited ground and therefore unlawful and invalid.

King v De Jager – Constitutional Court (2)

- This means that the second to sixth applicants (the five daughters) inherit the immovable properties held by their father as fideicommissary.
- The sons of Mr Kalvyn de Jager's deceased brother, who would have inherited under the will were the respondents. They are therefore limited to what they inherited from their deceased father.

Freedom of testation – what now?

- Jafta J, writing for the majority was at pains to emphasise that there is no right to inherit.

  [124] Therefore, it cannot be gainsaid that freedom of testation, as a right, is protected in our law. It is protected not only because it forms part of our common law, but also because it advances the values of freedom and dignity which are the foundation of the Constitution, our supreme law.

  [154] The fact that a testator may have decided to exclude some of her children from inheriting her property does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.

Freedom of testation – what now? (2)

- Bequests to a class where there is implicit discrimination against certain members of the class will cause trouble.
- The mere disinheriting of certain persons who would normally regard themselves as potential heirs will probably mostly be in order.
- It will be interesting to see what happens if a testator/trix beqeaths to his/her sons by name and just not mention the daughter(s) in the will.
  - Going by par 154, it should not be a problem.
  - Spence v BMO Trust Company (2016 ONCA 196).

Freedom of testation – what now? (3)

- Big questions:
  - What are the implications of this for Shariah succession?
  - How can you be discriminated against if you did not have any right to inherit in the first place?

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