

Crossing the public/private sphere divide -
limiting freedom of testation in the private
sphere - *King v De Jager* 2021 4 SA 1 (CC)

Matlala MK

 **orcid.org/0000-0003-4266-8570**

Mini-dissertation accepted in partial fulfilment of the
requirements for the degree *Master of Laws in Estate
Law* at the North-West University

Supervisor: Prof A Gildenhuis

Graduation: June 2023

Student number: 25996444

ABSTRACT

A fundamental principle of the law of testate succession is freedom of testation, which is indirectly protected in section 25(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*). However, freedom of testation is not absolute and is subjected to common law, statutory law and constitutional law limitations. In the past, courts were not hesitant to limit the freedom of testation based on public policy concerns if the contested clause was present in a testamentary instrument in the public sphere. These statutory limitations include but are not limited to, sections 9 and 36 of the *Constitution*. Since private testamentary instruments do not affect the general public, courts have been reluctant to interfere with them until recently.

The issue arises when constitutional rights and the testator's final wishes are imbalanced in the private or public sphere. The main issue that is addressed is the circumstances under which a court may limit a testator's freedom of testation whereby there are possible discriminatory provisions in a testamentary instrument within the private sphere.

The study elaborates on the importance of freedom of testation and the limitations thereof concerning the common law, legislation, and the *Constitution*. Furthermore, applicable judgments delivered since the enactment of the *Constitution* are discussed. The study further examines the Constitutional Court cases of *King v De Jager* [2021] ZACC 4 (19 February 2021) and *Wilkinson v Crawford* [2021] ZACC 8 (16 April 2021) where "discriminatory" provisions limited freedom of testation in the private sphere.

Keywords

Freedom of testation; public policy; unfair discrimination; unlawfulness; private sphere

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LIST OF ABBREVIATIONS

CC	Constitutional Court
PER	Potchefstroomse Elektroniese Regsblad [Potchefstroom Electronic Law Journal]
SCA	Supreme Court of Appeal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
TECLF	Tulane European and Civil Law Forum
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 Background

Freedom of testation is the freedom of a testator to dispose of his assets as he pleases.¹ Testators in South Africa have "free will" when dividing their estates and appointing beneficiaries in their wills.²

Although freedom of testation is a crucial principle in the law of testate succession, it is subjected to certain restrictions that limit it.³ The principle is not absolute and has always been limited.⁴ Freedom of testation is limited in terms of common law, which determines that bequests should not be impossible to enforce.⁵ Freedom of testation is also subject to statutory and unlawful, go against public policy, and/or be impracticably vague or constitutional limitations. These limitations include, but are not limited to, sections 9 and 36 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*)⁶; section 13 of the *Trust Property Control Act*;⁷ sections 6-8 of the *Immovable Property (Removal or Modification of Restrictions) Act*;⁸ and section 2(1) of the *Maintenance of Surviving Spouses Act*.⁹

In the past, courts were not hesitant to interfere so as to limit freedom of testation based on public policy considerations, should the impugned provision be contained in a testamentary instrument within the public sphere (that is, when it has to do with a public goal). In *Minister of Education v Syfrets Trust Ltd*¹⁰ (hereafter the *Syfrets case*), the High Court expressed on multiple occasions that freedom of

¹ Unless otherwise stated, references to the masculine form in this study will include the feminine form (and *vice versa*) unless specifically stated otherwise. Jamneck and Rautenbach *The Law of Succession in South Africa* 128. Du Toit 2001 *Stellenbosch Law Review* 224; Lehmann 2014 *Acta Juridica* 9.

² Jamneck and Rautenbach *The Law of Succession in South Africa* 128.

³ *King v De Jager* [2021] ZACC 4 (19 February 2021) para 36.

⁴ *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) para 18.

⁵ Jamneck and Rautenbach *The Law of Succession in South Africa* 143. Also see Matsemela 2015 *Journal of Law, Society and Development* 93; Du Toit 2000 *Stellenbosch Law Review* 359; Abduroaf 2020 *Without Prejudice* 25-26.

⁶ *Constitution of the Republic of South Africa, 1996*.

⁷ 57 of 1988.

⁸ 94 of 1965.

⁹ 27 of 1990. Also see *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) para 18.

¹⁰ 2006 4 SA 205 (C).

testation is not an absolute right. The Court emphasised the common law restrictions as well as the statutory restrictions engendered by the application of section 9 of the *Constitution*.¹¹ The court also refused to give effect to bequests made by the testator that were contrary to public policy- it indicated that, due to social changes, bequests that were accepted before the enactment of the *Constitution* might no longer be acceptable under its provisions.¹² The purpose of the *Constitution* is *inter alia* to heal the injustices of the past and prevent them from being repeated, where citizens are equally protected by the law.¹³

As mentioned, the courts were not hesitant to limit a testator's freedom of testation when it came to discriminatory provisions in a testamentary instrument within the public sphere.¹⁴ In contrast to such interference, until recently the courts were hesitant to interfere in private testamentary instruments as they did not influence the general public.¹⁵ However, the Constitutional Court recently had the opportunity to address the limitation on freedom of testation and bequests in private testamentary instruments in two judgments, namely *King v De Jager* [2021] ZACC 4 (19 February 2021) (hereafter the *King* (CC) case) and *Wilkinson v Crawford* [2021] ZACC 8 (16 April 2021) (hereafter the *Wilkinson* (CC) case). Section 9 of the *Constitution*, the *Promotion of Equality and Prevention of Unfair Discrimination Act*,¹⁶ and common law are grounds for limiting a testator's freedom of testation, and play a significant role in the Constitutional Court's judgments.

The recent confirmation and application of limitations on freedom of testation, as based on the unlawfulness of a discriminatory provision in a testamentary instrument within the private sphere, pertinently in *King* (CC), will contribute to the acknowledgement, advancement and protection of gender rights, and those

¹¹ Section 9 of the *Constitution* provides that no one may be unfairly discriminated against based on, *inter alia*, race, gender, birth and sex. See *Syffrets* para 17.

¹² *Syffrets* para 24. Also see Jamneck and Rautenbach *The Law of Succession in South Africa* 144.

¹³ Preamble to the *Constitution*.

¹⁴ See chapter 3 of this study.

¹⁵ See for example *King v De Jager* 2017 6 SA 527 (WCC); *Harvey v Crawford* 2019 2 SA 153 (SCA). See chapter 4 of this study.

¹⁶ 4 of 2000 (hereafter the *Equality Act*).

of women in particular, in terms of viewing them as vulnerable members of society.

This study will accordingly highlight recent developments relating to limiting freedom of testation in the private sphere in order to address the research question formulated below.

1.2 Research question

In light of the above, the research question can be formulated as follows: Under which circumstances may a court limit a testator's freedom of testation in the case of possible discriminatory provisions in a testamentary instrument within the private sphere?

1.3 Research aim and objectives

The primary aim of the study is to address the abovementioned research question. The following objectives are accordingly formulated in order to facilitate this aim:

- a. Explain the importance, nature, and scope of freedom of testation in general.¹⁷
- b. Differentiate and discuss the interlinkages among the following aspects related to the limitation of testamentary freedom, namely bequests that are: (a) *contra bonos mores*, (b) against public policy, and (c) unlawful.¹⁸
- c. Delineate conflicting fundamental rights and freedoms.¹⁹
- d. Delineate the differences between differentiation, discrimination, and unfair discrimination.²⁰
- e. Examine the limitations of fundamental rights.²¹
- f. Examine the limitation of freedom of testation in testamentary instruments of a public nature.²²

¹⁷ See Chapter 2.

¹⁸ See Chapters 2, 3 and 5.

¹⁹ See Chapters 3 -5.

²⁰ See Chapters 2-5.

²¹ See Chapters 2-3 and 5

²² See Chapter 3.

- g. Examine the courts' (initial) hesitancy relating to limiting freedom of testation in testamentary instruments of a private nature.²³
- h. Examine the Constitutional Court's ground-breaking judgments in the *King* (CC) and *Wilkinson* (CC) cases concerning limiting freedom of testation in testamentary instruments of a private nature.
- i. Delineate the issue of constitutional subsidiarity.²⁴

1.4 Research method

This study is a literature study in which primary and secondary sources applicable to freedom of testation, unfair discrimination, public policy, constitutional subsidiarity, and unlawfulness are consulted.

1.5 Chapter overview

The history, importance, and constitutional recognition of freedom of testation and the limitations thereon will be outlined in Chapter 2. Case law dealing with testamentary instruments in the public sphere, where public policy became the empirical foundation for limiting freedom of testation, will be addressed in Chapter 3. The South African courts' reluctance to interfere with freedom of testation within the private sphere will be discussed in Chapter 4 with reference to *King v De Jager* 2017 6 SA 527 (WCC), *Harper v Crawford* 2017 4 SA 30 (WCC) and *Harvey v Crawford* 2019 2 SA 153 (SCA). The Constitutional Court's ground-breaking judgments in the *King* (CC) and *Wilkinson* (CC) cases will be analysed in Chapter 5. Chapter 6 will conclude the research.

²³ See Chapter 4.

²⁴ See Chapter 5.

2 Historical background to the recognition of testamentary freedom and the limitations thereon

2.1 Introduction

Freedom of testation is regarded as the "cornerstone" of the law of testate succession.²⁵ In essence, this principle refers to the freedom that a testator enjoys to choose his beneficiaries and prescribe how his estate must devolve.²⁶ South African law allows a testator to practise freedom of testation and the courts should enforce provisions made in a will according to the maxim *voluntas testatoris servanda est*.²⁷ However, freedom of testation is not absolute.²⁸ Prior to 1994, freedom of testation was limited only by common law and legislation.²⁹ Since the enactment of the *Constitution*, freedom of testation has been limited in accordance with common law and legislation and the *Constitution*.³⁰ Therefore, provisions in a will should not be impossible to enforce, too vague, unlawful and/or unconstitutional, because this could result in the provision being regarded as *contra bonos mores* by a court.³¹

²⁵ *King* (CC) para 36; *Wilkinson* (CC) para 69; Du Toit 2001 *Stellenbosch Law Review* 224; De Waal 1997 *Stellenbosch Law Review* 169.

²⁶ Jamneck and Rautenbach *The Law of Succession in South Africa* 128; Du Toit 2001 *Stellenbosch Law Review* 224; Lehmann 2014 *Acta Juridica* 9.

²⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 128 explain the meaning of the maxim *voluntas testatoris servanda est* as follows: the court must enforce the will of the testator and it should be complied with. The High Court may not order an alteration of a testamentary provision. Rectification (such as the correction of clerical errors) may be done to the will on a case-by-case basis. Ferreira and Pretorius 2020 *Obiter* 453-454 indicate that, since a will is a unilateral legal act, a court must give effect to it. The "golden rule" of interpretation of a will comes into play in terms of the maxim *voluntas testatoris servanda est*. This golden rule is based on the way in which the testator's wishes in a will is interpreted. This was evidenced in *Greyling v Greyling* 1978 2 SA 114 (T) and *Robertson v Robertson's Executors* 1914 AD 503 507 where all the rules of interpretation were adhered to in order to give effect to the intention of the testator. Also see *Wilkinson* (CC) para 35.

²⁸ Jamneck and Rautenbach *The Law of Succession in South Africa* 128-129; Du Toit 2001 *Stellenbosch Law Review* 224-225; De Waal 1997 *Stellenbosch Law Review* 169-172.

²⁹ Matsemela 2015 *Journal of Law, Society and Development* 93; De Waal 1997 *Stellenbosch Law Review* 169-170.

³⁰ Matsemela 2015 *Journal of Law, Society and Development* 93; Du Toit 2000 *Stellenbosch Law Review* 359; Abduroaaf 2020 *Without Prejudice* 25-26.

³¹ Matsemela 2015 *Journal of Law, Society and Development* 93; Du Toit 1999 *Stellenbosch Law Review* 240-241.

The current chapter offers a two-part outline of both the recognition of freedom of testation and the limitations thereon.

The first part involves a brief outline of the historical development and recognition of freedom of testation through natural law. The historical development will be discussed based on two sets of factors that form part of the law of succession, namely social and economic ones. Locke and De Waal's perspectives on social and economic factors will be briefly discussed in order to illustrate how these are vital in the law of succession in terms of the principle of freedom of testation. Furthermore, constitutional recognition of freedom of testation in South African law will be discussed. The recognition will be portrayed as embodied in modern South African law and how sections 10, 14 and 25(1) of the *Constitution* indirectly protect freedom of testation.

The second part of the outline will focus on the limitations on freedom of testation that are effective in terms of common law, statutory provisions, and various applicable constitutional rights and freedoms enshrined in the *Constitution*. Furthermore, an outline of that which constitutes constitutional values and constitutional rights will be discussed. The importance of the differentiation between constitutional values and rights will further be portrayed with reference to case law.

The objectives for this chapter are:

- To determine how freedom of testation has developed in South African law in terms of the perspectives upheld by natural and common law.
- To discuss the indirect constitutional recognition of freedom of testation with reference to sections 10, 14 and 25 of the *Constitution*.
- To summarise the limitations on freedom of testation with reference to common law, statutory, and constitutional limitations.

2.2 Historical and recent developments relating to freedom of testation

2.2.1 Common law roots of the South African law of succession

The South African legal landscape is characterised by a mixed system derived from various sources such as the *Constitution*, judicial precedents, statutes, customary law, common law, foreign law, and international law.³² However, the present focus will be confined to the recognition and further development of testamentary freedom in the South African common law, namely Roman-Dutch law.

Roman elites were fixated on wills because these enabled a testator to have discretion in appointing a worthy heir to carry on their family legacy.³³ Furthermore, a will enabled the testator to reward family members, friends *etcetera*.³⁴ Roman-Dutch succession law was introduced in the seventeenth century in South Africa and was based on universal succession.³⁵ Upon adiation, the heir was responsible for winding up the testator's estate.³⁶ However, this situation changed in the nineteenth century when the English system replaced universal succession in South Africa.³⁷ Instead of the heir winding up the estate, an executor was appointed in accordance with the *Administration of Estates Act*.³⁸ If the intention and wishes expressed in the will were found to be reasonable and unambiguous, testators were free to use any words they preferred.³⁹ Furthermore, the formalities of a will (as stipulated in section 2 of the *Wills Act 7* of 1953) (hereafter the *Wills Act*) had to be met.⁴⁰

³² Humbly *et al Introduction to Law and Legal Skills* 97, 125. Also see De Waal "Testamentary Formalities in South Africa" 382.

³³ Rűfner "Testamentary formalities in Roman Law" 2.

³⁴ Rűfner "Testamentary formalities in Roman Law" 2.

³⁵ De Waal "Testamentary Formalities in South Africa" 382.

³⁶ De Waal "Testamentary Formalities in South Africa" 382

³⁷ De Waal "Testamentary Formalities in South Africa" 382.

³⁸ De Waal "Testamentary Formalities in South Africa" 382.

³⁹ De Waal "Testamentary Formalities in South Africa" 382; Jamneck and Rautenbach *The Law of Succession in South Africa* 132, 143.

⁴⁰ De Waal "Testamentary Formalities in South Africa" 382; Jamneck and Rautenbach *The Law of Succession in South Africa* 132,143; Section 2 of the *Wills Act 7* of 1953.

As freedom of testation is a fundamental principle in South African law of succession, it is important to note the ways in which it developed by means of common law and natural law.⁴¹

2.2.2 Applicable natural law perspectives

Locke and De Waal's views on freedom of testation and its influence on social and economic factors will be discussed briefly here, as well as the application of natural law in the development of freedom of testation. Locke's idea stems from the idea of freedom in property and De Waal views testamentary freedom through in terms of property and the economy. With a view to discussing the applicable natural law, it is important to establish the nature of natural law and its place in relation to the topic of the present study.⁴²

South African jurisprudence is inclusive of western traditions such as natural law.⁴³ The main concern of jurisprudence is the ways in which the ideal of justice relates to the reality of laws in the functioning of certain societies.⁴⁴ Although such relations are expressed in different terms by different philosophers such as Plato, Aristotle, and Locke, one finds common ground around the idea that there is a "law of nature" that is set against the man-made laws of society.⁴⁵

The most influential European philosopher who reflected on natural law, Locke, considered the notion of freedom in the context of property.⁴⁶ In the second half

⁴¹ Jamneck and Rautenbach *The Law of Succession in South Africa* 151.

⁴² Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 5 provide that natural law has different meanings but the main one is that it is an ideal of the "law of nature" which is juxtaposed with the reality of man-made regulations in society. Also see Platt 1894 *Political Science Quarterly* 54.

⁴³ Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 5.

⁴⁴ Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 5.

⁴⁵ Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 5; Venter 2001 *Acta Academica* 1-3. Also see Platt 1894 *Political Science Quarterly* 54 where "positive law" is described as assertions that indicate specific characteristics of conduct or courses of conduct that must be followed by humans. Basically, positive laws are regulations. However, natural laws are views about nature's unchanging order.

⁴⁶ Locke *Two Treatises of Government* (1680) 128; Croucher 2012 *Australian Journal of Legal Philosophy* 9 indicates that freedom does not give any person liberty to do as they please. Although it is portrayed in that manner, it provides liberty of disposal and actions of property to listed persons within the allowance of the laws which are common law and statutory in nature.

of the seventeenth century, Locke⁴⁷ indicated ways in which natural law creates a foundation for constitutional reform. This is of direct relevance for the present study in order to understand what is considered freedom in the context of one's property.

Locke's⁴⁸ idea of freedom in property was that it occurred "within allowable context" of laws, entailing that freedom was not the liberty of man to do as he pleased, but the liberty to dispose of any property arbitrarily.⁴⁹ Locke⁵⁰ therefore paved the way for freedom in the law of succession in the disposal of one's property, within the framework of the allowance of the laws.⁵¹

Testamentary freedom is viewed mainly through two lenses: that of property and that of family, respectively referred to as an economic factor and a social factor in the law of succession.⁵² The theory of Locke⁵³ on freedom in property is viewed through the lens of property as a logical extension of property disposition rights, whereby the testator has the right to dispose of (in a will) his property as he deems fit. Furthermore, it is viewed as a logical principle in the motivation for accumulating wealth. However, fixed inheritance rights demotivated beneficiaries to work for their own wealth, given that they could accumulate it through the testator's will.⁵⁴

In terms of the economic element in the law of succession, the work of De Waal⁵⁵ on testamentary freedom resembles Locke's. The economic factor allows the

⁴⁷ Johnson, Pete and Du Plessis *Jurisprudence a South African Perspective* 37.

⁴⁸ Locke *Two Treaties of Government* (1680) 106-112, 128; Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 39.

⁴⁹ Locke *Two Treaties of Government* (1680) 106-112, 128.

⁵⁰ Johnson, Pete and du Plessis *Jurisprudence: A South African Perspective* 39.

⁵¹ Johnson, Pete and du Plessis *Jurisprudence: A South African Perspective* 39.

⁵² Du Toit 2001 *Stellenbosch Law Review* 240; Croucher 2012 *Australian Journal of Legal Philosophy* 11; King (CC) para 32.

⁵³ Croucher 2012 *Australian Journal of Legal Philosophy* 11 considered testamentary freedom to be an element of property, providing that ownership of a thing cannot be considered in full, unless the owner has the full capacity to transfer the property at his or her discretion after death or during the owners' lifetime. Therefore, testamentary freedom is viewed in terms of property.

⁵⁴ Croucher 2012 *Australian Journal of Legal Philosophy* 11; Johnson 2011 *Estate Planning & Community Property Law Journal* 105.

⁵⁵ De Waal 1997 *Stellenbosch Law Review* 166; Du Toit 1999 *Stellenbosch Law Review* 233.

testator to dispose of his or her property as they wish in their will through freedom of testation.⁵⁶ A will is considered to be an economic document of vital importance, as it is an instrument that transfers wealth to the testator's beneficiaries.⁵⁷

However, unlimited testamentary freedom in property produces a form of "dead-hand" power, as the testator could continuously control the property rights for generations after his or her death.⁵⁸ Therefore, testamentary freedom is limited under the applicable statutory and common law provisions to which the testator is subjected.⁵⁹

In terms of family, testamentary freedom has caused a discussion on the entitlement of the testator's beneficiaries.⁶⁰ Locke⁶¹ identified testation as a component of "paternal jurisdiction", because parental power is derived from their duties of taking care of children who cannot take care of themselves during their childhood.⁶² Furthermore, Locke⁶³ provided that, even though testamentary freedom existed, a component of parental duty also existed.⁶⁴ The social factor was directly linked with the family, as it acquired a family unit "worthy of protection" to be preserved by the law of succession.⁶⁵

⁵⁶ De Waal 1997 *Stellenbosch Law Review* 166; Jamneck and Rautenbach *The Law of Succession in South Africa* 128; King (CC) para 36; Wilkinson (CC) para 69.

⁵⁷ De Waal 1997 *Stellenbosch Law Review* 166 and 169; Du Toit 1999 *Stellenbosch Law Review* 233.

⁵⁸ Merriam Webster date unknown <https://www.merriam-webster.com>: "dead hand" is considered property that has been bequeathed to natural and juristic beneficiaries in a perspicuous manner while controlling the ways in which the property will be used after death; Croucher 2012 *Australian Journal of Legal Philosophy* 11; Johnson 2011 *Estate Planning & Community Property Law Journal* 105-106.

⁵⁹ Johnson 2011 *Estate Planning & Community Property Law Journal* 107; Jamneck and Rautenbach *The Law of Succession in South Africa* 143, 128-129; *Minister of Education v Syfrets Trust Ltd NO* 2006 4 SA 205 (C) para 39; Croucher 2012 *Australian Journal of Legal Philosophy* 11.

⁶⁰ Locke *Two Treaties of Government* (1680) 126-137; Croucher 2012 *Australian Journal of Legal Philosophy* 12.

⁶¹ Locke *Population and Development Review* (1989) 749 explains that parental power already exists naturally in the state of nature.

⁶² Locke *Population and Development Review* (1989) 749.

⁶³ Locke *Population and Development Review* (1989) 749.

⁶⁴ Locke *Population and Development Review* (1989) 749.

⁶⁵ Locke *Population and Development Review* (1989) 749.

Locke's theory on freedom on the disposal of property influenced De Waal's views on testamentary freedom in the law of succession.⁶⁶ The freedom of disposal is highlighted in Locke's theory, where the testator is allowed to dispose of his property "within the allowance" of laws, where they may take the shape of what is known as positive law.⁶⁷ De Waal acknowledges Locke's theory and discusses how it influenced the law of succession through testamentary freedom.⁶⁸ He further explains that the law of succession was affected by the interaction between natural and positive law.⁶⁹ This is a pivotal place to start when interpreting the *Constitution*, which is the supreme law of South Africa, in order to understand the interaction between natural and positive law.⁷⁰ An example of discordance between natural law and positive law emerges in terms of human rights under the Bill of Rights in the *Constitution* and also internationally in terms of the *Universal Declaration of Human Rights*.⁷¹ Human rights are engendered by natural law and legislation from positive law, and this creates a challenge for legal scholars when it comes to interpreting laws in light of international human rights standards.⁷² The challenge arises when legislation, which is positive law, is used when interpreting international human right standards, which are regarded as natural law.⁷³ In its turn, the *Constitution* is led by human rights in the Bill of Rights, which makes it a product of natural law.⁷⁴

The application of natural law to the law of succession may be viewed in terms of Locke's perspective on property disposal and De Waal's reciprocal social and

⁶⁶ Locke *Two Treatises of Government* (1680) 106 -112,128; De Waal 1997 *Stellenbosch Law Review* 166; Du Toit 1999 *Stellenbosch Law Review* 233.

⁶⁷ Locke *Two Treatises of Government* (1680) 106-112, 128 provides an understanding of what is meant by "perfect freedom" whereby it allows the testator to dispose his property as he wishes within the "allowance of laws". Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* 39.

⁶⁸ De Waal 1997 *Stellenbosch Law Review* 166; Jamneck and Rautenbach *The Law of Succession in South Africa* 128; King (CC) para 36; Wilkinson (CC) para 69.

⁶⁹ See para 2.2 above.

⁷⁰ See para 2.2 above; section 1 of the *Constitution*.

⁷¹ Hopkins 2001 *De Rebus* 26-27. Universal Declaration of Human Rights (1948) (also known as the UDHR), is proclaimed by the United Nations General Assembly where it provides a framework of universal human rights that should be protected by all nations.

⁷² Hopkins 2001 *De Rebus* 26.

⁷³ Hopkins 2001 *De Rebus* 26 indicated that human rights are part of the Bill of Rights provided for in the *Constitution* (which is a form of statute).

⁷⁴ Hopkins 2001 *De Rebus* 26.

economic views on testamentary freedom. Thus, the application of natural law views may be found in the case of freedom of testation, which is indirectly acknowledged in the *Constitution* through various fundamental rights.⁷⁵

2.2.3 Recognition of freedom of testation as a constitutional right

In the post-apartheid era, the supreme law of the country (the *Constitution*) laid a democratic foundation where every citizen is protected under the *Constitution* and is equal before the law.⁷⁶

As mentioned, freedom of testation allows a testator to bequeath his or her assets as he or she wishes through a will.⁷⁷ Freedom of testation is not explicitly provided for in the *Constitution*, but is indirectly protected in terms of section 25(1), which protects rights in property as well as a series of other rights such as the right to dignity and privacy.⁷⁸

2.2.3.1 Section 25(1) of the *Constitution* (property clause)

a) General application of section 25 of the *Constitution*

Section 25 of the *Constitution* (also known as the “property clause”) provides protection of property rights against unlawful acts.⁷⁹ It is divided into four categories: section 25(1) is the deprivation clause; sections 25(2)-(3) are the expropriation clauses; section 25(4) is the interpretation clause; and sections 25(5)-(9) are the land reform clauses.⁸⁰ For the purpose of this study, section 25(1) of the *Constitution* will be the focus with relation to freedom of testation.

⁷⁵ Section 25 (1) of the *Constitution*; King (CC) para 65; Du Toit 2001 *Stellenbosch Law Review* 236.

⁷⁶ Preamble of the *Constitution*. Section 2 of the *Constitution*; Jamneck and Rautenbach *The Law of Succession in South Africa* 133.

⁷⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 151; see para 2.1 above.

⁷⁸ Section 25 (1) of the *Constitution*; King (CC) para 65; Du Toit 2001 *Stellenbosch Law Review* 236.

⁷⁹ Section 25 of the *Constitution*; Muller *et al General Principles of South African Property Law* 59; Van der Walt *Introduction to the Law of Property* 345.

⁸⁰ Section 25 of the *Constitution*; Strydom 2012 *Without Prejudice* 70. The third category, section 25(4) of the *Constitution*, provides a unique concept for interpreting the entire section 25 of the *Constitution*. The concept is explained to be a purpose of “public interest” (in terms of land reform and the nations commitment thereto) where equitable access to all South

Section 25(1) of the *Constitution* describes "property" as that which establishes the boundaries which others are not permitted to violate; protection of property is therefore considered a constitutional right.⁸¹ One of the functions of the property clause is to protect an individual's property rights and relates to "economic facts of life".⁸²

The term "property" is impossible to define accurately, as it has an extensive meaning.⁸³ Section 25 of the *Constitution* does not include either rights, ownership, or even real rights, but only the broad term "property".⁸⁴ This resulted in lawyers in the Roman-Dutch legal tradition preferring to view "property" as a legal connection between persons and corporeal or incorporeal things.⁸⁵ In *First National Bank of South Africa Ltd t/a Westbank v Commissioner, South African Revenue Service*⁸⁶ (hereafter *FNB (CC)*), the Constitutional Court indicated that it is "practically impossible" to provide an exact definition of property in relation to section 25 of the *Constitution*.⁸⁷ Despite this, ownership of a corporeal thing as well as ownership of land must be included in the constitutional context of property in order for the use and enjoyment of the right to be protected by it.⁸⁸

Africa's natural resources exists. The fourth and final categories provides a constitutional authority effect on land reform and other reforms. Also see Muller *et al General Principles of South African Property Law* 60; Rautenbach and Venter *Constitutional Law* 433.

⁸¹ Van der Walt *Introduction to the Law of Property* 345; Rautenbach and Venter *Constitutional Law* 421; Muller *et al General Principles of South African Property Law* 5.

⁸² Van der Walt *Introduction to the Law of Property* 345; Muller *et al General Principles of South African Property Law* 6. See paragraph 2.2 above on De Waal indication that a testator may dispose of his property through a will by exercising his right to testate freely in a manner that takes into account economic factors as part of the law of succession.

⁸³ Currie and De Waal *The Bill of Rights Handbook* 535.

⁸⁴ Currie and De Waal *The Bill of Rights Handbook* 535; Rautenbach 2003 *SALJ* 182; Muller *et al General Principles of South African Property Law* 1.

⁸⁵ Currie and De Waal *The Bill of Rights Handbook* 535; Muller *et al General Principles of South African Property Law* 1, Rautenbach and Venter *Constitutional Law* 421; Du Toit 2001 *Stellenbosch Law Review* 233; Rautenbach 2003 *SALJ* 182.

⁸⁶ 2002 4 SA 768 (CC).

⁸⁷ *FNB (CC)* para 49 explained that the consideration of the property clause should shift away from the private law view of the term and towards a dynamic typical public law view of the *Constitution*. The view must be a form of social change and transformation tool founded in constitutional values. Also see Strydom 2012 *Without Prejudice* 70-71.

⁸⁸ Strydom 2012 *Without Prejudice* 71; *FNB (CC)* para 49.

Even though section 25(1) provides for the constitutional protection of property, it is also regarded as a deprivation clause.⁸⁹ The section acts in a dual fashion that provides for the protection of property rights and the regulation of these in the public interest, but the latter must occur within the limitations imposed.⁹⁰ An interference with property rights may not be committed arbitrarily and it must fall within the ambit of the authorised context of the law of general application.⁹¹ However, an issue arises as to whether or not an infringement of a property right made in terms of private property can pass constitutional scrutiny.⁹² Whether or not there is an infringement of property rights in private property it is determined with a view to three possible matters: whether the concerned property right is protected by the *Constitution*; whether the conduct restricts the freedom of the holder's rights; and whether the infringing conduct is constitutionally justified.⁹³

The Constitutional Court's judgement in the *FNB (CC)* case sheds light on the content and structure of section 25(1) of the *Constitution*.⁹⁴ It addressed constitutional property conflicts and whether interference with property rights might result in arbitrary deprivation of property.⁹⁵ Deprivation occurs when the

⁸⁹ Van Der Walt 2004 *Southern African Public Law* 62; Strydom *Without Prejudice* 70 indicates that to understand section 25 of the *Constitution* as a property clause, one needs to grasp the deprivation clause, that is, section 25(1) of the *Constitution*. A deprivation is a statutory interference with property rights that could diminish the value of the property right or completely destruct it.

⁹⁰ Strydom 2012 *Without Prejudice* 70; Van Der Walt 2004 *Southern African Public Law* 62-63.

⁹¹ Strydom 2012 *Without Prejudice* 70; Van Der Walt 2004 *Southern African Public Law* 62-63; Section 25(1) of the *Constitution*.

⁹² Strydom 2012 *Without Prejudice* 70; Mostert and Badenhorst *Property and the Bill of Rights* 3FB4.

⁹³ Mostert and Badenhorst *Property and the Bill of Rights* 3FB4 explain the South African Constitutional Court's interest in the Canadian two-staged process when it comes to establishing the constitutional validity of statutes. It is assumed that, in a constitutional dispute on property, the two-staged process would be followed. The applicants bear the onus of proving that an infringement has taken place against their property right as protected by section 25 of the *Constitution*, and this establishes two issues. The interest in question must be protected under section 25, and it must be determined that such an interest has been infringed upon. Only upon the establishment of these does the state (or the other party) have the onus of proving the justification of the infringement in terms of sections 25 and/or 36 of the *Constitution*.

⁹⁴ Mostert and Badenhorst *Property and the Bill of Rights* 3FB4; Strydom 2012 *Without Prejudice* 70-71; *FNB (CC)* paras 45-50.

⁹⁵ Strydom 2012 *Without Prejudice* 71; Mostert and Badenhorst *Property and the Bill of Rights* 3FB4 describes how the Constitutional Court turned the two-staged approach into a single inquiry. Also see *FNB (CC)* para 46.

use and enjoyment of property rights are interfered with.⁹⁶ The property clause does not clearly state the recognition of freedom of testation but indirectly protects it.⁹⁷

b) Indirect constitutional recognition and protection of freedom of testation

Section 25 of the *Constitution* protects the testator's freedom of testation indirectly, seeing that assets are disposed of in accordance with a testator's wishes.⁹⁸ Section 25(1) of the *Constitution* provides the following:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.⁹⁹

The indirect protection of freedom of testation as contained here is evidenced by the *Syfreets* and *King* (CC) cases. Both cases refer to section 25 of the *Constitution* regarding freedom of testation where the testator has the right to dispose of his property as he deems fit, while it must be disposed of within the limitations of that right.¹⁰⁰

In the *Syfreets* case, freedom of testation has been given constitutional recognition with reference to the indirect inclusion in section 25 of the *Constitution*.¹⁰¹ It must also preserve freedom of testation, as this is an essential component of a testator's right to property.¹⁰² However, both the applicants and respondents indicated that section 25(1) or any other sections in the *Constitution* did not provide for freedom of testation as in the case, for instance, of the disposal of the testator's property upon death.¹⁰³ The court reasoned that the protection of this freedom in terms of the section has not been authoritatively recognised by the courts, while it has

⁹⁶ *FNB* (CC) para 49(i); *King* (CC) para 67; Strydom 2012 *Without Prejudice* 71; Mostert and Badenhorst *Property and the Bill of Rights* 3FB4.

⁹⁷ Section 25(1) of the *Constitution*; *Syfreets* para 18; *King* (CC) para 65.

⁹⁸ *BOE Trust* (SCA) para 26.

⁹⁹ Section 25(1) of the *Constitution*.

¹⁰⁰ *Syfreets* paras 9, 24, 47; *King* (CC) paras 65, 70, 211.

¹⁰¹ *Syfreets* para 17; *BOE Trust* (SCA) para 26; *King* (CC) para 65. *Syfreets* and *BOE Trust* (SCA) will be discussed in chapter 3.2 of this study.

¹⁰² *Syfreets* para 18; Ex Parte *BOE Trust Ltd* 2009 6 SA 460 (WCC) (hereafter *BOE Trust* (court a quo)) para 9; Du Toit 2012 *TECLF* 112; Rautenbach and Venter *Constitutional Law* 421.

¹⁰³ *Syfreets* para 18; Wood-Bodley 2007 *SALJ* 688.

been supported by authors of the law of succession.¹⁰⁴ Although the *Constitution* does not specifically refer to freedom of testation, the court indicated that the disposal of a testator's property is an integral part of the *Constitution* and must be recognised as such.¹⁰⁵ Though the freedom of testation was indirectly protected in the *Constitution*, this was not absolute it is subject to limitations which will be discussed in paragraph 2.3 of the present study.¹⁰⁶

In *King* (CC), the Constitutional Court indicated that freedom of testation formed part of the property clause in section 25(1) of the *Constitution* that enabled a testator to dispose of his property as they deemed fit upon his death.¹⁰⁷ Furthermore, it stated that the court in the *Syfreets* case highlighted the indirect protection of freedom of testation in the section.¹⁰⁸ In the first judgment, Judge Mhlantla indicated that freedom of testation was a fundamental aspect of testate succession and formed part of the section.¹⁰⁹ Furthermore, he indicated that freedom of testation was linked to property rights because, had it not been indirectly protected by the *Constitution* then the state would be able to infringe on the testator's property rights once they had passed on.¹¹⁰ In the majority judgement, Judge Jafta agreed that freedom of testation was indirectly protected by the section.¹¹¹ Therefore, if freedom of testation was not linked to property rights, it would have meant that, as soon as a testator had passed on, the state would be unrestricted by statutes that had been applied while the testator was still alive.¹¹²

Freedom of testation forms an integral part of rights in property, because it protects the testator's right to dispose of his property and appoint the beneficiaries

¹⁰⁴ *Syfreets* para 18.

¹⁰⁵ *Syfreets* para 18.

¹⁰⁶ *Syfreets* paras 22-24; Also see para 2.1 above.

¹⁰⁷ *King* (CC) para 66 made reference to *Syfreets*: which stated that, although freedom of testation was not expressly mentioned in the *Constitution*, it had to be protected in terms of section 25(1) as it pertains to a person's property right and the right to dispose of his property as he or she wishes in terms of his will.

¹⁰⁸ *King* (CC) 66-67.

¹⁰⁹ *King* (CC) para 66.

¹¹⁰ *BOE Trust* (SCA) para 26; *King* (CC) para 66.

¹¹¹ *King* (CC) paras 92 and 95.

¹¹² *BOE Trust* (SCA) para 26; *King* (CC) para 66.

of his estate.¹¹³ The court's reasoning was clear regarding the fact that freedom of testation was indirectly protected in the section, which is essential for ensuring that the testator's property would be protected after he had passed on.¹¹⁴ Freedom of testation is further indirectly recognised in sections 10 and 14 of the *Constitution* relating to the right to human dignity and privacy, as will be subsequently outlined.¹¹⁵

2.2.3.2 Sections 10 and 14 of the *Constitution*

a) Section 10 of the *Constitution* (the right to human dignity)

The term "human dignity" has been ingrained in the language of comparative constitutionalism: it means that human dignity cannot be compromised since it is not earned.¹¹⁶ Not only is the right to dignity enshrined in national constitutions and international human rights treaties, but it is also provided that dignity is the foundation of all human rights and should be used to interpret them.¹¹⁷

Section 10 of the *Constitution* provides everyone with the right to human dignity.¹¹⁸ The protection of this fundamental right is significant for preserving constitutional values.¹¹⁹ The value attached to being a human is protected by the right.¹²⁰

In *S v Makwanyane*,¹²¹ the Constitutional Court emphasised the importance of protecting the right of human dignity as it is one of the fundamental values in

¹¹³ *J W v Williams-Ashman* 2020 4 SA 567 (WCC) para 56; *Harvey v Crawford* 2019 2 SA 153 (SCA) para 64; Lehmann 2014 *Acta Juridica* 9.

¹¹⁴ Section 25(1) of the *Constitution*; *King* (CC) paras 66 and 204; *Syffrets* paras 17-21.

¹¹⁵ Sections 10 and 14 of the *Constitution*.

¹¹⁶ Botha 2009 *Stellenbosch Review* 171; Rautenbach and Venter *Constitutional Law* 347.

¹¹⁷ Botha 2009 *Stellenbosch Review* 171. An example of an international law instrument is the preamble of the Charter of the United Nations (1945). It provides that the international community must be determined to promote fundamental human right and the dignity of a human being by ensuring that men and women have equal rights.

¹¹⁸ Section 10 of the *Constitution* provides that everyone has the right to their dignity being respected and protected; Du Toit 2001 *Stellenbosch Law Review* 234; *Syffrets* para 22.

¹¹⁹ Human dignity was emphasised in the recent Constitutional Court case of *Qwelane v South African Human Rights Commission* 2021 ZACC 22 (31 July 2021) para 64, which indicated that it must be protected as it is the cornerstone of democracy.

¹²⁰ Rautenbach and Venter *Constitutional Law* 347 indicates that people are protected by this right just by being human.

¹²¹ *S v Makwanyane* 1995 3 SA 391 (CC).

South Africa as a democratic country.¹²² Furthermore, constitutional protection of human dignity emphasises the importance of recognition of an individual's self-worth.¹²³

Human dignity is the most protected right in the *Constitution* according to the High Court's acknowledgement in the Syfrets case.¹²⁴ According to this court, only natural persons- not juristic persons such as trusts or companies - may rely on the right to human dignity.¹²⁵

In *BOE Trust (SCA)*, the SCA indicated that the protection of human dignity does not only apply to the living but also to the deceased in order to substantiate the recognition of freedom of testation.¹²⁶ This allows the testator to die with peace of mind knowing that his or her last wishes will be adhered to in accordance with his or her will.¹²⁷

b) Section 14 of the *Constitution* (the right to privacy) in relation to human dignity

Section 14 of the *Constitution* provides that everyone has the right to privacy.¹²⁸ In accordance with the preamble of the *Constitution*, the *Constitution* and the Bill of Rights lay the foundation of citizens' rights in order to heal and recognise the injustices of the past.¹²⁹ Furthermore, in *Khumalo v Holomisa* (hereafter *Khumalo v Hlolomisa*),¹³⁰ Judge O'Regan described how the rights of human dignity and privacy are closely related, because human dignity is not just based on self-worth

¹²² *Qwelane v South African Human Rights Commission* 2021 ZACC 22 (31 July 2021) para 64.

¹²³ *Qwelane v South African Human Rights Commission* 2021 ZACC 22 (31 July 2021) para 65; *J W v Williams-Ashman* 2020 4 SA 567 (WCC) para 55.

¹²⁴ *Syfrets* para 30; Currie and De Waal *The Bill of Rights Handbook* 250-251 provides that dignity, as an abstract value shared by the fundamental principles of our *Constitution*, shapes the substance of all tangible rights and contributes to the process of balancing various rights and values.

¹²⁵ *Syfrets* para 41; Rautenbach and Venter *Constitutional Law* 351 indicates that juristic persons are protected by the concept of reputation and not human dignity, as it is a legal entity and not a human (natural person).

¹²⁶ *BOE Trust (SCA)* para 27; *King (CC)* para 67.

¹²⁷ *BOE Trust (SCA)* para 27 and also see para 3.2.2 on the discussion of this case; Lehmann 2014 *Acta Juridica* 9.

¹²⁸ Section 14 of the *Constitution*.

¹²⁹ *King (CC)* para 68; *Khumalo v Holomisa* 2002 5 SA 401 para 27; Chaskalson 2000 *SAJHR* 196; Preamble and Chapter 2 of the *Constitution*.

¹³⁰ 2002 5 SA 401.

but also on the affirmation of worth as a human being.¹³¹ Judge O'Regan stated that the close connection between privacy and human dignity stems from the right to intimacy and autonomy that is, being protected from invasion.¹³²

In relation to human dignity, privacy is ensured in South Africa's constitutional order.¹³³ In *King (CC)*, the Constitutional Court recognised that the right to privacy and human dignity are closely related.¹³⁴ Again, it was established that the right to privacy recognises the fact that human beings have the right to an intimate and autonomous space that should be safeguarded against invasion.¹³⁵

In the *King (CC)* case, Judge Mhlantla referred to freedom of testation as a constitutionally protected right.¹³⁶ In contrast, the right to privacy was part of the "concatenation of rights in the Bill of Rights".¹³⁷ Furthermore, freedom of testation was found to be sheltered through the right to privacy and the right to dignity.¹³⁸ The "sheltering of freedom of testation" through the right to privacy and dignity will be upheld when testators will have peace of mind knowing that their last wishes will be protected and respected after death.¹³⁹

Constitutional protection therefore promotes human dignity by guaranteeing that a testator's right to dispose of his or her property in his or her capacity should be protected even after death.¹⁴⁰

¹³¹ *Khumalo v Holomisa* para 27.

¹³² *Khumalo v Holomisa* para 27.

¹³³ *King (CC)* para 68; *Khumalo v Holomisa* para 27; Chaskalson 2000 *SAJHR* 196; Preamble and Chapter 2 of the *Constitution*.

¹³⁴ *King (CC)* para 64 and 68; *Khumalo v Holomisa* para 27.

¹³⁵ *King (CC)* para 68; *Khumalo v Holomisa* para 27.

¹³⁶ *King (CC)* para 65.

¹³⁷ *King (CC)* para 65. The majority judgement by Judge Jafta in the *King (CC)* case did not discuss the right to privacy in relation to human dignity.

¹³⁸ *King (CC)* para 68.

¹³⁹ *King (CC)* para 68.

¹⁴⁰ *King (CC)* para 68; *Khumalo v Holomisa* para 27.

2.3 The limitations on freedom of testation

As indicated in paragraph 2.1 of this study, freedom of testation is subjected to common law, legislative and constitutional limitations.¹⁴¹

2.3.1 Common law limitations

The courts will not enforce testamentary provisions that are *contra bonos mores* or against public policy.¹⁴² *Bonos mores* means “good faith” or “good morals”.¹⁴³ In South African law, testamentary provisions that are *contra bonos mores* would be regarded as *pro non scripto*, and no effect will be given to them.¹⁴⁴ Bequests that are immoral and/or illegal are regarded in the common law to be in the nature of the *contra bonos mores* principle.¹⁴⁵

Public policy is that which the community deems to be moral or immoral.¹⁴⁶ The narrative, however, changes over time.¹⁴⁷ In *Barkhuizen v Napier*,¹⁴⁸ Judge Ngcobo indicated that public policy involved values that society held dear to them as they were deeply rooted in the *Constitution* itself and possessed the legal convictions of the community.¹⁴⁹ Before the enactment of the *Constitution*, it was difficult to determine the contents of public policy.¹⁵⁰ Since the enactment of the *Constitution*, public policy has been deeply rooted in a constitutional democracy as well as all the values that underpin it, because of a response to the transgressions of the past (such as apartheid).¹⁵¹ Therefore, public policy must be determined by the *Constitution* itself when it is questioned; this must be done in

¹⁴¹ Jamneck and Rautenbach *The Law of Succession in South Africa* 128-129.

¹⁴² Jamneck and Rautenbach *The Law of Succession in South Africa* 129.

¹⁴³ *Syfrets case* para 24 provides that *boni mores* is the justice of the community.

¹⁴⁴ Du Toit 2000 *Stellenbosch Law Review* 358.

¹⁴⁵ Jamneck and Rautenbach *The Law of Succession in South Africa* 153.

¹⁴⁶ Matsemela 2015 *Journal of Law, Society and Development* 93; Jamneck and Rautenbach *The Law of Succession in South Africa* 129.

¹⁴⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 129. An example would be what was accepted prior to the enactment of the *Constitution*: that women were discriminated against when it came to owning property based on their gender. However, the equality clause provided for in section 9 of the *Constitution* listed grounds for that which would amount to discrimination, one of which is gender.

¹⁴⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC)

¹⁴⁹ *Barkhuizen v Napier* para 28.

¹⁵⁰ *Barkhuizen v Napier* para 28.

¹⁵¹ *Barkhuizen v Napier* para 28; Preamble and section 1 of the *Constitution*.

terms of the values that underpin it and the provisions set out in the Bill of Rights.¹⁵²

Public policy which had not been considered to be *contra bonos mores* 70 years ago may be viewed as such today.¹⁵³ Freedom of testation is limited in terms of the common law, where bequests should not be unlawful, against public policy, and/or impracticably vague or impossible to enforce.¹⁵⁴

Common law limitations on freedom of testation are considered core aspects of the South African law of succession and such examples are discussed below.¹⁵⁵ These cases were heard before the enactment of the *Constitution*, and if the same cases were heard by our courts today, some of them would enjoy different outcomes.

A) Conditions that are *contra bonos mores*

As mentioned, a testator has freedom of testation to include conditions to his or her testamentary bequests; however, certain conditions result in being *contra bonos mores*.¹⁵⁶ These conditions include interference with a beneficiary's marital relationship and limiting a beneficiary's freedom of movement.¹⁵⁷ Examples of testamentary conditions that are *contra bonos mores* will be discussed below.

Aa) Beneficiary's marital relationship

A testator may not impose a condition for an unmarried beneficiary to never marry in order to receive their share in the testator's estate.¹⁵⁸ Such a condition is *contra bonos mores*.¹⁵⁹ A testator may, however, provide a condition that prohibits a

¹⁵² *Barkhuizen v Napier* paras 28-29.

¹⁵³ Jamneck and Rautenbach *The Law of Succession in South Africa* 129; *King* (CC) para 62.

¹⁵⁴ Jamneck and Rautenbach *The Law of Succession in South Africa* 143; *Syfreets case* para 9.

¹⁵⁵ *Syfreets case* para 17.

¹⁵⁶ Jamneck and Rautenbach *The Law of Succession in South Africa* 130-131.

¹⁵⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 130-131.

¹⁵⁸ Jamneck and Rautenbach *The Law of Succession in South Africa* 131 referred to *De Wayer v SPCA Johannesburg* and *Ex parte Gitelson*.

¹⁵⁹ Jamneck and Rautenbach *The Law of Succession in South Africa* 131 referred to the applicable case of *Ex parte Gitelson*.

spouse from inheriting part of the state should he/ she remarry.¹⁶⁰ Suppose a testator provides for the destruction of an existing marriage.¹⁶¹ In that case, such a condition will be regarded as *contra bonos mores* and the court will declare it to be *pro non scripto*.¹⁶² A consequence of a *contra bonos mores* condition is evidenced by *De Wayer v SPCA Johannesburg*.¹⁶³ The testatrix bequeathed the residue of her estate to her son on the condition that he would not get married after her death.¹⁶⁴ If her son did indeed marry, he would have only inherited immovable property and the SPCA would have inherited the residue of the estate.¹⁶⁵ The court held that the condition posed a restraint on marriage which is *contra bonos mores*; therefore, the son inherited his benefits without the condition attached to it.¹⁶⁶ Conditions that prescribe the breakdown of an existing marriage of a beneficiary resulted in the court intervening and declaring it to be *pro non scripto*.¹⁶⁷ However, if the marriage had broken down and the testator did not foresee that the condition would terminate an existing marriage, the bequest would be deemed valid.¹⁶⁸

Ab) Limiting freedom of movement

Before the enactment of the *Constitution*, a testator was able to include a testamentary bequest that a beneficiary had to reside at a particular place.¹⁶⁹ The bequest would be declared valid unless it was vague.¹⁷⁰

¹⁶⁰ Jamneck and Rautenbach *The Law of Succession in South Africa* 130-131 referred to the applicable case law of *Levy v Schwartz*.

¹⁶¹ Jamneck and Rautenbach *The Law of Succession in South Africa* 131.

¹⁶² Jamneck and Rautenbach *The Law of Succession in South Africa* 131.

¹⁶³ *De Wayer v SPCA Johannesburg* 1963 1 SA 71 (T).

¹⁶⁴ Jamneck and Rautenbach *The Law of Succession in South Africa* 155; *De Wayer v SPCA Johannesburg*.

¹⁶⁵ *De Wayer v SPCA Johannesburg*; Jamneck and Rautenbach *The Law of Succession in South Africa* 155.

¹⁶⁶ *De Wayer v SPCA Johannesburg*; Jamneck and Rautenbach *The Law of Succession in South Africa* 155.

¹⁶⁷ *King (WCC)* para 79.

¹⁶⁸ Jamneck and Rautenbach *The Law of Succession in South Africa* 131.

¹⁶⁹ Jamneck and Rautenbach *The Law of Succession in South Africa* 132.

¹⁷⁰ Du Toit 2001 *Stellenbosch Law Review* 238-239; Jamneck and Rautenbach *The Law of Succession in South Africa* 132.

Section 21 of the *Constitution*, however, provides that everyone has the right to freedom of movement.¹⁷¹ A testamentary bequest may provide otherwise, but such a bequest may not infringe on the beneficiary's rights unless justified in terms of section 36 of the *Constitution*.¹⁷²

2.3.2 Statutory limitations

Freedom of testation is also limited in terms of statutory law in South Africa. The following examples are illustrative of such statutory limitations.

The *Maintenance of Surviving Spouses Act* limits freedom of testation by allowing the surviving spouse to claim maintenance from the estate under certain conditions or circumstances.¹⁷³

Section 13 of the *Trust Property Control Act* indirectly limits freedom of testation by allowing the court to amend and vary a trust provision or provisions, which *inter alia* yields consequences that the trust founder did not contemplate.¹⁷⁴ Furthermore, if the provisions would impair the realisation of the founder's aims or prejudice the interests of the beneficiaries and are found to be contrary to public policy, the court will be permitted to delete or alter such provisions.¹⁷⁵ Section 13 of the *Trust Property Control Act* will be discussed in Chapter 3 of this study with reference to the *Syfrets* case.¹⁷⁶

The common law allows for fideicommissary conditions in a will whereby property stays within the family for generations.¹⁷⁷ However, the common law did not

¹⁷¹ Section 21 of the *Constitution*.

¹⁷² Sections 21 and 36 of the *Constitution*; Du Toit 2001 *Stellenbosch Law Review* 238.

¹⁷³ Section 2 (1) of the *Maintenance of Surviving Spouses Act* 27 of 1990 provides that maintenance may be claimed against the deceased spouse's estate upon the death of the latter until the surviving spouse dies or remarries. The surviving spouse has the onus of proving that it is reasonable to claim maintenance. Lehmann 2014 *Acta Juridica* 11; Jamneck and Rautenbach *The Law of Succession in South Africa* 134.

¹⁷⁴ Matsemela 2015 *Journal of Law, Society and Development* 101; Jamneck and Rautenbach *The Law of Succession in South Africa* 129; section 13 of the *Trust Property Control Act* 57 of 1988.

¹⁷⁵ Matsemela 2015 *Journal of Law, Society and Development* 101; *Syfrets* para 9 and 34.

¹⁷⁶ See paragraph 3 below on how section 13 of the *Trust Property Control Act* limits freedom of testation as a statutory limitation.

¹⁷⁷ Matsemela 2015 *Journal of Law, Society and Development* 101.

restrict the successive number of *fideicommissari*.¹⁷⁸ The *Immovable Property Act* however, limits fideicommissum over immovable property to two successive *fideicommissari*.¹⁷⁹

Sections 2 and 3 of the *Immovable Property Act* allows beneficiaries to approach the court to remove restrictions imposed by the testator.¹⁸⁰ The application should, however, be made in accordance with the factors indicated in section 3.¹⁸¹ If the court is satisfied with the application made by the beneficiary or beneficiaries, it may limit the testator's freedom of testation by removing or altering provisions in his or her will.¹⁸²

Section 37(c) of the *Pension Funds Act* 24 of 1956 (hereafter the *Pension Funds Act*), provides that pension funds do not form part of the deceased's estate, which restricts the testator from bequeathing the funds in a will to beneficiaries.¹⁸³

2.3.3 Constitutional limitations

The law of succession should dovetail with the *Constitution* (being the supreme law) in terms of constitutional values, principles, and rights.¹⁸⁴

The Bill of Rights is the cornerstone of the *Constitution* and protects human rights and prohibits, among others, unfair discrimination.¹⁸⁵ Therefore, the inclusion of discriminatory provisions can be limited with reference to constitutional values, rights, and/or principles if contested in court.¹⁸⁶

¹⁷⁸ Matsemela 2015 *Journal of Law, Society and Development* 101.

¹⁷⁹ Section 6 of the *Immovable Property Act* provides for the limitation on a fideicommissum to a maximum of two-generation *fideicommissari*. Also see sections 7-8 of the *Immovable Property Act*.

¹⁸⁰ Sections 2 and 3 of the *Immovable Property Act*.

¹⁸¹ Sections 2 and 3 of the *Immovable Property Act*.

¹⁸² Sections 2 and 3 of the *Immovable Property Act*.

¹⁸³ Section 37 (c) *Pension Funds Act* 24 of 1956; Lehmann 2014 *Acta Juridica* 19.

¹⁸⁴ Matsemela 2015 *Journal of Law, Society and Development* 102.

¹⁸⁵ Chapter 2 of the *Constitution* constitutes of the Bill of Rights.

¹⁸⁶ Jamneck and Rautenbach *The Law of Succession in South Africa* 133; See also Chapters 3 and 4 below for an in-depth discussion of how conditions were declared to be forms of unfair discrimination by the courts.

Part of the freedom of testation is the testator's choice regarding his or her beneficiaries, which exercise may result in differentiation. A testator may differentiate between beneficiaries but the differentiation must occur within the ambit of common law, statutory and constitutional limitations.¹⁸⁷ Differentiation occurs among people and not in terms of the category of persons; if it occurs in terms of the category of persons, it amounts to discrimination.¹⁸⁸ However, there is a thin line between differentiation and discrimination.¹⁸⁹ Constitutional limitations that are relevant to this study are sections 1, 9, and 36 of the *Constitution*.¹⁹⁰ That which constitutes a constitutional value and right will be discussed briefly below. The difference is essential, since it underpins the reasoning of the courts to be discussed in Chapters 3-5 of this study.

2.3.3.1 Constitutional values (current public policy)

A constitutional value may be interpreted as a set requirement for the desired application of the *Constitution* and those dependent on it.¹⁹¹ It may therefore be defined as a principle that gives worth to the *Constitution*.¹⁹²

The *Constitution* provides a clear break from South Africa's dark past.¹⁹³ The new era marks a significant departure from the previous one, making the *Constitution* one of the most progressive constitutions in the world.¹⁹⁴

Section 1 of the *Constitution* provides for the fact that South Africa is a sovereign, democratic country that is based on the following values:¹⁹⁵

¹⁸⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 130.

¹⁸⁸ *Harksen v Lane* para 53. See para 3.2.3.

¹⁸⁹ Differentiation is discussed in para 3.2.3 below.

¹⁹⁰ See paragraph 2.3.3.2 on the discussion of these sections.

¹⁹¹ Venter 2001 *PER* 6.

¹⁹² Venter 2001 *PER* 6 explains how constitutional values differ from principles, while he maintains that they are similar in the sense that they embody the ideals that the law should be applied fairly and be justifiable.

¹⁹³ Tladi 2002 *De Jure* 306.

¹⁹⁴ Tladi 2002 *De Jure* 306; Davis and Klare 2010 *SAJHR* 404-405.

¹⁹⁵ Section 1 of the *Constitution* provides for the fact that the Republic of South Africa is founded on the listed values. Also see Venter 2001 *PER* 10; Tladi 2002 *De Jure* 307 explained that, when interpreting the Bill of Rights, the values must be promoted by the courts and should always underlie the *Constitution*. Also see Davis and Klare 2010 *SAJHR* 403.

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the *Constitution* and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

The values that are underscored in section 1 of the *Constitution* are not described in the *Constitution* itself. However, the values are expressed through other constitutional provisions.¹⁹⁶ Section 1(a) provides for the advancement of human rights and freedoms, which is diffused throughout the *Constitution*.¹⁹⁷ In *Barkhuizen v Napier*, Judge Ngcobo expressed the effect of freedom and dignity as constitutional values as follows:

Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.¹⁹⁸

Furthermore, in *AB v Minister of Social Development*,¹⁹⁹ Judge Khampepe provided that the awareness of each person's unique ability to understand and act on their own desires and beliefs is what drives the value of freedom.²⁰⁰ Freedom is an inherent part of human dignity, and it is important to identify and recognise the significance of the value.²⁰¹

Public policy is firmly embedded in our *Constitution* in terms of the values that underpin it.²⁰² The constitutional values that form the foundation of our constitutional democracy (as expressed in the provisions of the Bill of Rights) are used to direct public policy.²⁰³ Judge Jafta provided in the *King (CC)* case that public policy, based on the values enshrined in the *Constitution*, may give rise to

¹⁹⁶ Van Staden 2020 *AHRLJ* 487.

¹⁹⁷ Section 1(a) of the *Constitution*; *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) para 66; Van Staden 2020 *AHRLJ* 487.

¹⁹⁸ *Barkhuizen v Napier* para 57.

¹⁹⁹ *AB v Minister of Social Development* 2016 SA 570 (CC).

²⁰⁰ *AB v Minister of Social Development* para 52; Van Staden 2020 *AHRLJ* 488.

²⁰¹ Van Staden 2020 *AHRLJ* 487-488.

²⁰² *Barkhuizen v Napier* para 28; refer to para 2.3.1 on how public policy influences the courts decisions.

²⁰³ *Barkhuizen v Napier* para 29.

a clash of rights - for example, a clash between the rights of equality against freedom and human dignity.²⁰⁴

Furthermore, section 39(2) of the *Constitution* requires core constitutional values that affect common law.²⁰⁵ The common law must be developed within the framework of this objective normative value system.²⁰⁶ Therefore, section 39(2)'s goal is to guarantee that our common law is associated with the ideals of the *Constitution* as well as legislation.²⁰⁷

2.3.3.2 Constitutional rights and freedoms

The Bill of Rights protects all citizens' rights and upholds the democratic values of human dignity, equality, and freedom.²⁰⁸ As indicated in paragraph 2.2.3, the Bill of Rights is the cornerstone of democracy, just as freedom of testation is the cornerstone of the law of succession.²⁰⁹ The Bill of Rights must ensure that public policy is protected along with the right to be protected from unfair discrimination.²¹⁰

Section 39(1) of the *Constitution* provides that the courts must “promote” the constitutional values of human dignity, equality, and freedom when they interpret the Bill of Rights.²¹¹

Section 39(2) of the *Constitution* provides that the courts must promote the spirit, purport, and objects of the Bill of Rights when they interpret or develop customary law or common law.²¹²

²⁰⁴ *King* (CC) para 92.

²⁰⁵ Section 39(2) of the *Constitution* is the interpretation of the Bill of Rights clause that gives provision to the interpretation of legislation and the development of the common law, while underlining that courts must promote the spirit, purport, and objects of the Bill of Rights. *King* (CC) para 43-44.

²⁰⁶ *King* (CC) para 43-44.

²⁰⁷ *King* (CC) para 49; *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) para 66; Van Staden 2020 *AHRLJ* 487.

²⁰⁸ Section 7(1) of the *Constitution*; Kgosimore 2000 *Crime Research in South Africa* 1.

²⁰⁹ Section 7(1) of the *Constitution*; See paras 2.1 and 2.3 above.

²¹⁰ Du Toit 2012 *TECLF* 117.

²¹¹ Freedom is one of the foundational values in the *Constitution* as provided for in section 1(a) of the *Constitution*. Section 39(1)(a) of the *Constitution*; Liebenberg 2008 *Acta Juridica* 149.

²¹² Section 39(2) of the *Constitution*.

Section 9(1) of the *Constitution* provides that everyone is equal and is equally protected by the law.²¹³ However, according to section 36, a right may be limited if it is reasonable and justifiable to do so in an open and democratic society founded on freedom, dignity, and equality.²¹⁴ The courts must examine the nature, scope, and purpose of the right and its limitation, as well as the rationality and proportionality of the limitation, so as to determine whether the State has met this requirement.²¹⁵

a) Section 9 of the equality clause

Some rights contained in the Bill of Rights affect freedom of testation. One of the consequences that could limit freedom of testation is the equality clause.²¹⁶ Section 9 of the *Constitution* provides for equality as a fundamental right and no one may be discriminated against unless the discrimination is deemed fair.²¹⁷

Section 9 of the *Constitution* provides a foundation for the protection of equality as a right.²¹⁸ The *Equality Act* further provides extensive insight on the effect of section 9 of the *Constitution* by preventing and restricting unfair discrimination while promoting equality.²¹⁹ Section 9(1) of the *Constitution* provides a general formulation of the equality right and stresses that this right protects everyone.²²⁰ The equality clause provides that everyone enjoys equal protection by the law and that this should be interpreted substantively.²²¹ Substantive interpretation of the

²¹³ Section 9(1) of the *Constitution*.

²¹⁴ Section 36 of the *Constitution*.

²¹⁵ Van Staden 2020 *AHRLJ* 491.

²¹⁶ See paras 3.2.3, 3.3.3, 3.4.3, 4.2.3, 5.2.5-5.2.7 and 5.3.3 below of this study.

²¹⁷ Section 9(1), (3)–(5) of the *Constitution*. Testamentary provisions centre on the testator's discretion on how his assets should be disposed of in accordance to his desire. Jamneck and Rautenbach *The Law of Succession in South Africa* 130 states that the testator may differentiate between beneficiaries, while this must be done within the ambit of common law and statutory and constitutional limitations.

²¹⁸ Currie and De Waal *The Bill of Rights Handbook* 211.

²¹⁹ Currie and De Waal *The Bill of Rights Handbook* 211; Preamble of the *Equality Act*. Also see Rautenbach and Venter *Constitutional Law* 330-331.

²²⁰ Section 9(1) of the *Constitution*; Loenen 1997 *South African Journal on Human Rights* 403.

²²¹ Substantive equality requires of the law to assure equality of outcome, which entails the willingness to accept variances in treatment. Currie and de Waal *The Bill of Rights Handbook* 213; Loenen 1997 *South African Journal on Human Rights* 403.

equality clause restricts indirect discrimination as provided for in section 9(3)-(4) of the *Constitution*.²²²

In *NK v Minister of Safety & Security*,²²³ the Constitutional Court emphasised that the values and rights contained in the *Constitution* must be present in terms of common law principles.²²⁴ However, it is crucial to note that not all differentiation in wills and trusts is invalid; it only is if it comprises unfair discrimination.²²⁵

Unfair discrimination is based on the grounds provided for section 9(3) of the *Constitution*.²²⁶ Furthermore, a test as to whether differentiation is fair or unfair is provided for in *Harksen v Lane*,²²⁷ (hereafter *Harksen v Lane*) as well as in the *Promotion of Equality and Prevention of Unfair Discrimination Act*.²²⁸

The test that was formulated in the *Harksen v Lane* case is based on three criteria:²²⁹ firstly, whether the dispute of differentiation occurs among people or categories of people.²³⁰ If so, does it bear a reasonable explanation for a legitimate purpose? If not, does it violate constitutional rights in a justifiable manner? However, it was found that a reasonable explanation of conduct could still amount to unfair discrimination.²³¹

Secondly, a two-staged analysis is required to determine whether the differentiation amounts to unfair discrimination.²³² Given that discrimination has been established, the question would be whether or not differentiation occurs on one or more grounds listed in section 9 of the *Constitution*.²³³ If not, the second question would be whether the differentiation contains characteristics that infringe

²²² Section 9(3) and (4) of the *Constitution*; Loenen 1997 *South African Journal on Human Rights* 404.

²²³ *NK v Minister of Safety & Security* 2005 6 SA 419 (CC).

²²⁴ *NK v Minister of Safety & Security* para 17.

²²⁵ *Syffrets* para 48.

²²⁶ Section 9(3) of the *Constitution* provides that no one may be unfairly discriminated against on the grounds of race, gender, marital status, and so forth.

²²⁷ 1998 1 SA 300 (CC).

²²⁸ 4 of 2000.

²²⁹ *Harksen v Lane* para 53.

²³⁰ *Harksen v Lane* para 53.

²³¹ *Harksen v Lane* para 53.

²³² *Harksen v Lane* para 53.

²³³ *Harksen v Lane* para 53.

on the affected person's human dignity.²³⁴ The second stage centres on differentiation that amounts to discrimination on an unspecified ground of unfairness, which must be proven.²³⁵ Thus, unfair discrimination is established with reference to how negatively the discrimination impacts the complainant.²³⁶

Lastly, should the discrimination be held to be unfair, it must then be determined whether it is justifiable against the limitations of rights as provided for in section 36 of the *Constitution*.²³⁷

A detailed application with reference to case law on the implications of the equality clause will be given in Chapter 4 of this study.

b) Section 36 (limitation of constitutional rights and freedoms)

Section 36 of the *Constitution* is a general limitation provision because it applies to the limitation of all rights in the Bill of Rights.²³⁸ It is important to note that section 36 cannot be used to limit the constitutional values listed in section 1 of the *Constitution*.²³⁹

The *Constitution* provides that rights can be limited but it must be justifiable in terms of section 36 of the *Constitution*.²⁴⁰ Section 36(1) provides the following:

The rights in the Bill of Rights may be limited only in terms of 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, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.²⁴¹

²³⁴ *Harksen v Lane* para 53.

²³⁵ *Harksen v Lane* para 53.

²³⁶ *Harksen v Lane* para 53.

²³⁷ Section 36 of the *Constitution*; *Harksen v Lane* para 53.

²³⁸ Section 36 of the *Constitution*.

²³⁹ Section 36 of the *Constitution*; *King* (CC) para 98. If a law infringes a right, and the infringement is justifiable, it may not be declared unconstitutional, as provided in Currie and De Waal *The Bill of Rights Handbook* 151. Also see Du Toit 2001 *Stellenbosch Law Review* 252.

²⁴⁰ Currie and De Waal *The Bill of Rights Handbook* 151; *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) para 20.

²⁴¹ Section 36(1) of the *Constitution*.

Though the Constitutional Court has not offered a comprehensive explanation of the “law of a general application”, it has established a definition that incorporates both common law and statutory law if the legislation is clear.²⁴² The law must be applied equally to all individuals: furthermore, the legislation must be clear even when common and statutory law are included in the law of general application.²⁴³

The application of section 36 of the *Constitution* will be further illustrated in the discussion of the cases in Chapters 3-5 of this study.

2.4 Conclusion

The first objective of this chapter was to determine how the development of freedom of testation has been influenced by natural law and common law.²⁴⁴ Historical developments in law create a foundation for understanding how the law was perceived then and how it is perceived now. Examining natural law elucidated the matter of freedom of testation: it centres on the testator’s free will to bequeath his or her assets as he or she may wish.²⁴⁵ Furthermore, the historical development of freedom of testation was found to be based on common law roots in South Africa’s law of succession through the Republic’s mixed legal system.²⁴⁶ Furthermore, natural law also influenced historical and recent developments relating to freedom of testation in terms of Locke’s theories and De Waal’s views on testamentary freedom.²⁴⁷ They both indicate how freedom of testation is influenced by social and economic factors. The testator may dispose of his or her property as he or she wishes, while this must occur in accordance with the law.²⁴⁸

The second objective centred on an assessment of the recognition of freedom of testation as a constitutional right. In the South African context, every law must

²⁴² Iles 2007 *SAJHR* 76.

²⁴³ Iles 2007 *SAJHR* 76.

²⁴⁴ See para 2.2 above.

²⁴⁵ See para 2.2.2 above.

²⁴⁶ See para 2.2 above; Humbly *et al Introduction to Law and Legal Skills* 97,125. Also see De Waal “Testamentary Formalities in South Africa” 382.

²⁴⁷ Johnson, Pete and Du Plessis *Jurisprudence a South African Perspective* 5; Locke *Two Treaties of Government* (1680) 106 -112,128; De Waal 1997 *Stellenbosch Law Review* 166; Du Toit 1999 *Stellenbosch Law Review* 233.

²⁴⁸ De Waal 1997 *Stellenbosch Law Review* 166; Jamneck and Rautenbach *The Law of Succession in South Africa* 128; King (CC) para 36; Wilkinson (CC) para 69.

dovetail with the *Constitution*.²⁴⁹ The recognition of freedom of testation is interpreted in the *Constitution* (section 25(1)) before any other legislation.²⁵⁰ It is important to note that freedom of testation is not provided for expressly in the *Constitution* but indirectly in section 25(1) by means of the property clause.²⁵¹ Sections 10 and 14 of the *Constitution* indirectly protect the testator's dignity and privacy during his or her lifetime and after death.²⁵²

The third objective centred on discussing the limitations of freedom of testation, whereby it is not absolute- limitations are provided for in common law, statutory law, and the *Constitution*.²⁵³ The testator does have testamentary freedom, but the common law limitations indicate that the bequests should not be unlawful, against public policy, and/or impracticably vague or impossible to enforce.²⁵⁴ The former kind of bequest will be regarded in the common law as *contra bonos mores*.²⁵⁵ Furthermore, statutory limitations such as section 13 of the *Trust Property Control Act* limit freedom of testation directly in cases where a trust has been formed. The provisions would impair the founder's aims, prejudice beneficiaries, and work against public policy.²⁵⁶

Although the *Constitution* indirectly protects freedom of testation in section 25(1), it also gives provision for situations where freedom of testation may be limited. The limitations are provided for in sections 9 and 36: section 9 deals with the equality clause and section 36 provides for how 5constitutional rights and freedoms may be limited.²⁵⁷

²⁴⁹ Section 2 of the *Constitution*.

²⁵⁰ Section 25 (1) of the *Constitution*; *King* (CC) para 65; Du Toit 2001 *Stellenbosch Law Review* 236.

²⁵¹ Van der Walt *Introduction to the law of property* 345; Rautenbach and Venter *Constitutional Law* 421; Muller *et al General Principles of South African Property Law* 5.

²⁵² *King* (CC) para 68; *Khumalo v Holomisa* para 27; Chaskalson 2000 *SAJHR* 196; Preamble and Chapter 2 of the *Constitution*.

²⁵³ See para 2.3 above.

²⁵⁴ Jamneck and Rautenbach *The Law of Succession in South Africa* 143; *Syfrets* para 9.

²⁵⁵ Jamneck and Rautenbach *The Law of Succession in South Africa* 153.

²⁵⁶ Section 13 of the *Trust Property Control Act* 57 of 1988; Matsemela 2015 *Journal of Law, Society and Development* 101.

²⁵⁷ See para 2.3.3.2 above.

The topic covered in Chapter 1 of this study will be clarified and addressed further in terms of case law as found in Chapters 3, 4, and 5. Chapter 3 will discuss the matter of freedom of testation in the public sphere in terms of the enactment of the *Constitution*.

3 Case law on the limitation of freedom of testation in the public sphere since the enactment of the *Constitution*

3.1 Introduction

Since the enactment of the *Constitution*, courts have not hesitated to limit freedom of testation in testamentary provisions within the public sphere, such as bequests made to charitable trusts.²⁵⁸ However, while this being said, the courts, until recently, have been hesitant to interfere with private bequests: that is, until the advent of Constitutional Court judgements in the *King (CC)* and *Wilkinson (CC)* cases.²⁵⁹

This chapter will focus on prominent post-constitutional cases in the public sphere that inform the matter of whether or not the courts outweighed constitutional rights over freedom of testation as well as the battle of trying to balance constitutional rights over freedom of testation, if possible.

The *Syfreys*, *Emma Smith*, and *BOE Trust (SCA)* cases which centred on whether testamentary trust instruments were public in nature will be discussed. The way in which freedom of testation was either limited by or had prevailed over constitutional rights in charitable trusts will be considered.

The objectives are as follows:

- To analyse how the *Syfreys* case, which was the first heard on the matter of freedom of testation after the enactment of the *Constitution*, challenged

²⁵⁸ *King (CC)* para 36; Du Toit 2012 *TECLF* 113; Bequests made within the public sphere often relate to charitable trusts that contain an element of public benefit.

²⁵⁹ Du Toit 2012 *TECLF* 113; The *King (CC)* and *Wilkinson (CC)* cases will be discussed in Chapters 4-5; *King (CC)* para 36.

the limitation of freedom of testation by indirect application of the Bill of Rights.

- To analyse how the court in *Emma Smith* case²⁶⁰ constitutionally limited freedom of testation.
- To analyse the court's reasoning for not limiting freedom of testation even though there were discriminatory provisions in the testatrix's bequest in *BOE Trust* (SCA).²⁶¹

3.2 Minister of Education v Syfrets Trust

The *Syfrets* case challenged the long-held concept of freedom of testation by applying the freedoms, rights, and values guaranteed in the Bill of Rights.²⁶²

The judgment was based on the effect of section 13 of the *Trust Property Control Act*, which provides that the court has jurisdiction relating to altering or deleting a trust provision.²⁶³

3.2.1 Facts of the case

The testator, Mr Scarbrow, executed a will in 1920 in terms of which the residue of his estate should be held in a charitable testamentary trust if his wife predeceased him and his sons had not produced any offspring.²⁶⁴ The trust's objective was to provide bursaries to white, non-Jewish male students who qualified to study overseas.²⁶⁵ In 2002, a notice was published in the newspapers encouraging prospective students of the University of Cape Town, who fit the category to apply for the bursary fund.²⁶⁶ The trust's objective caught the attention of the Minister of Education, who brought an application to the High Court to remove the discriminatory in the will around rewarding the bursaries.²⁶⁷

²⁶⁰ 2010 6 SA 518 (SCA).

²⁶¹ 2013 3 SA 236 (SCA).

²⁶² Matsemela 2015 *Journal of Law, Society and Development* 102; *Syfrets* para 16.

²⁶³ Matsemela 2015 *Journal of Law, Society and Development* 106; Section 13 of the *Trust Property Control Act*. Also see para 3.2.1 below.

²⁶⁴ *Syfrets* para 3; Jamneck and Rautenbach *The Law of Succession in South Africa* 129.

²⁶⁵ The Bursary fund was established in 1965. *Syfrets* para 3-5.

²⁶⁶ *Syfrets* para 6.

²⁶⁷ Jamneck and Rautenbach *The Law of Succession in South Africa* 129; *Syfrets* para 6.

The applicants argued that the court had jurisdiction to alter the testamentary conditions, based on the following considerations:

a) Section 13 of the *Trust Property Control Act* provides the court with jurisdiction to amend and vary a trust provision(s).²⁶⁸ The amendment becomes possible when the consequences of a trust provision were not contemplated by the founder or were not foreseeable in terms of impacting the objectives that the trust wants to achieve, where the beneficiaries' interests are compromised, or when the provisions are in conflict with the public interest.²⁶⁹

b) The common law provides that bequests that are vague and unlawful or contrary to public policy are invalid.²⁷⁰

c) The Bill of Rights should be directly applied with reference to the right to equality, and unfair discrimination should not occur, as provided for in section 9 of the *Constitution*.²⁷¹

3.2.2 Legal question

The legal question in the *Syfrets* case was how the central principle of freedom of testation contributes to the right to be free from discrimination in relation to section 9 of the *Constitution* in the public sphere.²⁷²

3.2.3 Court's decision on mentioned legal question

The court held that the testator provided unfair discriminatory provisions based on race, gender, and religion, contrary to public policy.²⁷³ Unfair discriminatory provisions could accordingly be regarded as *pro non scripto*, thus limiting the

²⁶⁸ See para 2.3.2 above.

²⁶⁹ *Syfrets* para 9; Wood-Bodley 2007 *The South African Law Journal* 688; Matsemela 2015 *Journal of Law, Society and Development* 102; Section 13 *Trust Property Control Act*.

²⁷⁰ *Syfrets* para 9; Wood-Bodley 2007 *The South African Law Journal* 688; Matsemela 2015 *Journal of Law, Society and Development* 93,102; Section 13 *Trust Property Control Act*; Jamneck and Rautenbach *The Law of Succession in South Africa* 143.

²⁷¹ See para 2.3 above; *Syfrets* para 9.

²⁷² *Syfrets* para 9; Wood-Bodley 2007 *The South African Law Journal* 688; Section 9 of the *Constitution* focuses on the equality clause in which race, gender, and religion are part of the grounds listed; *Syfrets* para 15.

²⁷³ *Syfrets* para 47; Wood-Bodley 2007 *The South African Law Journal* 688.

testator's freedom of testation.²⁷⁴ Before analysing the court's decision, it is important to evaluate the constitutional rights involved in order to comprehend the ruling.

3.2.3.1 Values versus rights

The differences between values and rights elucidate the court's decisions. That which constitutional values and rights differences has been indicated here.²⁷⁵ Public policy is deeply rooted in the *Constitution* with the enrichment of fundamental values established as a normative value system.²⁷⁶ In the *Syfrets* case, the court used public policy as a foundation from which to navigate the constitutional values of human dignity, equality, freedom, non-racialism, and non-sexism.²⁷⁷ When a core value and a right are in question, such as the value of equality and the right to equality, the courts are required to weigh up the constitutional values (that is, again, human dignity, freedom, non-racialism, and non-sexism) and public policy.²⁷⁸ The approach that is followed is proposed in *Holomisa v Argus Newspapers Ltd.*²⁷⁹

The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.

Equality and human dignity form part of the Bill of Rights and are also part of the core constitutional values.²⁸⁰

3.2.3.2 Direct/indirect application

There are two different ways the Bill of Rights could be applied: indirectly and directly.²⁸¹

²⁷⁴ *Syfrets* para 47; Wood-Bodley 2007 *The South African Law Journal* 688.

²⁷⁵ See para 2.3.above.

²⁷⁶ *Syfrets* para 24; *Barkhuizen v Napier* para 28.

²⁷⁷ *Syfrets* para 24; Section 1(a) and (b) of the *Constitution*; *Barkhuizen v Napier* para 11.

²⁷⁸ *Syfrets* para 39.

²⁷⁹ 1996 2 SA 588 (W).

²⁸⁰ *Syfrets* para 32.

²⁸¹ Currie and De Waal *The Bill of Rights Handbook* 31.

The difference between rights and values how the Bill of Rights is applied directly/ indirectly, as well as how courts interpret such an application, as in the *Syffrets* case.²⁸²

The establishment of the *Constitution* provides that the Bill of Rights must be respected in all stages of common law interpretation, application and development.²⁸³ The application of the Bill of Rights is provided for in section 8 of the *Constitution*.²⁸⁴

To consider whether the application of the Bill of Rights applies directly or indirectly, the Bill of Rights must create benefits and duties between the respondent and the applicant.²⁸⁵ Indirect application is informed by a normative system of values, which form a set of values that should be adhered to by all types of legislation or when common law or legislation is interpreted, applied, or developed.²⁸⁶ Furthermore, section 39(2) of the *Constitution* provides the following:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.²⁸⁷

When the court applies legislation indirectly, it firstly uses “reading down” to examine whether the challenged law is “reasonably feasible” in terms of an interpretation that does not limit the right.²⁸⁸ Therefore, when the Bill of Rights is applied indirectly, it does not create its own remedies or override the law.²⁸⁹

²⁸² See paras 2.3.3.1 and 2.3.3.2 above.

²⁸³ Bhana 2013 *SAJHR* 355.

²⁸⁴ Section 8 of the *Constitution*.

²⁸⁵ University of Cape Town on *Chapter Seven: Introduction to the Bill of Rights* 205.

²⁸⁶ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) (hereafter *Carmichele v Minister of Safety and Security* (CC)) paras 54-55.

²⁸⁷ Section 39(2) of the *Constitution*, *Carmichele v Minister of Safety and Security* (CC) paras 54 – 56.

²⁸⁸ University of Cape Town on *Chapter Seven: Introduction to the Bill of Rights* 206; Currie and De Waal *The Bill of Rights Handbook* 57-59.

²⁸⁹ *Barkhuizen v Napier* para 35; Currie and De Waal *The Bill of Rights Handbook* 31; Chirwa 2006 *Law, Democracy & Development* 31.

However, it adheres to the norms and remedies of ordinary law, guaranteeing that the relevant values are mediated by ordinary laws.²⁹⁰

When a natural or legal person who should not have been subjected to an infringement or made to comply with the Bill of Rights has breached the beneficiary's right, direct application of the Bill of Rights is carried out.²⁹¹ Unlike indirect application, direct application overrides ordinary law and any law that is inconsistent with it.²⁹² Furthermore, it generates its own remedies if the legal remedies are inadequate with regards to giving effect to fundamental rights.²⁹³

In the *Syfreets* case, section 9 of the *Constitution* was highlighted, which provided the right to direct application of equality and non-discrimination.²⁹⁴ It is important to break down the components of the way in which Judge Griesel concluded that the condition of awarding bursaries to white, non-Jewish male students resulted in unfair discrimination.²⁹⁵

Race, gender and religion have been (and still are) sensitive issues in South Africa.²⁹⁶ Race remains a driving force of unfair discrimination.²⁹⁷ Hence the Preamble of the *Constitution* refers to "we the people of South Africa", and not a particular race, which indicates the equality of all individuals.²⁹⁸ The testamentary provisions provided bursaries to white, non-Jewish males only, and section 9 of the *Constitution* protects equality as a fundamental right.²⁹⁹

²⁹⁰ Section 39(2) of the *Constitution* places a general duty on courts to promote the spirit, purport, and objects of the Bill of Rights. *Barkhuizen v Napier* para 35; Currie and De Waal *The Bill of Rights Handbook* 57.

²⁹¹ Currie and De Waal *The Bill of Rights Handbook* 31.

²⁹² Currie and De Waal *The Bill of Rights Handbook* 31; Chirwa 2006 *Law, Democracy & Development* 39.

²⁹³ Currie and De Waal *The Bill of Rights Handbook* 31.

²⁹⁴ *Syfreets* para 9.

²⁹⁵ *Syfreets* paras 3-5.

²⁹⁶ MacDonald *Why Race Matters in South Africa* 2, 6-7.

²⁹⁷ MacDonald *Why Race Matters in South Africa* 2, 6-7 shows that, in pre-apartheid era, the white supremacist state granted whites citizenship while identifying blacks as non-citizens. Apartheid was the epitome of racism in South Africa, where the whites were dominating other racial groups and were provided with better opportunities, houses, education, and so on; Currie and De Waal *The Bill of Rights Handbook* 227; Du Toit 2017 *Manitoba Law Journal* 146.

²⁹⁸ Preamble of the *Constitution*.

²⁹⁹ Section 9 of the *Constitution*; *Syfreets* para 33-34; Du Toit 2012 *TECLF* 117.

According to the *International Convention on the Elimination of All Forms of Racial Discrimination*, racial discrimination is regarded to be unfair.³⁰⁰ Due to South Africa's experience with inequality, the necessary positive measures have been put in place to remove it.³⁰¹ Judge Griesel applied the test in *Harksen v Lane* to determine whether differentiation amounted to unfair discrimination.³⁰² He found that there was discrimination as based on race, which is listed as one of the grounds in section 9(3) of the *Constitution*.³⁰³ Judge Griesel acknowledged the painful past of the Republic in terms of racism.³⁰⁴

In the *Syfreets* case, she directed her judgment by means of the application of the common law and not by directly applying the *Constitution* therefore, the judgment reached a conclusion on the basis of section 13 of the *Trust Property Control Act*.³⁰⁵ The applicant raised the matter of racial discrimination clauses which stipulated that only European descendants of a non-Jewish faith were eligible for the bursaries.³⁰⁶ The court concluded that the provisions in the awarding of bursaries indirectly discriminated against race and directly discriminated against religion.³⁰⁷

The court indicated that the majority of people, who consisted of blacks, women, and Jews, were among the "complainants" who, according to the law, were victims of discrimination because they "have been historically experienced patterns of disadvantaged".³⁰⁸ Furthermore, the trust's main purpose was to award bursaries to students who had "limited to no finances" to pursue a tertiary education.³⁰⁹

³⁰⁰ Currie and De Waal *The Bill of Rights Handbook* 227, state that the *Constitution* is the most powerful measure that has been put in place to lay a foundation of law.

³⁰¹ Currie and De Waal *The Bill of Rights Handbook* 227.

³⁰² *Syfreets* para 33; Du Toit 2017 *Manitoba Law Journal* 146-147; Wood-Bodley 2007 *The South African Law Journal* 693; See Chapter 2.3.3.1.

³⁰³ *Syfreets* para 33-34; Du Toit 2017 *Manitoba Law Journal* 146-147; Wood-Bodley 2007 *The South African Law Journal* 693.

³⁰⁴ *Syfreets* para 33-34; Du Toit 2017 *Manitoba Law Journal* 146-147; Wood-Bodley 2007 *The South African Law Journal* 693.

³⁰⁵ Matsemela 2015 *Journal of Law, Society and Development* 102-104; *Syfreets* para 32.

³⁰⁶ *Syfreets* para 8-9; Wood-Bodley 2007 *The South African Law Journal* 688,693; Roux 2013 *De Rebus* 49.

³⁰⁷ *Syfreets* para 34; Wood-Bodley 2007 *The South African Law Journal* 692; Matsemela 2015 *Journal of Law, Society and Development* 103-104.

³⁰⁸ *Syfreets* para 35.

³⁰⁹ *Syfreets* para 35.

However, the trust's provisions prohibited at least half of the potential candidates from applying based on their race, religion, or gender.³¹⁰

The trust was not set to promote one religious group over the other, but directly targeted a religious group.³¹¹ The court decided not to directly apply section 9 of the *Constitution* to the provisions of religion and gender, but indicated that the provisions set out amounted to unfair discrimination, which is against public policy.³¹²

As mentioned in Chapter 2 of this study, common law limits the principle of freedom of testation in respect of any testamentary provisions that are illegal, immoral, or against public policy, so that these will be regarded to be *contra bonos mores*.³¹³

Public policy develops over time, especially in South Africa with regard to the pre-constitutional and post-constitutional eras.³¹⁴ Such change is influenced by social and basic freedom developments such as the rights expressed in the Bill of Rights.³¹⁵ Therefore, it is not a static concept.³¹⁶ Due to the enactment of the *Constitution*, public policy is not only a common law limitation but is embodied in the *Constitution* itself.³¹⁷

Affecting provisions against public policy within a trust allows a court to have statutory powers in revoking or terminating such a provision by applying section 13 of the *Trust Property Control Act*.³¹⁸ South African courts may not give effect to provisions that are against public policy; thus section 13 of the *Trust Property Control Act* is applicable in this regard.³¹⁹

³¹⁰ *Syfrets* para 35.

³¹¹ *Syfrets* para 35.

³¹² *Syfrets* paras 33, 35; Roux 2013 *De Rebus* 49.

³¹³ See para 2.3.1 above; *Syfrets* para 9,24; Du Toit 2012 *TECLF* 110.

³¹⁴ Jamneck and Rautenbach *The Law of Succession in South Africa* 117; *Syfrets* para 24; Roux 2013 *De Rebus* 49.

³¹⁵ *Syfrets* para 24.

³¹⁶ *Syfrets* para 24.

³¹⁷ *Syfrets* para 24.

³¹⁸ Section 13 *Trust Property Control Act* 57 of 1988; Olivier, Van den Berg and Strydom *Trust Law and Practice* para B19.1.

³¹⁹ Olivier, Van den Berg, and Strydom *Trust Law and Practice* para B19.1.

The court emphasised that public policy and its effects on the community are simultaneous: that which was not considered go against public policy changes over time and the law should adapt to these.³²⁰ Furthermore, the application of section 13 of the *Trust Property Control Act* provides the court with statutory powers to alter trust provisions that were not foreseeable by the testator by the time at which the provisions were executed.³²¹

Therefore, the discriminatory provisions set out in the trust resulted in unfair discrimination, hence going against public policy, thus allowing the court, in terms of section 13 of the *Trust Property Control Act* and common law, to remove the provisions.³²² The High Court in the *Syfrets* case did not deal with the application through direct application of the *Constitution* with reference to constitutional rights and values, but rather in terms of common law with regard to testamentary provisions in relation to trusts.³²³

3.3 Emma Smith Educational Fund v University of KwaZulu-Natal

Following *Syfrets*, *Emma Smith* was a second prominent case in the public sphere that centred on the limitation of freedom of testation through charitable trusts.³²⁴ The SCA directly applied the Bill of Rights resulting in a constitutional limitation on the freedom of testation.³²⁵

³²⁰ *Syfrets* paras 19, 35.

³²¹ Olivier, Van den Berg and Strydom *Trust Law and Practice* para B19.1; Matsemela 2015 *Journal of Law, Society and Development* 101-102; *Syfrets* para 9.

³²² Matsemela 2015 *Journal of Law, Society and Development* 104; Jamneck and Rautenbach *The Law of Succession in South Africa* 130; *Syfrets* para 48.

³²³ *Syfrets* para 32; Farlam J indicated in *Rylands v Edros* 1997 1 BCLR 77 (C) that the judgment in *Ismail v Ismail* 1983 1 SA 1006 (A) determined that marriages that were concluded under the Muslim faith were contrary to public policy and thus invalid. However, according to the judge, the marriages had to be reconciled with constitutional values such as equality and tolerance. He based his decision on substantive constitutional policies. However, this judgment was recently overruled by the Constitutional Court. Du Toit 2001 *Stellenbosch Law Review* 233.

³²⁴ *Emma Smith*; Du Toit 2017 *Manitoba Law Journal* 147; Matsemela 2015 *Journal of Law, Society and Development* 102-114.

³²⁵ Du Toit 2017 *Manitoba Law Journal* 147; Matsemela 2015 *Journal of Law, Society and Development* 102-114.

3.3.1 Facts of the case

Mr Smith executed a will in 1938, and established a testamentary trust in honour of his mother, Emma Smith.³²⁶ The purpose of the fund was to offer bursaries to "European" girls who were born to "British" or "Dutch South African parents" and who had lived in Durban for at least three years prior to applying.³²⁷ The recipients of the bursaries who were pursuing studies in any field of art were chosen by the Council of the Natal University College.³²⁸

The University of KwaZulu-Natal brought an application to the Durban High Court in 1999 to seek an order to vary the trust provision (in terms of section 13 of the *Trust Property Control Act*), as it included discriminatory provisions that excluded certain groups of people.³²⁹ The applicant sought a relief that would entail that the words "European" and "Dutch and British South African" must be deleted in terms of section 13 of the *Trust Property Act* and that the Durban Council should replace the phrase "Durban municipality".³³⁰

3.3.2 Legal question

The question before the court was (again with reference to section 13 of the *Trust Property Control Act*) whether the phrases "European", "Dutch", and "British South African" were discriminatory in nature and whether or not they should be removed.³³¹

3.3.3 Court's decision on the mentioned questions/ issues

The applicants based their arguments on the *Syfrets* case.³³² The basis was that discriminatory provisions went against public policy and that the testator could not

³²⁶ *Emma Smith* paras 4 and 6.

³²⁷ *Emma Smith* para 8; De Waal *Annual Survey of SA Law* 1194.

³²⁸ *Emma Smith* paras 7-9; De Waal *Annual Survey of SA Law* 1194.

³²⁹ *Emma Smith* paras 2, 16; De Waal *Annual Survey of SA Law* 1194.

³³⁰ *Emma Smith* para 21; De Waal *Annual Survey of SA Law* 1194-1195.

³³¹ *Emma Smith* para 21.

³³² *Emma Smith* paras 34, 38.

foresee these consequences as provided for in section 13 of the *Trust Property Act*.³³³

The university was further concerned that, if the fund retained racially exclusive conditions, it could be taken to the Equality Court for administering funds that were exclusive to white people.³³⁴

The court held that the discriminatory provisions against race should be deleted as provided in section 13 of the *Trust Property Act*.³³⁵ However, discriminatory provisions against gender were allowed, as the fund was used to benefit South African women.³³⁶ The SCA emphasised the importance of the protection of equality in the *Constitution* as well as the extension of section 9(4) of the *Constitution* to the *Equality Act*.³³⁷ Furthermore, the SCA indicated that freedom of testation was not absolute and testators should not infringe constitutional rights.³³⁸ Therefore, courts have the right to interfere where testators have compromised their freedom of testation so as to remove unfair discriminatory conditions.³³⁹

3.4 BOE Trust Ltd 2013 3 SA 236

Freedom of testation was upheld in the *BOE Trust* (SCA) case, where the removal of the term “white” from the testamentary provision was dismissed by the court, because the deceased set out certain alternative provisions, unlike in the *Syffrets* case.³⁴⁰

3.4.1 Facts of the case

Mrs De Villiers (the testatrix) executed a will in 2002 in which she bequeathed part of her estate to her siblings, nieces, nephews, and godchild, and the residue to a

³³³ *Emma Smith* paras 38,40; De Waal *Annual Survey of SA Law* 1195.

³³⁴ *Emma Smith* para 14, De Waal *Annual Survey of SA Law* 1194.

³³⁵ *Emma Smith* paras 40-41; Section 13 of the *Trust Property Act*.

³³⁶ *Emma Smith* paras 40-41.

³³⁷ *Emma Smith* para 35; Matsemela 2015 *Journal of Law, Society and Development* 113.

³³⁸ *Emma Smith* paras 37-38; Matsemela 2015 *Journal of Law, Society and Development* 114.

³³⁹ Matsemela 2015 *Journal of Law, Society and Development* 114.

³⁴⁰ *BOE Trust* (SCA) paras 2-4.

trust.³⁴¹ Small bursaries from the "Jean Pierre De Villiers Trust" were given to white South Africans who had obtained MSc degrees and wanted to pursue PhDs overseas.³⁴² However, the recipients had to return to the country to apply their knowledge to improve the economy.³⁴³

The testatrix was advised that the primary objective of the trust, which included the words "white" South Africans, would be discriminatory.³⁴⁴ However, the testatrix retained the wording of the testamentary conditions.³⁴⁵ She held that, should the trustees had difficulty in carrying out the trust's primary objective, the income generated to the trust would then be donated to a number of charitable organisations.³⁴⁶

The trustees approached the University of Free State, the University of Pretoria, the University of Cape Town, and the University of Stellenbosch to administer the trust.³⁴⁷ The universities, however, refused to accept the bursaries indicating that they included a discriminatory provision and that they should be inclusive of all races.³⁴⁸ The universities indicated that if the word "white" were to be removed from the bursary provisions, they would accept them and offer them to students who held such a degree.³⁴⁹

3.4.2 Legal question

The question before the court was whether "white" should be removed from the testamentary provision set out for the bursaries and that, in the case of the impossibility of this, whether the funds would be distributed to charities.³⁵⁰

³⁴¹ *BOE Trust* (SCA) para 2-3.

³⁴² *BOE Trust* (SCA) para 3; Matsemela 2015 *Journal of Law, Society and Development* 106.

³⁴³ *BOE Trust* (SCA) para 3; Matsemela 2015 *Journal of Law, Society and Development* 106.

³⁴⁴ *BOE Trust* (SCA) para 4, 47.

³⁴⁵ *BOE Trust* (SCA) paras 4, 47.

³⁴⁶ *BOE Trust* (SCA) para 4; Modiri 2013 *PER* 584.

³⁴⁷ Matsemela 2015 *Journal of Law, Society and Development* 106; Modiri 2013 *PER* 584-586.

³⁴⁸ Matsemela 2015 *Journal of Law, Society and Development* 106; *BOE Trust* (SCA) para 7.

³⁴⁹ *BOE Trust* (SCA) para 8-9; Matsemela 2015 *Journal of Law, Society and Development* 106.

³⁵⁰ Matsemela 2015 *Journal of Law, Society and Development* 108; *BOE Trust* (SCA) para 11.

3.4.3 Court's decision on the mentioned questions/ issues

The applicants argued that the term "white" should be removed from the provisions as it was discriminatory to students of different races.³⁵¹ The trustees indicated that the provision infringed on section 9 of the *Constitution* (the right to equality) as well as the enrichment set in section 7 of the *Equality Act*.³⁵²

The *BOE Trust (SCA)* case highlights the dispute between freedom of testation and public policy.³⁵³ Judge Mitchell in the court *a quo* (*BOE Trust case Ltd 2009 6 SA 470 (WCC)*), dismissed an application to the contrary and found that the term "white" should be deleted for the purpose of identifying candidates who would benefit from the trust.³⁵⁴ Judge Mitchell provided that freedom of testation was a fundamental part of section 25(1) of the *Constitution* and that it should be adhered to, as it provided for directions on the disposal of the testator's assets.³⁵⁵ In *BOE Trust (SCA)*, the SCA acknowledged the High Court's decision and reasons in these terms by indicating that the principle of freedom of testation is protected by section 25 of the *Constitution*. It was established that this was important in South African law, and that there was therefore an obligation to give effect to the testator's intentions.³⁵⁶

As previously mentioned (in paragraph 2.2.3 above), freedom of testation gives effect to human dignity as a constitutional right.³⁵⁷ The right to human dignity that is associated with freedom of testation would "allow" the testator to rest easy knowing that his or her final intentions would be carried out.³⁵⁸ However, the

³⁵¹ *BOE Trust (SCA)* para 11.

³⁵² *BOE Trust (SCA)* para 11; Matsemela 2015 *Journal of Law, Society and Development* 106-107.

³⁵³ *BOE Trust (SCA)* para 1.

³⁵⁴ *BOE Trust (SCA)* para 1; *BOE Trust (WCC)*.

³⁵⁵ *BOE Trust (SCA)* para 15; Section 25(1) of the *Constitution*. See para 2.2.3 above where the recognition of freedom of testation as a constitutional right is discussed.

³⁵⁶ Matsemela 2015 *Journal of Law, Society and Development* 107; *BOE Trust (SCA)* paras 14, 26; See para 2.2.3 above.

³⁵⁷ Sections 1(a), 10 and 25(1) of the *Constitution*; see para 2.3.3 above on the difference between constitutional rights and values and how a value can also be a right, for instance in the cases of human dignity and equality for example.

³⁵⁸ *BOE Trust (SCA)* para 27; Pace and Van der Westhuizen *Wills and Trusts* para A2. Also see para 2.2.3.2 on how freedom of testation is recognised in terms of the right of human dignity.

applicants argued that freedom of testation, in this case, was contrary to public policy and an infringement of section 9(1) of the *Constitution*.³⁵⁹

In relation to the notion that the term "white" is contrary to public policy, the application was dismissed in the court *a quo*.³⁶⁰ Although Judge Mitchell emphasised the importance and protection of freedom of testation in the *Constitution*, it was pointed out that the provision set out in the trust amounted to unfair discrimination when viewed within the bounds of the *Constitution*.³⁶¹ However, the discriminatory term used by the testatrix could be justified.³⁶² The SCA did not hand out judgment based on the value of equality but on equality as a right by indicating that the testatrix had sufficient reason to justify the discrimination, as she indicated that, if the bequest was impossible to carry out, funds would be awarded to charity organisations.³⁶³

An analysis of the court's reasons must be presented to understand whether the SCA used direct or indirect application of the Bill of Rights in its judgment. It seems as if the SCA applied the Bill of Rights indirectly.³⁶⁴ The SCA emphasised that freedom of testation is not absolute and that a balance must be struck between the principle and its limitations.³⁶⁵ The indirect application of the Bill of Rights towards the testatrix's wishes was based on the reasons briefly set out below.

³⁵⁹ Furthermore, the applicants provided in *BOE Trust (SCA)* para 11 that freedom of testation by inserting the term "white" was also contrary to section 7 of the *Promotion of Equality and Prevention of Discrimination Act*; principles provided in sections 3 and 4 of the *National Education Policy Act 4 of 2000*.

³⁶⁰ *BOE Trust (SCA)* para 14.

³⁶¹ *BOE Trust (SCA)* para 14.

³⁶² *BOE Trust (SCA)* para 14.

³⁶³ It is important to note that a constitutional value may not be limited. However, a constitutional right may be limited in terms of section 36, as indicated in paragraph 2.3 above. Also see *BOE Trust (SCA)* paras 14-16.

³⁶⁴ It's important to note this indirect application of the Bill of Rights, because it means that the Bill of Rights will not override ordinary law or create remedies, as indicated in para 3.2.3.2 above.

³⁶⁵ *BOE Trust (SCA)* para 28, in which the SCA indicated that there should be a balance between freedom of testation and its limitations by applying the golden rule of interpretation. The golden rule expresses the understanding of how the testator wanted his wishes to be fulfilled in terms of the language he used. The court must give effect to the testator's wishes unless they are contrary to the rule of law.

Firstly, the jurisdictional element that a court may alter provisions imposed in section 13 of the *Trust Property Control Act* was absent, because the testatrix did foresee the potential of the impossibility of giving effect to the provision with a view to an alternative measure where the funds could be allocated to charities.³⁶⁶ Therefore, the applicants failed to prove that the testatrix could not foresee any circumstances that would render the primary objective of the trust impossible.³⁶⁷

Furthermore, the discriminatory provision relating to section 9(3) of the *Constitution* was considered to be fair and not contrary to public policy.³⁶⁸ The discrimination was seen as benefiting the economy, since it would enhance the skills required in South Africa.³⁶⁹

Secondly, the SCA referred to the *Emma Smith* case.³⁷⁰ In that case, the court determined that the Bill of Rights was applicable to all law and that only the racially discriminative testamentary provision should be deleted, and not the entire testamentary provision, as freedom of testation should be adhered to.³⁷¹ In the *Emma Smith* case, there was no alternative provision made - it had to be awarded to a particular group and this was discriminative in nature.³⁷² Hence the court provided a direct application of the Bill of Rights around having the discriminative provision removed.³⁷³

Therefore, the difference between the *Syfreets* case and *BOE Trust* (SCA) was that the discrimination in the *BOE Trust* (SCA) case was considered fair because it was used for a legitimate purpose.³⁷⁴ In the *Syfreets* case, freedom of testation was not

³⁶⁶ *BOE Trust* (SCA) para 30-31; Matsemela 2015 *Journal of Law, Society and Development* 107; Abduroaf 2020 *Without Prejudice* 26.

³⁶⁷ *BOE Trust* (SCA) para 31; Abduroaf 2020 *Without Prejudice* 26.

³⁶⁸ Matsemela 2015 *Journal of Law, Society and Development* 107.

³⁶⁹ Matsemela 2015 *Journal of Law, Society and Development* 107.

³⁷⁰ *Emma Smith*; Matsemela 2015 *Journal of Law, Society and Development* 102-114; *BOE Trust* (SCA) paras 13, 16-17.

³⁷¹ *Emma Smith* paras 35-38, 48; *BOE Trust* (SCA) para 22.

³⁷² The discriminative testamentary provision in the trust in *Emma Smith* was that bursaries would be awarded to "European" girls born from "Dutch or British South African" parents who wanted to complete their studies in art. The court provided for the racial discrimination to be deleted but kept the gender discrimination, in order to give effect to the testamentary provision. *Emma Smith* paras 4, 8, 12; *BOE Trust* (SCA) paras 22-24.

³⁷³ *Emma Smith* paras 4, 8, 12; *BOE Trust* (SCA) paras 22-24.

³⁷⁴ Abduroaf 2020 *Without Prejudice* 26.

upheld, because of the provisions contravened common law and the Bill of Rights.³⁷⁵ As mentioned, South African courts have statutory powers to alter testamentary provisions that are set out in trusts in terms of section 13 of the *Trust Property Control Act*.³⁷⁶ If the testatrix in the *BOE Trust* (SCA) did not have an alternative plan for distributing the trust funds to charities, the discriminatory provision would have been declared unfair.³⁷⁷ Section 13 of the *Trust Property Control Act* would have been applied towards altering the testamentary provision, as was done in the *Syfreets* case.³⁷⁸

3.5 Conclusion

The first objective set for this chapter was to analyse how the *Syfreets* case challenged the limitation of freedom of testation by indirect application of the Bill of Rights.³⁷⁹ Freedom of testation was limited in that case through the application of the common law and not the direct application of the *Constitution*.³⁸⁰ Therefore, the discriminatory clause was removed in terms of section 13 of the *Trust Property Control Act* as it was contrary to public policy.³⁸¹ However, the SCA held that the discriminatory provision against “gender” was upheld, while the discriminatory provision against “race” was to be deleted in terms of section 13 of the *Trust Property Control Act*.³⁸²

The second objective was to analyse the way in which freedom of testation was constitutionally limited in the *Emma Smith* case.³⁸³ The applicants based their arguments on the *Syfreets* case on the way in which the discriminatory provisions set out in the testamentary bequest went against public policy and therefore had

³⁷⁵ See para 3.2 above.

³⁷⁶ Matsemela 2015 *Journal of Law, Society and Development* 107; Pace and Van der Westhuizen *Wills and Trusts* para A2.

³⁷⁷ Matsemela 2015 *Journal of Law, Society and Development* 107; Pace and Van der Westhuizen *Wills and Trusts* para A2.

³⁷⁸ See para 3.2.3 above.

³⁷⁹ See para 3.2 above.

³⁸⁰ See para 3.2.3 above.

³⁸¹ See para 3.2.3 above.

³⁸² See para 3.3.3 above.

³⁸³ See para 3.3 above.

to be deleted in terms of section 13 of the *Trust Property Act*.³⁸⁴ In the *Emma Smith* case, the court constitutionally limited freedom of testation.

The third objective was to analyse the reasoning of not limiting freedom of testation in the *BOE Trust* (SCA). Here the outcome was significantly different from the other two cases. In the *BOE Trust* (SCA) case, as demonstrated, the court upheld freedom of testation over the discriminatory criteria used by the testatrix.³⁸⁵ The SCA justified the discriminatory provision in an *obiter dictum* because it benefitted the economy.³⁸⁶ A limitation was not enforced, because the testatrix made provisions for an alternative- that the funds could be allocated to charitable organisations, once more.³⁸⁷

Chapter 4 of this study will focus on case law where courts were hesitant to limit freedom of testation in the private sphere with reference to *King* (WCC), *Harper* (WCC), and *Harvey* (SCA).

³⁸⁴ See para 3.3.3 above.

³⁸⁵ See para 3.4.3 above.

³⁸⁶ See para 3.4.3 above.

³⁸⁷ See para 3.4.3 above.

4 Case law and courts' hesitancy to limit freedom of testation in respect of testamentary provisions of a private nature

4.1 Introduction

Recently, testamentary clauses that violate public policy have been constitutionally challenged in the private sector.³⁸⁸ Before the Constitutional Court judgments in the *King (CC)* and *Wilkinson (CC)* cases can be discussed, it is essential to examine the judgments of the respective court *a quos* namely: (a) *King v De Jager* 2017 6 SA 527 (WCC) (hereafter *King (WCC)*); (b) *Harper v Crawford* 2017 4 SA 30 (WCC) (hereafter *Harper (WCC)*); and (c) *Harvey v Crawford* 2019 2 SA 153 (SCA) (*Harvey (SCA)*).

The focus of Chapter 4 is on testamentary provisions in the private sector and how the courts reached their conclusions in terms of evaluating the freedom of testation against the equality clause.

The objectives here are as follows:

- To analyse why the court *a quo* justified the discrimination in clause 7 of the will in favour of freedom of testation in *King (WCC)*.
- To analyse why, in *Harper (WCC)* the discrimination was justified in terms of section 9 of the *Constitution*.
- To analyse why, in the *Harvey (SCA)* case, the SCA upheld the judgement by the court *a quo*.

4.2 King (WCC)

4.2.1 Facts of the case

A joint will was executed in 1902 by Mr Karel Johannes Cornelius De Jager and Mrs Catherine Dorothea De Jager who were married in community of property.³⁸⁹ A testamentary provision in the joint will stipulated that the inheritance of the

³⁸⁸ See chapter 3 above.

³⁸⁹ *King (WCC)* para 7.

farms bequeathed to their children was subject to the condition that certain farms would only be passed down to their children's male descendants for three generations.³⁹⁰

The condition formulated in clause 7 of the will was valid until 2015, when the matter appeared before the High Court.³⁹¹ The testator had three heirs, where the eldest (Corrie de Jager) died childless and his one-third share devolved to the surviving brothers in equal shares.³⁹² In 2005, one of the heirs, John de Jager, died, and his shares in the properties were passed down to his three sons as the clause stipulated.³⁹³ However, in 2015, Kalvyn de Jager died, leaving only four daughters and no sons.³⁹⁴ His daughters could not inherit because of the provisions set out in clause 7 of the 1902 will.³⁹⁵

4.2.2 Legal questions

The question before the court was whether the provision set out in clause 7, which excluded the applicants from inheriting anything, as indicated, could be viewed to be *contra bonos mores*.³⁹⁶ Furthermore, it had to be ascertained whether the court would be able to amend the testamentary provision in question by removing the discriminatory provision.³⁹⁷

4.2.3 The court's decision on the mentioned questions/ issues

The court held that clause 7 was discriminatory with regard to the equality clause (section 9 of the *Constitution*), but could be justified in terms of the provisions set out in section 36 of the *Constitution* as well as the fact that section 8(c) of the

³⁹⁰ *King* (WCC) paras 3-4.

³⁹¹ *King* (WCC).

³⁹² *King* (WCC) para 7

³⁹³ *King* (WCC) paras 7-8.

³⁹⁴ *King* (WCC) paras 7-8.

³⁹⁵ *King* (WCC).

³⁹⁶ *King* (WCC) para 27.

³⁹⁷ *King* (WCC) para 27.

Equality Act did not apply to private wills.³⁹⁸ The court based its judgment on the weight of constitutional values against constitutional rights and freedoms.³⁹⁹

4.2.3.1 The court's reasoning on the limitation of constitutional values

According to Section 36 of the *Constitution's* guiding principles, constitutional values cannot be limited, while constitutional rights and freedoms may be limited,⁴⁰⁰ as indicated in the analysis of differences between constitutional values and rights in paragraphs 2.3.1 and 2.3.2 above.⁴⁰¹

As stated in paragraph 2.3 of this study, freedom of testation is restricted, because it is subject to common law, statutory law, and constitutional law limitations.⁴⁰² In *King (WCC)*, the High Court highlighted that freedom of testation was challenged in the *Syfreets* case, indicating that Judge Griesel applied the limitations of common law instead of directly applying the provisions set out in the *Constitution* relating to limiting freedom of testation⁴⁰³ It indicated that the court in the *Syfreets* case had to:

weigh up competing constitutional values and public policy principles: on the one hand, the right to equality and freedom from unfair discrimination. On the other, the principle of private ownership and its consequences of private succession and freedom of testation.⁴⁰⁴

Furthermore, Judge Bozalek referenced the *BOE Trust (SCA)* case where Judge Mitchell decided that the constitutional necessity of repealing racially discriminatory restrictions took precedence over freedom of testation and, as a result, that the removal of such did not amount to unconstitutional loss of property, as provided for by the *Constitution*.⁴⁰⁵ Judge Bozalek emphasised that

³⁹⁸ *King (WCC)* paras 42, 48, 53, 73-81.

³⁹⁹ *King (WCC)* para 46.

⁴⁰⁰ See para 2.3.3 above.

⁴⁰¹ See para 2.3.3 above. This will be discussed in Chapter 5 with reference to *King (CC)*.

⁴⁰² See para 2.3 above on the limitations of freedom of testation. Also see *King (WCC)* paras 29-30.

⁴⁰³ See paras 2.3.1 and 2.3.3 above on the limitations of common law and the *Constitution*. Furthermore see para 3.2.3 on the court's decision regarding *Syfreets*. *King (WCC)* paras 19-31.

⁴⁰⁴ *Syfreets* para 39; *King (WCC)* para 31.

⁴⁰⁵ See para 3.3.3 of this study on the court's decision on the *BOE Trust (SCA)* case. *King (WCC)* paras 32-35.

in the *King* (WCC) case the facts did not centre on a matter of a testamentary trust in the public sector, and therefore did not discriminate publicly against society, but amounted instead to a case of the disinheritance of certain beneficiaries in the private sphere.⁴⁰⁶

With regard to constitutional values and rights in the *King* (WCC) case, Judge Bozalek acknowledged that the applicants and respondents agreed that clause 7 did discriminate on the basis of gender against female descendants, and that this was one of the listed grounds of discrimination in section 9 of the *Constitution*.⁴⁰⁷ The respondents did not argue or challenge that the discrimination based on gender was unfair, but rather lodged a complaint that common law should not be developed by means of direct constitutional challenges or public policy in order to suppress freedom of testation.⁴⁰⁸

Judge Bozalek acknowledged the constitutional values in section 1 and the application of the Bill of Rights in sections 8(2)-(3) of the *Constitution*.⁴⁰⁹ As mentioned, section 8(2) provides for the application of the Bill of Rights to a natural and juristic person in terms also of the duties imposed on such persons.⁴¹⁰

Section 8(2) binds private persons to the Bill of Rights by means of its horizontal application.⁴¹¹ It is important to distinguish here between direct horizontal and direct vertical application.⁴¹² Vertical application centres on the relationship between an individual and the state.⁴¹³ Horizontal application centres on private individuals who are accused of violating the Bill of Rights in terms of section 8(2)

⁴⁰⁶ *King* (WCC) para 47.

⁴⁰⁷ *King* (WCC) para 46; Section 9(3) of the *Constitution*.

⁴⁰⁸ *King* (WCC) para 46.

⁴⁰⁹ See para 2.3.3.1 which discusses constitutional values provided in sections 1 and 8(2) and (3) of the *Constitution*; *King* (WCC) para 48; Also see Venter 2001 *PER* 10; Nishihara 2001 *PER* 2.

⁴¹⁰ Section 8(2) of the *Constitution*; *King* (WCC) para 48.

⁴¹¹ Bhana 2013 *SAJHR* 351.

⁴¹² See para 3.2.3.2 above on the differences between direct and indirect application of the Bill of Rights.

⁴¹³ Currie and De Waal *The Bill of Rights Handbook* 41 indicates that the Bill of Rights protects individuals from the abuse of state's powers by ensuring that the duty lies on the state to respect provisions as provided for in section 8(1) of the *Constitution*. Section 8(2) provides that all branches of the state are bound by the Bill of Rights.

of the *Constitution*.⁴¹⁴ Since the *King (WCC)* case involved private individuals in the private sphere, the application of the Bill of Rights would be horizontal.⁴¹⁵

In *Khumalo v Holomisa*,⁴¹⁶ the court indicated that the nature of the relevant substantive right and responsibility must be used to assess the degree of horizontal application of a clause in the Bill of Rights.⁴¹⁷ Section 8(2) must remain a relevant consideration when it comes to binding private persons.⁴¹⁸ Furthermore, section 8(3) of the *Constitution* provides the following:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2, a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).⁴¹⁹

Therefore, section 8(3) of the *Constitution* provides that the court gives effect to the constitutional rights that bind natural or juristic persons.⁴²⁰ The scope of the Bill of Rights on a natural or juristic person is thus determined by the provisions of the clause being challenged – in this case, the equality clause.

The right to equality is highlighted in *King (WCC)*.⁴²¹ The court referred to sections 9(3) and 9(4) of the *Constitution* and maintained that the equality clause and section 4(2) of the *Equality Act* were relevant in this case, because the applicants reasoned that equality should prevail over freedom of testation.⁴²² Section 4(2) of the *Equality Act* states the following:

⁴¹⁴ Currie and De Waal *The Bill of Rights Handbook* 41.

⁴¹⁵ Section 8(2) of the *Constitution*; Currie and De Waal *The Bill of Rights Handbook* 41-42; Bhana 2013 *SAJHR* 364-367.

⁴¹⁶ *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

⁴¹⁷ *Khumalo v Holomisa* para 33; Bhana 2013 *SAJHR* 365-366; Also see Rautenbach 2002 *Journal of South African Law* 753.

⁴¹⁸ Bhana 2013 *SAJHR* 365-366.

⁴¹⁹ Section 8(3) of the *Constitution*.

⁴²⁰ Section 8 (3) of the *Constitution*; Bhana 2013 *SAJHR* 367.

⁴²¹ *King (WCC)* paras 38,45,49,59.

⁴²² See para 2.3.3.2 (a) of this study; *King (WCC)* paras 49-50, 77.

The existence of systematic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by' amongst others factors, colonialism and patriarchy, must be taken into account. It also refers to 'the need to take measures at all levels to eliminate such discrimination and inequalities'.⁴²³

Furthermore, the court held that the discrimination was fair, because the limitations were justified in terms of section 36 of the *Constitution*.⁴²⁴ This brings into focus the crucial issue as to how the court argued that clause 7's discriminatory provisions were justified in consideration of section 36 of the Constitution.⁴²⁵

4.2.3.2 The court's reasoning on why freedom of testation outweighed equality

As indicated, the recognition of freedom of testation as a constitutional right forms part of section 25(1) of the *Constitution*.⁴²⁶ Furthermore, freedom of testation protects the testator's right to dispose of his or her property, thus protecting the testator's wishes beyond death.⁴²⁷ Despite the fact that freedom of testation is indirectly protected by section 25(1) of the *Constitution*, the freedom is restricted.⁴²⁸ In the case of *King (WCC)*, the applicants argued that the female descendants of the deceased were discriminated against, so that clause 7 of the 1902 was *contra bonos mores*.⁴²⁹

The court first interpreted the testator's intention: of wanting the property to stay under the ownership of males up to and including the third generation of the De Jager family.⁴³⁰ With the principle of the law of succession (freedom of testation) being the centre of the court's reasoning, it held that the testator's intentions should be adhered to and given effect to unless a rule of law prevented it from this.⁴³¹ The criteria formulated in *Harksen v Lane* were found to be applicable

⁴²³ Section 4(2) of the *Equality Act*; *King (WCC)* para 51.

⁴²⁴ *King (WCC)* para 73.

⁴²⁵ See para 2.3.3 on constitutional limitations.

⁴²⁶ See para 2.2.3.1 above.

⁴²⁷ See para 2.2.3.1 above.

⁴²⁸ See para 2.3 above; *King (WCC)* para 56.

⁴²⁹ *King (WCC)* para 27.

⁴³⁰ *King (WCC)* para 22.

⁴³¹ The court referenced *Robertson v Robertson's Executors* 1914 AD 503, which stated that courts are bound to give effect to the language used in the will unless the effect is prevented by the rule of law. *King (WCC)* paras 28, 55.

around determining whether the intention of the testators of the 1902 will was to differentiate among and not discriminate against the beneficiaries.⁴³² The court used the *Harksen v Lane* criteria in order to determine whether the testamentary provision in clause 7 was justifiable in terms of section 36 of the *Constitution*.⁴³³

The court subsequently gave judgment on the limitation of the fideicommissum and whether or not the *Constitution* was able to nullify the terms in clause 7.⁴³⁴ In simple terms, a fideicommissum occurs when a testator selects a succession of owners for the property in question.⁴³⁵ An advantage of this condition is that the testator is able to keep the property in the family circle for generations.⁴³⁶ The fideicommissum created by the testators had a definite future date which was valid for three generations.⁴³⁷ This is known as a fideicommissum *in diem*, as it pertains to a conditional clause of the property that is passed down only to male descendants for three generations.⁴³⁸

The court then weighed the importance of two main rights, namely equality in terms of the beneficiaries and human dignity with regard to the testator. As stated, in section 10 the *Constitution* expresses a fundamental right that indirectly recognises freedom of testation.⁴³⁹ Furthermore, it gives the testator dignity in terms of knowing that his or her wishes will be adhered to after death.⁴⁴⁰ The court recognised the value of human dignity by indicating that it was a democratic value that was also a right provided for in section 7(1) of the *Constitution*.⁴⁴¹ However, even though human dignity involves the recognition of freedom of testation, it also forms part of discrimination when differentiation is based on

⁴³² *King* (WCC) paras 31 and 71; See para 2.3.2.2 of this study.

⁴³³ *King* (WCC) paras 31, 71.

⁴³⁴ *King* (WCC) para 55.

⁴³⁵ Jamneck and Rautenbach *The Law of Succession in South Africa* 197.

⁴³⁶ Jamneck and Rautenbach *The Law of Succession in South Africa* 198.

⁴³⁷ *King* (WCC) paras 22-23; Jamneck and Rautenbach *The Law of Succession in South Africa* 199.

⁴³⁸ *King* (WCC) paras 7-10 and 22-23; Jamneck and Rautenbach *The Law of Succession in South Africa* 199.

⁴³⁹ See para 2.2.3.2 above.

⁴⁴⁰ *BOE Trust* (SCA) para 27; Lehmann 2014 *Acta Juridica* 9.

⁴⁴¹ *King* (WCC) para 48; Section 7(1) of the *Constitution* provides that the Bill of Rights is the cornerstone of democracy in South Africa. It protects the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom.

gender, sex, or any other grounds that undermine the section.⁴⁴² It was clear that clause 7 discriminated against female descendants and that the respondents did not argue that the discrimination was fair.⁴⁴³ The next question was, then, whether the discrimination in clause 7 was unfair. Since it matched one of the listed grounds of discrimination in section 9(3), it was presumed in terms of section 9(5) to be an instance of unfair discrimination until proven otherwise.⁴⁴⁴

In accordance with the court's reasoning, the court favoured freedom of testation above equality for the reasons briefly itemised and discussed below.

(a) The court based its decision on section 8(c) of the *Equality Act*

One of the grounds for discrimination listed in section 9(3) of the *Constitution* is gender, which was clearly relevant in the *King (WCC)* case.⁴⁴⁵ As stated, section 9(4) of the *Constitution* refers to national legislation that must be enacted in order to prohibit unfair discrimination, that is, the *Equality Act*.⁴⁴⁶ Section 8(c) of this Act provides

including – the system of preventing women from inheriting family property.⁴⁴⁷

The court indicated that this expressly condemns gender discrimination in view of its unfairness in terms of a system of inheritance and not in terms of private wills.⁴⁴⁸ In *Bhe v Magistrate, Khayelitsha*⁴⁴⁹ (hereafter the *Bhe* (CC) case),⁴⁵⁰ this rule was challenged on the grounds of gender and human dignity: the customary law rule of male primogeniture and its legislative conditions were declared unconstitutional, as they unfairly discriminated against women.⁴⁵¹ Male primogeniture was described as follows in this case:

⁴⁴² *King* (WCC) para 52.

⁴⁴³ *King* (WCC) para 58.

⁴⁴⁴ Section 9(3)-(4) of the *Constitution*.

⁴⁴⁵ Section 9(3) of the *Constitution*; *King* (WCC) paras 47, 52.

⁴⁴⁶ Section 9(4) of the *Constitution*; Also refer to para 3.3.3 above of this study.

⁴⁴⁷ Section 8(c) of the *Equality Act*.

⁴⁴⁸ Section 8 (c) of the *Equality Act*.

⁴⁴⁹ 2005 1 BCLR (CC).

⁴⁵⁰ *Bhe* (CC) para 92; *King* (WCC) case para 53.

⁴⁵¹ *Bhe* (CC) para 92.

[A] male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.⁴⁵²

In *King (WCC)*, the court indicated that a fideicommissum is not a system or practice of inheritance (as required in section 8(c) of the *Equality Act*), but rather a manifestation of freedom of testation.⁴⁵³

(b) The application of section 36 of the *Constitution*

In *King (WCC)* the court focused on freedom of testation and the limitations imposed by section 36 of the *Constitution* read together with sections 8(2) and 8(3)(b) of the *Constitution*.⁴⁵⁴ The court indicated that values such as human dignity and freedom were present around exercising freedom of testation and that the right to equality, as a fundamental right, had to give way to competing rights.⁴⁵⁵ The court further provided that no cases had been placed before it where discrimination in private wills resulted from testators disposing of their properties through freedom of testation.⁴⁵⁶ Therefore, if freedom of testation and discrimination were battling it out, weight should be given to freedom of testation as it occurred in the private sphere and was not public in nature.⁴⁵⁷ Furthermore, the court indicated that the discriminatory provision of the will was directed to a limited number of people and for a limited duration.⁴⁵⁸ Therefore, when applying section 36, the court provided that the discrimination was justified as it did not directly infringe on the female descendants' right to dignity.⁴⁵⁹

⁴⁵² *Bhe* (CC) para 77 is an example of how a system has unfairly discriminated against women based on gender. The court indicated that the *Intestate Succession Act* 81 of 1987 should be applied to customary law estates. *King (WCC)* para 53.

⁴⁵³ *King (WCC)* para 53.

⁴⁵⁴ *King (WCC)* paras 72-73.

⁴⁵⁵ *King (WCC)* para 73. Also see para 2.3.3 on the discussion of section 36 of the *Constitution* as a constitutional limitation.

⁴⁵⁶ *King (WCC)* para 74.

⁴⁵⁷ *King (WCC)* paras 74-75.

⁴⁵⁸ *King (WCC)* para 75.

⁴⁵⁹ *King (WCC)* para 75.

4.3 Harper v Crawford 2017 4 SA 30 (WCC)

4.3.1 Facts of the case

A Notarial Deed of Trust was executed in January 1953 by “the donor”, Mr Louis John Druiff, who also later executed a Notarial Deed of Amendment of Trust in May 1953 to amend clause 5 of the trust deed.⁴⁶⁰ Clause 4 trust deed indicated that the donor’s four children would be the income and capital beneficiaries of the trust.⁴⁶¹ The revenue of the trust deed had to be divided equally amongst the four children and, in case of the death of the children, their decedents were to inherit their share *per stirpes*.⁴⁶² Furthermore, the trust deed provided that, should one of the beneficiaries pass away and be childless, one quarter of the share would be passed to the descendants of the remaining beneficiaries.⁴⁶³ The donor was aware that one of his children, Helene Harper, had suffered miscarriages, and that there would be a possibility of adoption.⁴⁶⁴ However, the donor died before the adoption took place.⁴⁶⁵ The remaining children of the donor were able to bear children of their own.⁴⁶⁶

4.3.2 Legal question

The legal question before the court was whether the interpretation of the trust deed included both biological and adopted children.⁴⁶⁷ Were it to be held that it was the donor’s intention to exclude adopted children, the subsequent issue would be to determine whether such exclusion was contrary to public policy and an infringement on the rights protected in section 9 of the *Constitution*.⁴⁶⁸

⁴⁶⁰ *Harper* (WCC) para 2.

⁴⁶¹ *Harper* (WCC) para 2.

⁴⁶² *Harper* (WCC) para 2.

⁴⁶³ *Harper* (WCC) paras 2-3.

⁴⁶⁴ *Harper* (WCC) para 4-5.

⁴⁶⁵ *Harper* (WCC) paras 4-5.

⁴⁶⁶ *Harper* (WCC) para 5.

⁴⁶⁷ *Harper* (WCC) para 5.

⁴⁶⁸ *Harper* (WCC) para 5.

4.3.3 *The court's decision on the mentioned questions/ issues*

In *Harper (WCC)*, the court recognised the development of the South African law with regard to legislation, the *Constitution*, and public policy.⁴⁶⁹ The reason why the trust deed was challenged in terms of section 9 and public policy was that the word "children" was used it was unclear whether adopted children would fall within the ambit of the word. The High Court based its decision on whether the donor's intention was constitutionally justifiable.⁴⁷⁰

Firstly, the High Court referred to similar cases in the public sphere regarding freedom of testation and legislation that limit it.⁴⁷¹ References were made to the *Syfrets* and *BOE Trust (SCA)* cases and public policy developments.⁴⁷² The court recognised that public policy was not stagnant and changed over time to align with that which the community deemed to be moral or immoral.⁴⁷³ Since public policy is deeply rooted in the *Constitution*, the determination is done by the *Constitution* itself as to whether the exclusion of adopted children undermines constitutional values, taking into account that contemporary public policy and that of 1953 were not the same.⁴⁷⁴ Therefore, contemporary public policy was found to be crucial, because it was imperative for the court to interpret the testamentary provision and the trust deed in terms of the Bill of Rights.⁴⁷⁵

Secondly, in order to determine whether the interpretation of the trust deed was contrary to public policy and infringed section 9 of the *Constitution*, the court tried to weigh freedom of testation in the private sphere against section 9 of the *Constitution* and constitutional values.⁴⁷⁶ The court based most of its reasoning on the *Syfrets* and *BOE Trust (SCA)* cases and emphasised that, although

⁴⁶⁹ *Harper (WCC)* para 9.

⁴⁷⁰ *Harper (WCC)* para 5.

⁴⁷¹ *Harper (WCC)* para 10.

⁴⁷² *Harper (WCC)* para 10.

⁴⁷³ *Harper (WCC)* para 10; Jamneck and Rautenbach *The Law of Succession in South Africa* 129; *Syfrets* para 24.

⁴⁷⁴ See para 2.3.1 above; *Harper (WCC)* para 12; Jamneck and Rautenbach *The Law of Succession in South Africa* 129.

⁴⁷⁵ *Harper (WCC)* para 10; Section 8(3) of the *Constitution*; *BOE Trust (SCA)* para 11.

⁴⁷⁶ *Harper (WCC)* para 12.

discrimination was present, it was done in the public sphere.⁴⁷⁷ Furthermore, unlike *King (WCC)*, where the applicants and respondents agreed that discrimination was present, the court *a quo* mainly focused on freedom of testation as a right and the testator's ability to dispose of his property.⁴⁷⁸ The court held that the donor would have included adopted children if he intended for them to inherit when the trust deed was concluded.⁴⁷⁹

Therefore, the court dismissed the applicant's arguments by declaring that the donor did not foresee that the adopted children would benefit from the trust deed as that was not his intention, because he would clearly have indicated that the adopted children should inherit.⁴⁸⁰

4.4 Harvey v Crawford 2019 2 SA 153 (SCA)

The facts of the case remain the same.⁴⁸¹ The court *a quo* held that the donor would have expressively included the adopted children if his intention were to do so.⁴⁸²

4.4.1 Legal question

The legal question before the SCA was whether the words "children", "descendants", "legal descendants", and "issue" as stipulated in the trust deed could be interpreted to include adopted children in terms of section 71(2) of the *Children's Act 31 of 1973* (hereafter the *1973 Children's Act*).⁴⁸³

4.4.2 The court's decision on the mentioned questions/ issues

The *Harvey (SCA)* decision consisted of a majority and minority judgment.

⁴⁷⁷ *Harper (WCC)* para 28, 34.

⁴⁷⁸ See para 4.2.3 above; *Harper (WCC)* para 22.

⁴⁷⁹ *Harper (WCC)* paras 9, 19.

⁴⁸⁰ *Harper (WCC)* paras 35-36.

⁴⁸¹ See para 4.3.1 above.

⁴⁸² *Harvey (SCA)* para 10 and 12.

⁴⁸³ *Harvey (SCA)* para 4 and 13; *Children's Act 31 of 1973*.

The minority judgment by Judge Molemela focused on a broader and holistic approach around the interpretation of the trust deed.⁴⁸⁴ Judge Molemela provided that because the donor had knowledge of his daughter's intention to adopt, the adopted children should not be excluded from the deed.⁴⁸⁵ The issue of public policy was not dealt with, because the language and the circumstances surrounding the deed did not indicate that adopted children had to be excluded.⁴⁸⁶

The majority judgment (by Judge Ponnan) upheld the High Court's decision based on the following reasons.⁴⁸⁷ The terms "children", "descendants", "issue", and "legal descendants" in the trust deed should have expressly included adopted children (if that was his wish), because the 1973 *Children's Act* excluded adopted children from inheriting unless the testamentary instrument explicitly included them in the inheritance in accordance with trust law.⁴⁸⁸ The testator would have to expressly include adopted children if that was his intention, therefore, the trustee should give effect to the trust instrument as it should be lawfully interpreted in order for it to be effective.⁴⁸⁹

The trust deed was concluded when the *Children's Act* was in force.⁴⁹⁰ Section 71(2) of this act reads as follows:

Subject to the provisions of s 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption – (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child; (b) Inherit any property *ab intestato* from any relative of his adoptive parents.

The ordinary meaning of "child" or "grandchild" stems from blood relations only and do not include adopted children.⁴⁹¹ The donor expressly practised his

⁴⁸⁴ *Harvey* (SCA) para 1-40.

⁴⁸⁵ *Harvey* (SCA) para 40.

⁴⁸⁶ *Wilkinson* (CC) para 20.

⁴⁸⁷ *Harvey* (SCA) para 75.

⁴⁸⁸ *Harvey* (SCA) para 44-45.

⁴⁸⁹ *Harvey* (SCA) para 45.

⁴⁹⁰ *Harvey* (SCA) para 46; *Children's Act* 31 of 1937.

⁴⁹¹ *Wilkinson* (CC) para 17-18.

freedom of testation by disposing of his property as he pleased by not including adopted children, which he would have done if he intended to do so.⁴⁹² Therefore, the SCA upheld the decision of the court *a quo*.⁴⁹³

4.5 Conclusion

The *King* (WCC), *Harper* (WCC), and *Harvey* (SCA) cases discussed above point to the ways in which discrimination and freedom of testation were contested in the private sphere. The cases reverted to the *Syfreys* and *BOE Trust* (SCA) cases on the fundamental aspect of discrimination in a public setting that influenced society as a whole.

The chapter's first objective required an analysis of *King* (WCC). Due to the limitation on the duration of a fideicommissum and the fact that it did not violate public policy, the court *a quo* determined that the testator's right to exercise their freedom of testation outweighed the discriminatory causes.⁴⁹⁴ The court referred to section 8(c) of the *Equality Act*, which indicates that discrimination based on gender would be unfair if it was done by a system and not a private will.⁴⁹⁵ The judgment of the court *a quo* was appealed at the SCA, which upheld the judgment of the court *a quo* without giving reasons for the decision.

In respect of the present chapter's second and third objectives, the judgments in *Harper* (WCC) and *Harvey* (SCA) cases were analysed. A trust deed that was executed provided that the testator's children should give equal shares to their descendants who would inherit the relevant property *per stirpes* in case of death.⁴⁹⁶ However, the testator did not include the term "adopted children": therefore, the applicants argued that the exclusion would result in the testamentary bequest going against public policy.⁴⁹⁷ In *Harper* (WCC) the court weighed freedom of testation against the applicant's argument and held that, if

⁴⁹² *Harvey* (SCA) para 56, 64.

⁴⁹³ *Harvey* (SCA) para 75.

⁴⁹⁴ *King* (WCC) paras 81-82.

⁴⁹⁵ See para 4.2.3 above.

⁴⁹⁶ See paras 4.3.1 and 4.3.2 above.

⁴⁹⁷ See para 4.3.1 and 4.3.2 above.

the testator wanted to include the adopted children, he would have done so.⁴⁹⁸
The majority judgement in the *Harvey* (SCA) upheld the High Court's judgement.⁴⁹⁹

The Constitutional Court's landmark decision in *King* (CC) and *Wilkinson* (CC), in which the distinction between the protection of freedom of testation in the private sphere and public sphere was held to be artificial will be discussed in Chapter 5.

⁴⁹⁸ See para 4.3.3 above.

⁴⁹⁹ See para 4.4.2 above.

5 Recent case law on the limitation of freedom of testation in the private sphere

5.1 Introduction

As mentioned in paragraph 2.2 of this study, in the post-apartheid era, the South African courts sharply decided against testamentary provisions within the public sphere that unfairly discriminates against *inter alia* race and gender.⁵⁰⁰ Until recently, the courts have been reluctant to do so in the private sphere with reference to *King* (WCC) and *Harvey* (SCA), as indicated.⁵⁰¹ However, the two recent Constitutional Court judgments in *King* (CC) and *Wilkinson* (CC) came to represent a historical position pertaining to the way in which the prohibition on unfair discrimination may restrict freedom of testation within the private sphere. The *King* (CC) and *Wilkinson* (CC) cases will be discussed in this chapter.

The aims of the current chapter are as follows.

- Evaluate the judgments in both the *King* (CC) and *Wilkinson* (CC) cases.
- Examine the way in which the Constitutional Court interpreted freedom of testation in both cases.
- Demonstrate the way in which the *Equality Act* and equality clause (section 9 of the *Constitution*) impacted the court's decision in the *King* (CC) case with respect to declaring clause 7 of the will to be unlawful in terms of constitutional subsidiarity.
- Briefly assess the donor's intention to exclude adopted children in the testamentary provision in *Wilkinson* (CC) insofar as it constituted unfair discrimination on one of the grounds listed in section 9 of the *Constitution*.

The first part of the chapter will address the *King* (CC) case.⁵⁰² In order to address the legal issue in this case, a brief summary of both the minority and majority judgments⁵⁰³ will be offered and then the majority judgment will be examined in

⁵⁰⁰ See para 2.2 above.

⁵⁰¹ Refer to Chapter 4 of this study.

⁵⁰² See para 5.2 below.

⁵⁰³ See paras 5.2.2-5.2.3 below.

further brief detail.⁵⁰⁴ Thereafter, freedom of testation, its significance and limitation will be highlighted.⁵⁰⁵ Thereafter, the *Equality Act* and constitutional subsidiarity will be discussed.⁵⁰⁶

The second part will focus on the *Wilkinson* (CC) case to demonstrate how the donor's intention to exclude adopted children resulted in unfair discrimination.

5.2 King (CC) case

5.2.1 Legal questions before the Constitutional Court

The legal questions that the Constitutional Court had to address were as follows:

- a) Whether clause 7 of the contested will unfairly discriminated against the applicants, namely the original testator's female descendants; and
- b) Whether the creation of a fideicommissum in a private will possessed an element of unfair discrimination which might or might not have limited freedom of testation in accordance with section 9 of the *Constitution* and/or section 8 of the *Equality Act*.⁵⁰⁷

The judgment consisted of a majority and two minority judgments.⁵⁰⁸

5.2.2 Brief outline of the majority judgement and two minority judgements

The first minority judgment, delivered by Judge Mhlantla, held that the matter should be resolved by indirectly applying the Bill of Rights through integrating public policy with constitutional values.⁵⁰⁹ When it came to the issue, disinheritance in private wills presented a special challenge to public policy where the development of common law was justified.⁵¹⁰ Judge Mhlantla concluded that common law had to be extended.⁵¹¹ The extension rendered private testamentary

⁵⁰⁴ See paras 5.2.3-5.2.7 below.

⁵⁰⁵ See paras 5.2.4-5.2.7 below.

⁵⁰⁶ See paras 5.2.6-5.2.7 below.

⁵⁰⁷ *King* (CC) para 4.

⁵⁰⁸ *King* (CC).

⁵⁰⁹ *King* (CC) paras 38-41.

⁵¹⁰ *King* (CC) para 39.

⁵¹¹ *King* (CC) paras 33, 39, and 72-86.

disinheritance that violated constitutional values and public policy unenforceable.⁵¹² It was found that, in order to establish public policy along with constitutional values, the common law had to be developed concurrently with the *Constitution*.⁵¹³

The second minority judgment, delivered by Judge Victor, embraced the *Equality Act*.⁵¹⁴ According to this, a private individual in any circumstance, also in the private sphere, might constitute unfair discrimination if the testator included testamentary provisions that violated the constitutional value of equality.⁵¹⁵

The majority judgment, delivered by Judge Jafta, reasoned differently from the first minority judgment. It was held that there was no reason for the common law to be developed, since its limitations already made provisions that a will was not enforceable if it was unlawful and/or against public policy.⁵¹⁶ According to section 9(3) of the *Constitution*, clause 7 of the original 1902 will would have resulted in unfair discrimination by the statutory and constitutional limitations.⁵¹⁷

5.2.3 Initial remarks on freedom of testation

As indicated in paragraph 2.2 of this study, freedom of testation is not expressively provided for in the *Constitution*, but is instead indirectly protected in constitutional rights such as the right to property (section 25(1)), the right to human dignity (section 10), and the right to privacy (section 14).⁵¹⁸ It is important to illustrate how the three judgments in the *King* (CC) case applied freedom of testation and the protection of the principle before identifying the factors that limited the principle.⁵¹⁹

⁵¹² *King* (CC) paras 33, 39, and 72-86.

⁵¹³ *King* (CC) paras 23, 29, 33, and 43.

⁵¹⁴ *King* (CC) para 166.

⁵¹⁵ *King* (CC) paras 166-168, and 193-194.

⁵¹⁶ *King* (CC) paras 90-91, and 131-132.

⁵¹⁷ *King* (CC) paras 131-132, and 158.

⁵¹⁸ *King* (CC) para 65; Sections 10, 14 and 25(1) of the *Constitution*; Du Toit 2001 *Stellenbosch Law Review* 236; refer to para 2.2.3 above on the recognition of freedom of testation as a constitutional right. See paras 5.2.5, 5.3.2 and 5.3.4.

⁵¹⁹ *King* (CC).

Judge Mhlantla indicated that it was not the purpose of the Constitutional Court to challenge the principle of freedom of testation but to re-evaluate the weight of the principle against constitutional considerations.⁵²⁰ Judge Mhlantla reiterated that the *Constitution* indirectly protected freedom of testation.⁵²¹ However, it had to be weighed against the non-discrimination principle.⁵²²

Despite the recognition and protection of freedom of testation in the *Constitution*, constitutional values carry significant weight when it comes to upholding a democratic state that is equal, non-racial, and non-sexist.⁵²³ Judge Mhlantla acknowledged that the *Constitution* protected all persons in the public and private spheres from direct and indirect discrimination unless it was justified in term of section 36.⁵²⁴ Furthermore, Judge Mhlantla stated that the courts had been unable to declare enforceable the freedom of testation and the principle of non-discrimination in the private sphere on the grounds of public policy.⁵²⁵

Judge Victor indicated that testamentary freedom should be re-calibrated to be more equitable and have a sense of *ubuntu*.⁵²⁶ Therefore, freedom of testation and substantive equality were to be balanced as a public policy component.⁵²⁷

Judge Jafta emphasised that, although freedom of testation provided the testator with the right to dispose of his assets, it should be executed legally and not contrary to public policy.⁵²⁸ However, common law had been integrated in the

⁵²⁰ *King* (CC) para 51.

⁵²¹ *King* (CC) paras 65, 70 and 211; See para 2.2.3 above; Matsemela 2015 *Journal of Law, Society and Development* 106.

⁵²² *King* (CC) para 65, 70 and 211; See para 2.2.3 above; Matsemela 2015 *Journal of Law, Society and Development* 106; *Syfrets* para 39; *J W v Williams-Ashman* 2020 4 SA 567 (WCC) para 85. Croucher 2012 *Australian Journal of Legal Philosophy* 10 states that, when testamentary freedom conflicts with exclusion on discriminatory grounds, an imbalance may be created between the two whereas balance was the preferred objective.

⁵²³ Sections 1(a)-(b) of the *Constitution*; *King* (CC) para 71; Also see para 2.2.3 above.

⁵²⁴ *King* (CC) para 71; Sections 9 and 36 of the *Constitution*. Also see para 2.3.3.2 above.

⁵²⁵ *King* (CC) para 71.

⁵²⁶ *King* (CC) para 203.

⁵²⁷ *King* (CC) para 211.

⁵²⁸ *King* (CC) para 95; Jamneck and Rautenbach *The Law of Succession in South Africa* 129. Also see para 2.3.1 above.

Constitution and, due to the supremacy of the *Constitution*, any law or conduct inconsistent with it was invalid.⁵²⁹

Therefore, freedom of testation was protected to a certain extent unless the conditions were unlawful or contrary to public policy, in which case the conditions were declared unenforceable by the courts.⁵³⁰

5.2.4 The interpretation of the common law limitations on freedom of testation in the King (CC) judgments

As indicated in paragraph 2.3.1 of this study, common law limitations on freedom of testation provide that the testamentary provisions should not be *contra bonos mores* or go against public policy, as such provisions would not be enforceable by the courts.⁵³¹ Bequests that are unlawful, against public policy, and/or impracticably vague or impossible to enforce are limited in terms of common law.⁵³²

Each of the three judgments in the *King* (CC) case adopted a different stance on the interpretation and execution of the way in which the common law limited the testator's freedom of testation in the original 1902 will.

Judge Mhlantla explained the way in which the common law limitation on freedom of testation was interpreted during the post-constitutional era, whereby any testamentary bequests contrary to public policy were unenforceable.⁵³³ Judge Mhlantla focused on public policy in modern South African society and described the way in which public policy tests differed in public and private wills.⁵³⁴ Judge Mhlantla, however, referred to two cases that were heard before the enactment of the *Constitution: Aronson v Estate Hart*⁵³⁵ (hereafter *Aronson*) and *Levy v*

⁵²⁹ *King* (CC) para 128; Section 2 of the *Constitution*. Also see para 2.2 above.

⁵³⁰ *King* (CC) paras 126-128.

⁵³¹ See para 2.3.1 above.

⁵³² Jamneck and Rautenbach *The Law of Succession in South Africa* 143; *Syfrets* para 9; *King* (CC) para 23.

⁵³³ *King* (CC) para 25; Jamneck and Rautenbach *The Law of Succession in South Africa* 129. Also see para 2.3.1

⁵³⁴ *King* (CC) paras 26-27.

⁵³⁵ 1950 1 SA 539 (A).

*Schwartz*⁵³⁶ (hereafter *Levy*).⁵³⁷ The conditions in *Aronson* and *Levy* were tested in order to determine whether they were contrary to public policy.⁵³⁸

In *Aronson*, the testator bequeathed his estate to his beneficiary on the condition that he would not marry outside of the Jewish religion.⁵³⁹ The condition was challenged and tested as to whether it was contrary to public policy.⁵⁴⁰ The court held that the condition was valid.⁵⁴¹ The court reasoned that, should the condition be declared contrary to public policy, the marital union would exacerbate tension, raise the likelihood of irreconcilable conflicts, and be uncomfortable for the children.⁵⁴²

However, in *Levy*, a condition that was attached to a bequest was declared unenforceable and contrary to public policy.⁵⁴³ The condition provided that the daughter would only receive her benefit if her marriage was dissolved by death or any other cause that would result in its termination.⁵⁴⁴ The court declared the condition to be *contra bonos mores*, contrary to public policy, and invalid, because the testator's intention was to terminate the marriage.⁵⁴⁵

In both of these cases, public policy would have been different prior to the enactment of the *Constitution*, as indicated by paragraph 2.3.1 of this study.⁵⁴⁶ The progression of public policy after the enactment of the *Constitution* was evidenced by the *Aronson* and *Levy* cases where the public policy test was applied

⁵³⁶ 1948 4 SA 930 (W).

⁵³⁷ *King* (CC) paras 25-27.

⁵³⁸ *King* (CC) paras 25-27.

⁵³⁹ *King* (CC) para 25; Matsemela 2015 *Journal of Law, Society and Development* 95; Jamneck and Rautenbach *The Law of Succession in South Africa* 130-131. Also see para 2.3.1 above.

⁵⁴⁰ *King* (CC) para 25; Matsemela 2015 *Journal of Law, Society and Development* 95; the applicant provided that the condition should be declared unenforceable as it restricted the beneficiary from getting married outside of the Jewish religion.

⁵⁴¹ *King* (CC) para 25; Matsemela 2015 *Journal of Law, Society and Development* 95.

⁵⁴² *King* (CC) para 25; Matsemela 2015 *Journal of Law, Society and Development* 95.

⁵⁴³ *King* (CC) para 26; Matsemela 2015 *Journal of Law, Society and Development* 97.

⁵⁴⁴ *King* (CC) para 26; Matsemela 2015 *Journal of Law, Society and Development* 97; the applicant provided that the condition was contrary to public policy or *contra bonos mores*, because benefits would only be received if her marriage was terminated.

⁵⁴⁵ *King* (CC) para 26; Matsemela 2015 *Journal of Law, Society and Development* 97.

⁵⁴⁶ See para 2.3.1 of this study.

as it was applicable then, which was flexible and allowed testators to include discriminatory provisions in their wills.⁵⁴⁷

Regarding public testamentary bequests escalating in the post-constitutional era, Judge Mhlantla included an outline of the common law position with a view to the constitutional dispensation.⁵⁴⁸ The reason was that, after the enactment of the *Constitution*, testamentary bequests had been challenged in courts for being contrary to public policy and the infringement of constitutional values; this was different from the position that had been maintained prior to the enactment of the *Constitution*.⁵⁴⁹

Such cases in the public sphere have undergone the public policy test.⁵⁵⁰ However, the public policy test for out-and-out disinheritance in the private sphere was novel.⁵⁵¹ According to De Waal there are four factors why direct ('out-and-out') disinheritance should be handled differently and, in theory, be allowed.⁵⁵² The first is that an opposite outcome would reduce the concept of freedom of testation to a myth, and that any constitutional protection of the right of freedom of testation would be rendered useless.⁵⁵³

Secondly, the right to inherit is not a basic right that is enjoyed by anybody.⁵⁵⁴ Excluding a person from being a beneficiary does not constitute an infringement or deprivation of an existing right.⁵⁵⁵ Thirdly, limiting freedom of testation in this context would create uncertainty among testators as to whether their testamentary conditions would be carried out or not, even if the condition was fundamentally unacceptable.⁵⁵⁶ Lastly, interference by the courts on the conditions

⁵⁴⁷ *King* (CC) para 25.

⁵⁴⁸ *King* (CC) para 29.

⁵⁴⁹ *King* (CC) para 29. Cases such as *Syfrets* and *BOE Trust* (SCA) (as explained in para 3.1 above), have been challenged since the enactment of the *Constitution*.

⁵⁵⁰ *King* (CC) para 29; See para 3.1 above.

⁵⁵¹ *King* (CC) para 29.

⁵⁵² According to De Waal 2017 *Annual Survey of South African Law* 1143, out-and-out disinheritance is also known as direct disinheritance.

⁵⁵³ De Waal 2017 *Annual Survey of South African Law* 1143; In the *King* (CC) case para 55, freedom of testation is constitutionally protected by sections 10 and 25 of the *Constitution*. Also see para 2.2.3 above.

⁵⁵⁴ De Waal 2017 *Annual Survey of South African Law* 1143.

⁵⁵⁵ De Waal 2017 *Annual Survey of South African Law* 1143.

⁵⁵⁶ De Waal 2017 *Annual Survey of South African Law* 1143.

imposed may result in an arbitrary outcome (for example, when the court will indicate how much a beneficiary will inherit).⁵⁵⁷

The novelty of the *King* (CC) case gave rise to the question as to whether clause 7 of the will was contrary to public policy under the contemporary constitutional regime, and whether the common law had to be developed in order to address out-and-out disinheritance in terms of constitutional values.⁵⁵⁸

Applying section 39(2) of the *Constitution*, Judge Mhlantla argued that in order to advance the spirit, purport, and objectives of the Bill of Rights, the court had a responsibility to develop the common law.⁵⁵⁹ Section 39(2) is read together with section 173 of the *Constitution*, which provides the court with the inherent power to develop the common law in the interest of justice.⁵⁶⁰

Out-and-out disinheritance challenges the public policy test in private wills; the common law should be extended when it comes to catering for such bequests.⁵⁶¹ Public policy, as stated in paragraph 2.3.1, is that which the community considers moral or immoral, but it is far more complex than that.⁵⁶² It is deeply rooted in the *Constitution* and the values that underpin it. Therefore, when public policy is questioned, it must be determined by the *Constitution* itself in terms of the values that underpin it and the provisions set out in the Bill of Rights.⁵⁶³ For out-and-out disinheritance, the public policy test is applied to assess whether testamentary bequests are moral or immoral, which would render them unenforceable.⁵⁶⁴

Judge Mhlantla's reasoning for developing the common law was, however, not supported by the other judgments.⁵⁶⁵ Judge Jafta held that public policy could not

⁵⁵⁷ De Waal 2017 *Annual Survey of South African Law* 1144.

⁵⁵⁸ *King* (CC) para 29.

⁵⁵⁹ *King* (CC) para 43; Section 39(2) of the *Constitution* requires that courts or tribunals must uphold the spirit, purport, and objects of the Bill of Rights whether they are interpreting legislation or are developing common law or customary law.

⁵⁶⁰ Section 172 of the *Constitution*; *King* (CC) para 43.

⁵⁶¹ *King* (CC) para 50.

⁵⁶² See para 2.3.1 above; Matsemela 2015 *Journal of Law, Society and Development* 93; Jamneck and Rautenbach *The Law of Succession in South Africa* 129.

⁵⁶³ See para 2.3.1 above. Also see *Barkhuizen v Napier* paras 28-29; Preamble and section 1 of the *Constitution*. *Syfrets* para 24.

⁵⁶⁴ See para 2.3.1 above.

⁵⁶⁵ *King* (CC) para 91 and 172.

be the driving force in this case, because public policy is already embedded in the *Constitution*.⁵⁶⁶ Therefore, developing the common law was unnecessary, seeing that it already provided for the limitation of freedom of testation, whereby any testamentary provisions that were unlawful and/or contrary to public policy were unenforceable.⁵⁶⁷

5.2.5 The application of equality and non-discrimination in terms of the Constitution

As discussed in paragraph 4.2.3, direct horizontal application occurs when individuals may directly exercise their constitutional rights against the state and other individuals, since the rights guaranteed by the Bill of Rights binds not only the state in regard to individuals, but also individuals in regard to other individuals.⁵⁶⁸ Section 8 of the *Constitution* provides for the way in which the Bill of Rights is applied to the rule of law; therefore, direct horizontal application is applied in certain cases.⁵⁶⁹

The idea of equality is a divisive societal ideal in terms of equal treatment of people in similar situations.⁵⁷⁰ An example is depriving women from voting when men can.⁵⁷¹ Men and women are equally able to make political choices and are in the same position here.⁵⁷² Therefore, if men and women are similar, they should be treated equally.⁵⁷³ However, this dynamic changes as soon as children are prohibited from voting, because children and adults are not similar when it comes to the ability to exercise political choices.⁵⁷⁴ Therefore, the law restricts the legal age for voting, which is justifiable.⁵⁷⁵

⁵⁶⁶ *King* (CC) para 91.

⁵⁶⁷ *King* (CC) para 91. Also see para 3.2 above.

⁵⁶⁸ Currie and De Waal *The Bill of Rights Handbook* 553.

⁵⁶⁹ Currie and De Waal *The Bill of Rights Handbook* 553; Section 8(1) of the *Constitution*.

⁵⁷⁰ Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷¹ Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷² Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷³ Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷⁴ Currie and De Waal *The Bill of Rights Handbook* 210; Section 19(3) of the *Constitution* provides that adult citizens have the right to vote.

⁵⁷⁵ Currie and De Waal *The Bill of Rights Handbook* 210; Section 19(3) of the *Constitution*.

The concept of equality is not "clean cut".⁵⁷⁶ It is complex and controversial. Consider the following concerns relating to the concept of equivalent treatment for similar individuals.⁵⁷⁷ The first is defining that which is significant when it comes to assessing the similarity of persons in a circumstance.⁵⁷⁸ The second is defining that which constitutes the inherent aspect of persons in similar situations.⁵⁷⁹ The equality concerns are not always apparent, and it raises the question of whether it is possible for all persons to be treated equally.

The right to equality in section 9 of the *Constitution* does not prevent the state or individuals from treating people differently.⁵⁸⁰ The right does not demand that persons in the same situation be treated equally, but rather that people with similar ethical stances be treated equally.⁵⁸¹

As indicated in paragraph 2.3.3.1 of this study, an element of freedom of testation is a testator's ability to choose his or her beneficiaries, which can result in differentiation.⁵⁸² However, differentiation may amount to fair or unfair discrimination.⁵⁸³ Discrimination is regarded as a form of differentiation, but there is a thin line between it and unfair discrimination, as indicated.⁵⁸⁴ Discrimination is established on the basis of the grounds listed in section 9(3) of the *Constitution*.⁵⁸⁵ The equality clause does not prohibit fair discrimination, while it does prohibit unfair discrimination.⁵⁸⁶

⁵⁷⁶ Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷⁷ Currie and De Waal *The Bill of Rights Handbook* 210.

⁵⁷⁸ Currie and De Waal *The Bill of Rights Handbook* 210-211; Rautenbach and Venter *Constitutional Law* 329-330.

⁵⁷⁹ Currie and De Waal *The Bill of Rights Handbook* 210-211; Rautenbach and Venter *Constitutional Law* 329-330.

⁵⁸⁰ Currie and De Waal *The Bill of Rights Handbook* 218.

⁵⁸¹ Currie and De Waal *The Bill of Rights Handbook* 218.

⁵⁸² See para 2.3.3.1 on how differentiation amounts to discrimination in terms of the *Harksen v Lane* test.

⁵⁸³ See para 2.3.3.1 on how differentiation amounts to discrimination through the use of the *Harksen v Lane* test.

⁵⁸⁴ Currie and De Waal *The Bill of Rights Handbook* 222.

⁵⁸⁵ Currie and De Waal *The Bill of Rights Handbook* 222; section 9(3) of the *Constitution* provides that no one may be unfairly discriminated against based on *inter alia* race, gender and sex.

⁵⁸⁶ Currie and De Waal *The Bill of Rights Handbook* 224; Preamble of *Equality Act*.

The notion that not all types of discrimination are unfair or that some forms of discrimination may be acceptable seems confusing, since the term "discrimination" has a bad connotation.⁵⁸⁷ The concept of fair discrimination was provided for in the *President of the Republic of South Africa v Hugo*⁵⁸⁸ (hereafter *Hugo (CC)*). The facts relate to the President reducing the sentences of all incarcerated mothers who had children below the age of twelve.⁵⁸⁹ A father of a twelve-year-old who was not granted the same treatment, argued that the President had unfairly discriminated against him on the grounds of gender.⁵⁹⁰ According to the Constitutional Court, it is understood in South African culture that mothers are primarily responsible for caring for and rearing children.⁵⁹¹ Even if there was discrimination against fathers, the discrimination was fair, since there were more fathers behind bars than mothers, and releasing them would have provoked a public uproar.⁵⁹²

In *Prinsloo v Van der Linde*⁵⁹³ (hereafter *Prinsloo (CC)*), the Constitutional Court defined "unfair discrimination" as follows:

Treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.⁵⁹⁴

To determine whether discrimination is unfair, reference is made to the impact that the discrimination has on the victims in terms of the factors listed in paragraph 2.3.3.1 above.⁵⁹⁵ Victims who were previously subjected to discrimination and suffered from this disadvantage as a result, are affected negatively.⁵⁹⁶

⁵⁸⁷ Currie and De Waal *The Bill of Rights Handbook* 224.

⁵⁸⁸ 1997 4 SA 1 (CC).

⁵⁸⁹ *Hugo (CC)* paras 1-4 and 47.

⁵⁹⁰ *Hugo (CC)* para 4.

⁵⁹¹ *Hugo (CC)* paras 33-40 and 115.

⁵⁹² *Hugo (CC)* paras 42-45.

⁵⁹³ 3 SA 1012 (CC).

⁵⁹⁴ *Prinsloo (CC)* para 31.

⁵⁹⁵ The factors are: a) the complainant's standing in society and whether they have experienced prejudice in the past. Discrimination treatment that places burdens on individuals who are less fortunate is more likely to be unfair than that which places difficulties on those who are generally better situated. b) The nature of the discriminatory law and what it seeks to accomplish. c) The extent to which the complainant's rights have been violated and whether there has been a violation of their basic dignity. Currie and De Waal *The Bill of Rights Handbook* 223; *Harksen v Lane* para 53.

⁵⁹⁶ Currie and De Waal *The Bill of Rights Handbook* 225.

5.2.6 The Equality Act

The *Equality Act* was enacted in terms of section 9(4) of the *Constitution*.⁵⁹⁷ As mentioned, this section provides that national legislation should be enacted to prevent or prohibit unfair discrimination.⁵⁹⁸ The *Equality Act* aims to erode social and economic inequalities, especially victims that were affected in the apartheid era.⁵⁹⁹

A horizontal application for prohibiting unfair discrimination is provided by the *Equality Act*, which binds the state and all persons.⁶⁰⁰ However, discrimination in the workplace is covered in the *Employment Equity Act* 55 of 1998.⁶⁰¹ Chapter 2 of the *Equality Act* encompasses a broad prohibition on unfair discrimination by the government and private individuals.⁶⁰² Section 6 provides that neither the government nor any person may unfairly discriminate against anyone – in general. Section 8 prohibits discrimination based on gender, which is the subject of the *King (CC)* case.⁶⁰³ Section 8 of the *Equality Act*⁶⁰⁴ reads as follows:

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including- (a) gender-based violence; (b) female genital mutilation; (c) the system of preventing women from inheriting family property; (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; (f) discrimination on the ground of pregnancy; (g) limiting women's access to social services or benefits, such as health, education and social security; (h) 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; (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

⁵⁹⁷ Currie and De Waal *The Bill of Rights Handbook* 244.

⁵⁹⁸ Section 9(4) of the *Constitution*; Kok 2002 *SAJHR* 61, 65; *King (CC)* para 132.

⁵⁹⁹ Preamble of the *Equality Act*; Kok 2002 *SAJHR* 65.

⁶⁰⁰ Section 5(1) of the *Equality Act* provides the application of the *Equality Act* binding all persons and the state. Also see Currie and De Waal *The Bill of Rights Handbook* 244.

⁶⁰¹ Section 1 of the *Equality Act* defines persons as juristic and non-juristic entities and a group or category of persons; section 1 of the *Equality Act*; Currie and De Waal *The Bill of Rights Handbook* 244; Kok 2002 *SAJHR* 65,445.

⁶⁰² *Chapter 2 of the Equality Act*.

⁶⁰³ Sections 6 and 8(c) of the *Equality Act*.

⁶⁰⁴ Section 8 of the *Equality Act*.

It is important to note this section must be read with section 6 of the *Equality Act* which stipulates it to be an "all-inclusive provision"-in other words, discrimination based on gender is not confined to the acts listed in section 8.⁶⁰⁵

There are two procedural advantages that the *Equality Act* offers the complainant.⁶⁰⁶ The first occurs when the state or private action is challenged and the complainant establishes a *prima facie* allegation of discrimination. In such circumstances, the *Equality Act* shifts the burden to the respondent to prove that the discrimination was fair.⁶⁰⁷

The *Equality Act's* second benefit is that it assumes that discrimination on a prohibited and similar ground (as found in section 9(3) of the *Constitution*) is unfair.⁶⁰⁸ Discrimination that is not based on one or more of the circumstances stated in paragraph (b) of the definition of "prohibited grounds" in section 1 of the *Equality Act* is assumed to be unfair until the respondent proves that it is fair.⁶⁰⁹ The complainant should only make out a *prima facie* case of discrimination, either in terms of the listed grounds or with a view to one or more further conditions, in order to facilitate the presumption that it is unfair.⁶¹⁰

5.2.7 Application that led to the finding that clause 7 of the will in the King (CC) case was unlawful

Judge Jafta acknowledged the importance of freedom of testation and that testators were at liberty to dispose of their assets as they deemed fit.⁶¹¹ The testator had a right to impose conditions on the testamentary bequest as to the

⁶⁰⁵ Sections 6 and 8 of the *Equality Act*.

⁶⁰⁶ Currie and De Waal *The Bill of Rights Handbook* 246.

⁶⁰⁷ Sections 5(2) and 13 of the *Equality Act*; section 5(2) of the *Equality Act* provides that, if the *Equality Act* is in conflict with other provisions or other legislation except the *Constitution* or an Act of Parliament, the *Equality Act* will prevail; Currie and De Waal *The Bill of Rights Handbook* 246; Kok 2008 *SAJHR* 471.

⁶⁰⁸ Currie and De Waal *The Bill of Rights Handbook* 246; Rautenbach and Venter *Constitutional Law* 334.

⁶⁰⁹ Currie and De Waal *The Bill of Rights Handbook* 246; Sections 1 and 13 of the *Equality Act*; Rautenbach and Venter *Constitutional Law* 336.

⁶¹⁰ Currie and De Waal *The Bill of Rights Handbook* 246; Section 14(2) of the *Equality Act* provides that the respondent must prove that the discrimination is fair. Also see Rautenbach and Venter *Constitutional Law* 336-338.

⁶¹¹ *King (CC)* para 124.

way in which the property would be disposed of and such wishes needed to be respected and enforced, as they were part of the testator's right of disposal.⁶¹² He reiterated that freedom of testation was protected in the South African law by section 25(1) of the *Constitution* and that it formed part of the common law, while it promoted the constitutional rights of freedom and human dignity.⁶¹³ No matter how important freedom of testation is, he indicated, it did not give a "free pass" to impose unlawful disposals or conditions in wills and trust deeds.⁶¹⁴ Therefore, freedom of testation was only permissible if it was exercised in a legal manner that did not contradict public policy.⁶¹⁵

Secondly, as indicated in paragraph 4.3 of the present study, the majority judgment relied heavily on the fact that clause 7 was limited by the equality clause as well as the *Equality Act*.⁶¹⁶ Confusion arose, because Judge Jafta often jumped between sections 8 and 9 of the *Constitution* (read together with the general prohibition in section 6) of the *Equality Act*, focusing on the provisions in section 9 of the *Constitution*, but ultimately applying the *Equality Act*.⁶¹⁷

The judgment was based on a constitutional subsidiarity concerning the *Equality Act* whereby both parties stated that clause 7 of the will amounted to unfair discrimination against the female descendants.⁶¹⁸ The applicants sought relief from the Constitutional Court to alter the terms of clause 7 of the will.⁶¹⁹ Judge Jafta went back and forth on the constitutional limitation of freedom of testation by indicating that the courts were obligated not to enforce wills and trust deeds that were inconsistent with the *Constitution*.⁶²⁰ Such inconsistencies were to be

⁶¹² *King* (CC) para 124.

⁶¹³ Sections 10 and 25(1) of the *Constitution*; *King* (CC) para 125; See para 2.2.3 above.

⁶¹⁴ *King* (CC) para 126. Also see para 2.2.3 above.

⁶¹⁵ *King* (CC) paras 124, 126; *Moosa v Minister of Justice* [2018] 5 SA 13 (CC) para 18.

⁶¹⁶ *King* (CC) para 126 held that the *Equality Act* influenced the unenforceability of clause 7 of the will by declaring it unlawful.

⁶¹⁷ *King* (CC) paras 89-163. No one may be subjected to unfair discrimination by the State or anyone else according to section 6 of the *Equality Act*.

⁶¹⁸ *King* (CC) para 98: to declare whether discrimination is unfair, discrimination is evaluated by the impact it has on its victims.

⁶¹⁹ *King* (CC) paras 98 and 118.

⁶²⁰ *King* (CC) para 129; Section 172(1)(a) of the *Constitution*.

declared invalid; hence, if the *Constitution* was directly applied, clause 7 would be inconsistent with it and therefore unenforceable.⁶²¹

However, with regard to constitutional subsidiarity, Judge Kentridge in *S v Mhlungu*⁶²² (hereafter *S v Mhlungu*) provided that, whenever a matter could be resolved without infringing the *Constitution*, courts should do so in any civil or criminal case.⁶²³ In *South African National Defence Union v Minister of Defence*⁶²⁴ it was found that, when a case to defend a constitutional right against infringement was pursued, complainants had to depend on the legislation that was passed in order to give effect to that right rather than relying directly on the constitutional provision.⁶²⁵ The concept created a subsidiarity rule, because it prevented the constitutional provision from being directly applied when legislation was passed to give it effect.⁶²⁶

In its application in the *King* (CC) case, the equality provision was used to determine whether clause 7 of the will was unlawful, based on unfair discrimination.⁶²⁷ Three factors were taken into consideration. These created confusion, as is illustrated below:

- (a) Firstly, it had to be determined whether clause 7 of the will included differentiation amongst beneficiaries or discriminatory provisions that were justified or not based on freedom of testation;

⁶²¹ *King* (CC) paras 128-129; The courts have a responsibility to uphold the Constitution, as provided for in s 172(1) read with s 2 of the *Constitution* which, in turn, provides the supremacy clause. Furthermore, s 172(1)(a) of the *Constitution* states that, when a constitutional issue is determined, the court must declare any legislation or conduct that is inconsistent with it unconstitutional to the extent of its inconsistency.

⁶²² 1995 3 SA 867 (CC).

⁶²³ *S v Mhlungu* para 59; Van der Walt 2008 *Constitutional Court Review* 99. Also see Klare 2008 *Constitutional Court Review* 134.

⁶²⁴ 2007 5 SA 400 (CC).

⁶²⁵ *South African National Defence Union v Minister of Defence* paras 51-52; Van der Walt 2008 *Constitutional Court Review* 100.

⁶²⁶ *South African National Defence Union v Minister of Defence* paras 52-53; Van der Walt 2008 *Constitutional Court Review* 100.

⁶²⁷ As mentioned in para 5.2.5.2 above, s 9(4) of the *Constitution* provides that no person may be unfairly discriminated against directly or indirectly, as based on the grounds listed in section 9 (3) of the *Constitution*. Also see *King* (CC) para 129.

- (b) secondly, it had to be determined whether the equality clause limited the testator's freedom of testation in terms of constitutional limitation; and
- (c) lastly, it had to be determined whether the discriminatory provision of excluding women in the testator's 1902 will qualified as unfair discrimination against women and whether it contravened section 8 of the *Equality Act*.⁶²⁸

Each of these is subsequently briefly discussed. The main problem posed by clause 7 was that the respondents agreed that it resulted in unfair discrimination against women. However, freedom of testation should not be limited as it is indirectly protected in the *Constitution*.⁶²⁹ As mentioned in paragraph 2.3.1 above, freedom of testation allows the testator to differentiate amongst his or her beneficiaries and apply conditions on the way in which the assets are to be distributed. However, as indicated, the conditions should not be unlawful, go against public policy, and/or be impracticably vague or impossible to enforce.⁶³⁰ In addition to constitutional and legislative restrictions, the equality clause and the *Equality Act* also places restrictions on freedom of testation.⁶³¹

Judge Jafta stated that differentiation is permissible in a democratic society.⁶³² However, a thin line separates differentiation from discrimination. Pertaining to *King (CC)*, differentiation becomes impermissible when a testamentary bequest violates the rights to equality and dignity under modern South African law.⁶³³ However, differentiation was not challenged in this case, because both parties agreed that clause 7 of the will resulted in unfair discrimination against women,

⁶²⁸ *King (CC)* para 129.

⁶²⁹ As mentioned in paras 2.1 and 2.2 above, South African law protects and acknowledges freedom of testation as a key concept in the law of succession.

⁶³⁰ Jamneck and Rautenbach *The Law of Succession in South Africa* 143; *Syfrets* para 9; *King (CC)* para 23.

⁶³¹ Sections 2 and 9(4) of the *Constitution*; Jamneck and Rautenbach *The Law of Succession in South Africa* 133.

⁶³² *King (CC)* paras 147 and 170.

⁶³³ *King (CC)* paras 147 and 170; Du Toit 2001 *Stellenbosch Law Review* 252. As mentioned, a guide as to whether differentiation is fair or unfair is provided in *Harksen v Lane*; *Syfrets* para 48.

while the respondents argued that freedom of testation should outweigh the unfair discrimination.⁶³⁴

The respondents stated that, in the absence of a legitimate purpose for disinheriting potential heirs, unfair gender discrimination within a private will could be justified under section 36 of the *Constitution* if the respondents argued that the discrimination was fair.⁶³⁵ Furthermore, the respondents indicated that the treatment of private and public testamentary bequests should be treated differently.⁶³⁶ However, based on section 9(3) of the *Constitution*, discrimination had in fact been established on the ground of gender, and the respondents admitted that the discrimination was unfair.⁶³⁷

The next step in the analysis was to assess the equality provision in terms of the constitutional limitation on the testator's freedom of testation. Judge Jafta's ruling was significantly influenced by the equality clause in section 9 of the *Constitution*. The primary issue in his ruling was the extent to which clause 7 violated the *Constitution*.⁶³⁸ The burden of proof rested on the respondents to show that clause 7 did not amount to unfair discrimination against women, which they failed to accomplish.⁶³⁹ In addition, the respondents conceded that clause 7 did constitute unfair discrimination against women.⁶⁴⁰ As a result of that which the respondents admitted, it was necessary to assess the consistency of the matter.⁶⁴¹

The discriminatory provision was based on gender. The clause prohibited female descendants from inheriting their right to the fideicommissary property in the will, gender is one of the grounds listed in section 9(3) of the *Constitution*.⁶⁴² According

⁶³⁴ *King* (CC) paras 9, 17-18, and 98.

⁶³⁵ *King* (CC) para 18.

⁶³⁶ *King* (CC) para 18.

⁶³⁷ Section 9(3) of the *Constitution*; *King* (CC) para 132.

⁶³⁸ *King* (CC) para 129.

⁶³⁹ *King* (CC) para 132.

⁶⁴⁰ *King* (CC) para 132.

⁶⁴¹ *King* (CC) para 132.

⁶⁴² Section 9(3) of the *Constitution*; Currie and De Waal *The Bill of Rights Handbook* 222; *King* (CC) para 131.

to the general principle of subsidiarity, governance should be as near as is feasible to the people, and this is where the *Equality Act* comes into the fray.⁶⁴³

On the basis of the constitutional concept of subsidiarity, it was unnecessary to give the *Constitution* direct horizontal effect in this case, because the *Equality Act* could accomplish the same goal.⁶⁴⁴ The equality clause together with sections 6 and 8 of the *Equality Act* would suffice to determine that clause 7 constituted unfair discrimination, instead of giving effect to and relying on section 9 of the *Constitution*.⁶⁴⁵

5.3 Wilkinson (CC)

Along with *King (CC)*, the *Wilkinson (CC)* ruling represented a turning point in the way in which the *Constitution* and public policy were interpreted and applied in South African private law in general and trusts law specifically.⁶⁴⁶ It conveyed a strong message to those who worked in the trust industry to advise their customers against outright discrimination against possible beneficiaries of trusts.⁶⁴⁷ Additionally, it prioritised children's needs in South African constitutional law jurisprudence.⁶⁴⁸

5.3.1 Legal question before the Constitutional Court

The legal question before the court was whether the words "children", "descendants", "issue", and "legal descendants" in the trust deed exclude adopted children and, if so, whether it amounts to unfair discrimination that will limit the testator's freedom of testation?⁶⁴⁹

⁶⁴³ De Visser 2008 *Local Government Bulletin* 16.

⁶⁴⁴ Du Toit, Harding and Humm 2022 *Stellenbosch Law Review* 506; *King (CC)* paras 143-144.

⁶⁴⁵ *King (CC)* para 131; See para 4.3.2 above. Also see *South African National Defence Union v Minister of Defence* paras 51-52.

⁶⁴⁶ *Wilkinson (CC)* para 1. Also see University of the Western Cape April 2021 www.uwc.ac.za.

⁶⁴⁷ *Wilkinson (CC)* para 1. Also see University of the Western Cape April 2021 www.uwc.ac.za.

⁶⁴⁸ *Wilkinson (CC)* para 1. Also see University of the Western Cape April 2021 www.uwc.ac.za.

⁶⁴⁹ *Wilkinson (CC)* para 23.

5.3.2 Court's decision and reasoning

The Constitutional Court indicated that the interpretation of a trust deed followed the golden rule of interpreting a testamentary provision.⁶⁵⁰ Consideration must be given to the words used by the testator and their actual meaning as well as that which the testator intended.⁶⁵¹ As mentioned in paragraph 2.2 of this study, freedom of testation is embedded in the fundamental rights to dignity, privacy, and property in the *Constitution*, and is not to be regarded as a mere common law principle.⁶⁵²

The Constitutional Court had to interpret the trust deed first in order to determine the testator's intention as to whether or not adopted children were to be excluded.⁶⁵³ It concluded that the testator's intention was to exclude adopted children and this amounted to unfair discrimination.⁶⁵⁴ Therefore, the Court held that the trust deed had to include adopted children as beneficiaries. Consequently, Ms Harper's share had to be divided equally amongst her adopted children.⁶⁵⁵

5.3.3 Interpretation of a testamentary provision that constituted as unfair discrimination in *Wilkinson (CC)*

The difference between the *King (CC)* and *Wilkinson (CC)* cases needs to be briefly outlined. In the former case, the testamentary provision in clause 7 was further found to constitute unfair discrimination against women; it was found further that the clause was inconsistent with the *Constitution* and the *Equality Act* and therefore invalid and unenforceable.⁶⁵⁶ Furthermore, the considerations were based on the provisions of a will and not a trust deed.⁶⁵⁷

⁶⁵⁰ The golden rule is to "ascertain the wishes of the testator from the language used" *Wilkinson (CC)* para 35.

⁶⁵¹ *Wilkinson (CC)* para 35.

⁶⁵² Sections 10, 14 and 25 of the *Constitution* respectively; *Wilkinson (CC)* para 118.

⁶⁵³ *Wilkinson (CC)* paras 14, 15, 36 and 41.

⁶⁵⁴ *Wilkinson (CC)* paras 43, 74, 78 and 98.

⁶⁵⁵ *Wilkinson (CC)* paras 98, 100 and 208.

⁶⁵⁶ *King (CC)*.

⁶⁵⁷ *Wilkinson (CC)* para 76.

In contrast, the deliberation in *Wilkinson* (CC) was founded on the provisions of a trust deed that had a testamentary aspect.⁶⁵⁸ The exclusion in paragraph 6 of the trust deed constituted unfair discrimination against adopted children, which was found to be contrary to public policy and inconsistent with the *Constitution* and, therefore, unenforceable.⁶⁵⁹

5.3.3.1 Application of freedom of testation

In *Wilkinson* (CC), Judge Mhlantla acknowledged that freedom of testation is a fundamental principle in testate succession, and that the testator had the right to dispose his assets in whichever way he wanted.⁶⁶⁰ However, the dominating restriction in *Wilkinson* (CC) was a common law limitation, whereby any testamentary clause that is contrary to public policy is unenforceable.⁶⁶¹

As mentioned in paragraph 2.3.1, public policy is entrenched in the *Constitution*. Judge Ngcobo stated as much in *Barkhuizen v Napier*. Since the rise of constitutional democracy, he averred, public policy and fundamental principles had been firmly anchored in the *Constitution*.⁶⁶²

5.3.3.2 Statutory law limitations

The focus here will be on the way in which the Constitutional Court used section 9 of the *Constitution* as a basis for limiting freedom of testation in terms of a discriminatory bequest in a trust which, it concluded, amounted to unfair discrimination.

As mentioned, *Wilkinson* (CC) is not based on a testamentary bequest in a will but rather on testamentary clauses in a trust deed.⁶⁶³ The testator's interpretation of

⁶⁵⁸ *Wilkinson* (CC) para 76.

⁶⁵⁹ *Wilkinson* (CC) para 98-100.

⁶⁶⁰ *Wilkinson* (CC) para 69; *King* (CC) para 124; Jamneck and Rautenbach *The Law of Succession in South Africa* 151.

⁶⁶¹ *Wilkinson* (CC) para 69; *King* (CC) paras 19 and 98; *Syffrets* para 9 and 23; See para 2.2.1 above.

⁶⁶² *Wilkinson* (CC) para 69; Du Toit 2012 *TECLF* 117.

⁶⁶³ *Wilkinson* (CC) para 76.

the language used in the trust deed excluded adopted children, once more, which resulted in unfair discrimination against them.⁶⁶⁴

Judge Mhlantla provided a brief analysis of the sensitivity around adoption to determine that discrimination was based on the ground of birth.⁶⁶⁵ The exclusion of adopted children appeared to be a differentiation and might even have been a form of discrimination in terms of the child's birth or an equivalent ground like its adoption status.⁶⁶⁶ In this regard, Judge Mhlantla indicated that the differentiation was based on birth, which is one of the grounds for discrimination listed in section 9(3) of the *Constitution*.⁶⁶⁷ Adoption is a process where benefits are provided to disadvantaged groups in order for their needs to be met.⁶⁶⁸ Adopted children are fragile, and they have a history of discrimination.⁶⁶⁹ The *Constitution* protects children in section 28(2), whereby the best interest of a child must be treated with paramount importance in every situation.⁶⁷⁰ Judge Mhlantla stated:⁶⁷¹

Adoption neatly fits the ground of "birth" since one may face discrimination simply because they were not born of their adoptive parents; more on this below. As such, since birth is a listed ground, the discrimination is presumptively unfair.

Therefore, the interpretation of the trust deed or the intention of the testator to exclude adopted children unfairly discriminated against them and was found to be contrary to public policy.⁶⁷²

5.4 Conclusion

The stance of the Constitutional Court in its judgment in *King (CC)* was that although disinheritance and differentiation are allowed, common law, statutory law, and constitutional law limit freedom of testation.

⁶⁶⁴ *Wilkinson (CC)* para 77 indicated that section 9(3) of the *Constitution* provides listed grounds of discrimination including birth.

⁶⁶⁵ *Wilkinson (CC)* para 88-94.

⁶⁶⁶ *Wilkinson (CC)* para 74.

⁶⁶⁷ *Wilkinson (CC)* para 78

⁶⁶⁸ *Wilkinson (CC)* para 90.

⁶⁶⁹ *Wilkinson (CC)* para 90.

⁶⁷⁰ Section 28 of the *Constitution* gives provisions to children's rights. Also see *Wilkinson (CC)* para 91.

⁶⁷¹ *Wilkinson (CC)* para 78.

⁶⁷² *Wilkinson (CC)* para 98.

The first and second objectives of the present chapter were to assess the judgments in both cases as to the way in which freedom of testation had been interpreted. In the *King (CC)* case, the majority judgement by Judge Jafta emphasised that, although freedom of testation was indirectly protected in the Constitution, it was not absolute, and therefore was subject to limitations.⁶⁷³ Furthermore, Judge Jafta in the *King (CC)* case indicated that constitutional rights outweighed freedom of testation, which created an imbalance of freedom of testation against legislation. In *Wilkinson (CC)*, Judge Mhlantla acknowledged that freedom of testation was a fundamental principle in the law of succession.⁶⁷⁴ However, he highlighted the fact that Judge Ngcobo had indicated in *Barkhuizen v Napier* that freedom of testation was limited by common law limitations.⁶⁷⁵

The third objective of the present chapter was to determine the way in which Judge Jafta in *King (CC)* declared clause 7 of the will to be unlawful under the common law limitations.⁶⁷⁶ He directly applied section 8(c) of the *Equality Act*.⁶⁷⁷ Clause 7 contravened section 8 read together with section 6 of the *Equality Act*, and it was found that women were unfairly discriminated against from inheriting the farms on this basis.⁶⁷⁸ It was unlawful and invalid when a testamentary bequest discriminated against someone solely based on his or her gender, and this was indeed one of the grounds listed in section 9 of the *Constitution* for determining discrimination.⁶⁷⁹ According to clause 7, only female beneficiaries were disinherited, which resulted in the Constitutional Court ruling the clause unlawful and invalid.⁶⁸⁰

The fourth objective here was to assess the way in which the testamentary bequest constituted unfair discrimination in *Wilkinson (CC)*. The case focused on the interpretation of the trust deed at the time when the trust was executed, at

⁶⁷³ See para 5.2.3 above.

⁶⁷⁴ See para 5.3.1 above.

⁶⁷⁵ See para 5.3.1 above.

⁶⁷⁶ See para 5.2.5 above.

⁶⁷⁷ See para 5.2.5 above.

⁶⁷⁸ See para 5.2.5 above.

⁶⁷⁹ See para 5.2.5 above.

⁶⁸⁰ See para 5.2.5 above.

which time the law required the donor to expressly state that adopted children were included in the inheritance.⁶⁸¹ Discrimination based on "birth" was prohibited in terms of section 9(3) of the *Constitution*.⁶⁸² Therefore, the trust deed was declared unconstitutional, since it unfairly discriminated against adopted children and was found to be contrary to public policy.⁶⁸³

⁶⁸¹ See para 5.3.1 above.

⁶⁸² See para 5.3.3 above. Due to the discrimination that an adopted child faces as he is not biologically born from his adoptive parents, adoption is included in birth.

⁶⁸³ See para 5.3 above.

6 Conclusion

As mentioned, testamentary bequests are recognised as moral rather than legal dispositions.⁶⁸⁴ Therefore, no one has the right to inherit.⁶⁸⁵ Despite the fact that inheritance is accepted in the South African legal system, limitations are in place regarding spouses and children as well as bequests that discriminate unfairly on the grounds listed in section 9 of the *Constitution*.⁶⁸⁶ Freedom of testation (as mentioned in Chapter 2), is not absolute.

Since the enactment of the *Constitution*, the courts have (in numerous cases) limited freedom of testation but, prior to the *King* (CC) and *Wilkinson* (CC) cases, such interference was confined to discriminatory provisions in testamentary instruments within the public sphere.⁶⁸⁷ However, the Constitutional Court's judgments in *King* (CC) and *Wilkinson* (CC) opened the so-called Pandora's Box on discriminatory bequests in testamentary instruments within the private sphere.⁶⁸⁸

The primary aim of this study was to answer the following research question: under which circumstances may a court limit a testator's freedom of testation in the case of potentially discriminatory provisions in a testamentary instrument within the private sphere? This was answered by addressing the following objectives:

- a) To explain the importance, nature, and scope of freedom of testation in general.⁶⁸⁹

It can be concluded that the essence of freedom of testation stretches beyond the borders of the South African law: it is present in natural law in terms of Locke's theories.⁶⁹⁰ De Waal adopted Locke's view that a testator has the right to dispose

⁶⁸⁴ See paras 2.1 and 2.3 above.

⁶⁸⁵ See paras 2.1 and 2.3 above; *Wilkinson* (CC) para 131.

⁶⁸⁶ See para 2.3.3 above

⁶⁸⁷ See Chapter 3 above.

⁶⁸⁸ See Chapters 4-5 above.

⁶⁸⁹ See Chapter 2.

⁶⁹⁰ See para 2.2 above.

of his or her property as he or she sees fit within the "allowance of laws".⁶⁹¹ In my opinion, the "allowance of laws" in South African law ranges from the *Constitution* to legislation. The recognition of freedom of testation is recognised and is indirectly protected in the *Constitution*, as demonstrated in Chapter 2.2.3 of this study.

b) To differentiate and discuss the interlinkages among the following aspects, as related to the limitation of testamentary freedom, namely bequests that are (a) contra bonos mores; (b) against public policy; and (c) unlawful.⁶⁹²

Despite the fact that freedom of testation is implicitly protected by the *Constitution*, it is nonetheless subject to common law, statutory law, and constitutional law limitations.⁶⁹³ The author described that freedom of testation is limited by common law, whereby a limitation arises when the testamentary bequest is unlawful, goes against public policy, and/or is impracticably vague or impossible to enforce.⁶⁹⁴ The author described how freedom of testation is limited in terms of statutory law by the *Maintenance of Surviving Spouses Act*, *Trust Property Control Act*, *Immovable Property Act*, and the *Pension Funds Act*, amongst others.⁶⁹⁵ Furthermore, the author described the constitutional limitations that limit freedom of testation as provided for *inter alia* by sections 9 and 36 of the *Constitution*.⁶⁹⁶

c) To elaborate on conflicting fundamental rights and freedoms.⁶⁹⁷

As mentioned in paragraph 2.2.3, freedom of testation is indirectly protected in section 25(1) of the *Constitution*.⁶⁹⁸ Once more, however, the principle is subjected to common law, statutory law, and constitutional law limitations.⁶⁹⁹

⁶⁹¹ See para 2.2.2 above.

⁶⁹² See Chapters 2, 3 and 5.

⁶⁹³ See para 2.3 above.

⁶⁹⁴ See paras 2.1 and 2.3.1

⁶⁹⁵ See para 2.3.2 above.

⁶⁹⁶ See para 2.3.3 above.

⁶⁹⁷ See Chapters 3-5.

⁶⁹⁸ See para 2.2.3.1 above.

⁶⁹⁹ See para 2.3 above.

Chapter 3 focused on case law in the public sphere. In the *Syfrets* case, the concept of freedom of testation was challenged against unfair discriminatory provisions based on race, gender, and religion, which are listed as grounds of discrimination in section 9(3) of the *Constitution*.⁷⁰⁰ In the *Emma Smith* case, freedom of testation was challenged against racially exclusive conditions, whereby the court held that the discriminatory provisions against race should be deleted, as provided for in section 13 of the *Trust Property Act*.⁷⁰¹ However, discriminatory provisions against gender were allowed, as the fund was used to benefit South African women.⁷⁰² In the *BOE Trust (SCA)* case, freedom of testation was upheld where the removal of the term “white” was dismissed by the court because the deceased set out certain alternative provisions.⁷⁰³

Chapters 4 and 5 focused on case law in respect of testamentary provisions of a private nature. In Chapter 4, the *King (WCC)*, *Harper (WCC)*, and *Harvey (SCA)* cases were discussed in terms of the ways in which discrimination and freedom of testation were contested in the private sphere. In *King (WCC)*, the court *a quo* based its judgment on the weight of constitutional values against constitutional rights and freedoms.⁷⁰⁴ In all three cases, then, the courts upheld freedom of testation against the conflicting fundamental rights.⁷⁰⁵

In Chapter 5, it was established that freedom of testation was limited in *King (CC)* and *Wilkinson (CC)*. In *King*, Judge Jafta indicated that constitutional rights outweighed freedom of testation.⁷⁰⁶ In the *Wilkinson (CC)* case, the trust deed was declared unconstitutional because it unfairly discriminated against adopted children and was therefore found to be contrary to public policy.⁷⁰⁷

⁷⁰⁰ See para 3.2 above.

⁷⁰¹ See para 3.3.3 above.

⁷⁰² See para 3.3.3 above.

⁷⁰³ See para 3.4.3 above.

⁷⁰⁴ See para 4.2.3 above.

⁷⁰⁵ See Chapter 4 above.

⁷⁰⁶ See para 5.2 above.

⁷⁰⁷ See para 5.3 above.

d) To elaborate on the differences between differentiation, discrimination, and unfair discrimination.⁷⁰⁸

The differences between differentiation, discrimination, and unfair discrimination were found to be important when it comes to establishing whether the exclusion of the female descendants in the *King (CC)* case and of adopted children in the *Wilkinson (CC)* case was justified.⁷⁰⁹

As mentioned in paragraph 5.2.4, no one has the right to inherit because there is no infringement or deprivation of an existing right from excluding a person as a beneficiary.⁷¹⁰ This enables a testator to choose his or her beneficiaries and differentiate between persons by disinheriting certain beneficiaries.⁷¹¹ Differentiation occurs among people and not a category of persons, or it would amount to discrimination.⁷¹² *Harksen v Lane* and the *Equality Act* made provisions to test whether differentiation was fair or unfair.⁷¹³ When differentiation amounts to discrimination, it has to be proven that it is fair with reference to section 36 of the *Constitution*, or unfair under the section 9(3)-listed grounds.⁷¹⁴

In *King (CC)*, the respondents acknowledged that clause 7 amounted to unfair discrimination to the female descendants.⁷¹⁵ In terms of constitutional limitations on freedom of testation, it was established that section 8 of the *Equality Act* limited the testator's freedom and rendered clause 7 of the will invalid.⁷¹⁶ In *Wilkinson (CC)*, the Constitutional Court directly applied the *Constitution* by declaring that the testamentary provision resulted in unfair discrimination based on birth.⁷¹⁷

⁷⁰⁸ See Chapters 2-5 above.

⁷⁰⁹ See Chapters 4-5 above.

⁷¹⁰ See para 5.2.4 above.

⁷¹¹ See paras 2.3.3 and 4.2.3.1 above.

⁷¹² See para 2.3.3 above.

⁷¹³ See para 2.3.3.2 above.

⁷¹⁴ See paras 2.3.3.2; chapters 4-5 above.

⁷¹⁵ See para 5.2.7 above.

⁷¹⁶ See paras 5.2.6-5.2.7 above.

⁷¹⁷ See para 5.3.2-5.3.3 above.

e) To discuss the limitation of fundamental rights.⁷¹⁸

As mentioned, freedom of testation is not absolute.⁷¹⁹ Furthermore, fundamental rights may be limited by means of the application of section 36 of the *Constitution*.⁷²⁰

f) Discuss the limitation of freedom of testation in testamentary instruments of a public nature.⁷²¹

Chapter 3 focused on case law that limited freedom of testament after the *Constitution* was enacted, whereby courts were not reluctant to interfere in public testamentary bequests when public policy was the basis for limiting freedom of testation.⁷²² Firstly, in the public sphere, the court limited freedom of testation in both *Syfrets* and *Emma Smith*.⁷²³ In the *BOE Trust (SCA)* case, the testatrix offered an alternate method of transferring her inheritance to charity in the event that the distribution to the trust could not be made.⁷²⁴ The court upheld freedom of testation over the discriminatory provision of the testamentary bequest.⁷²⁵

g) Discuss the courts' (initial) hesitancy in limiting freedom of testation in testamentary instruments of a private nature.⁷²⁶

King (WCC), *Harper v Crawford (WCC)*, and *Harvey SCA* were discussed in Chapter 4.⁷²⁷ It was found that freedom of testation outweighed the discriminatory provisions of the private wills in these cases.⁷²⁸ However, the Constitutional Court held differently.⁷²⁹

⁷¹⁸ See Chapters 2, 3 and 5 above.

⁷¹⁹ See para 2.3 above.

⁷²⁰ See para 2.3.3.2 above.

⁷²¹ See Chapter 3 above.

⁷²² See Chapter 3 above.

⁷²³ See paras 3.2 and 3.3 above.

⁷²⁴ See para 3.4.3 above.

⁷²⁵ See para 3.4.3 above.

⁷²⁶ See Chapter 4.

⁷²⁷ See Chapter 4 above.

⁷²⁸ See Chapter 4 above.

⁷²⁹ See Chapter 5 above.

h) Discuss the Constitutional Court's ground-breaking judgments in the King (CC) and Wilkinson (CC) cases concerning limiting freedom of testation in testamentary instruments of a private nature with inclusion of a discussion of constitutional subsidiarity.⁷³⁰

In the *King (CC)* case, the Constitutional Court did away with the public/ private divide.⁷³¹ Judge Jafta indicated that although freedom of testation was an important principle in the law of succession, it was not absolute. Therefore, it is subjected to limitations, as described in paragraph 2.3 above.⁷³² Judge Jafta provided that freedom of testation was only to be enjoyed by the testator if the testamentary bequests were executed within the context of laws.⁷³³ Whether or not the executed will was private or public in nature still resorted under the same requirements, whereby freedom of testation was not absolute and the testator's intention limited.⁷³⁴

Judge Jafta stated that the courts had established a difference between private and public trusts.⁷³⁵ The same consequences were incurred by both public and private trust deeds and wills that violated the *Constitution's* provisions or one of its sections.⁷³⁶ However, in terms of constitutional subsidiarity, the common law principle had taken effect: if legislation, such as the Equality Act, was applicable, it would not be necessary to directly apply the *Constitution*.

In the King (CC), the respondents acknowledged that clause 7 amounted to unfair discrimination based on gender.⁷³⁷ Clause 7 was thus deemed to be unlawful under section 8 read with section 6 of the *Equality Act*, given that it contravened section 8.⁷³⁸ In accordance with the common law limitation, bequests that are unlawful, go against public policy, and/or impracticably vague or impossible to enforce will

⁷³⁰ See Chapter 5.

⁷³¹ See para 5.2 above.

⁷³² See para 2.3; *King (CC)* para 147.

⁷³³ *King (CC)* para 148.

⁷³⁴ *King (CC)* para 148. Also see Chapters 2 and 5 above.

⁷³⁵ *King (CC)* para 149.

⁷³⁶ *King (CC)* paras 149-150; See Chapters 2-3 and 5 above.

⁷³⁷ *King (CC)* para 157; See para 5.2.5 above.

⁷³⁸ *King (CC)* para 157; See para 5.2.5 above.

not be enforced.⁷³⁹ Therefore, clause 7 of the will was limited under the common law limitation as it contravened section 8 of the *Equality Act*.⁷⁴⁰ It is insignificant that a testamentary bequest may not be interfered with, because it stems from a private will.

In *Wilkinson (CC)*, the donor's intention for excluding adopted children resulted in the provision amounting to unfair discrimination. The sensitivity pertaining to adoption could also be linked to the sensitivity pertaining to women, as they both belong to previously disadvantaged groups. Since the Constitution is trying to fix the injustices of the past, courts have stepped in by doing away with the public/private divide so as to interfere in private wills as well.

In conclusion: a court may limit a testator's freedom of testation in the private sphere if the disputed testamentary provision (including a provision in a testamentary trust) unfairly discriminates against a category of people on the grounds listed in section 9(3) of the *Constitution*. Furthermore, the Constitutional Court rejected the private/public divide in both *King (CC)* and *Wilkinson (CC)*, so that unfair discriminatory testamentary bequests in the private sphere are also subjected to the same limitations as those in the public sphere. In order to balance freedom of testation against competing rights and values, the courts should take the following into consideration: the testator's intention; in a case where differentiation occurs, determining if it is fair or unfair; the connection of the parties involved in the matter as well as the fair or unfair discriminatory provisions that have a negative effect on the affected party.⁷⁴¹

⁷³⁹ See para 5.2.4 above.

⁷⁴⁰ *King (CC)* para 157; See para 5.2 above.

⁷⁴¹ Du Toit, Harding and Humm 2022 *Stellenbosch Law Review* 526.

Bibliography

Literature

Abduroaf 2020 *Without Prejudice*

Abduroaf M "Limitations on the right to freedom of testation" 2020 *Without Prejudice* 47-48

Bhana 2013 *SAJHR*

Bhana D "The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution" 2013 *SAJHR* 351-375

Botha 2009 *Stellenbosch Review*

Botha H "Human Dignity in Comparative Perspective" 2009 *Stellenbosch Review* 171-220

Chaskalson 2000 *SAJHR*

Chaskalson A "Human Dignity as a Foundational Value of Our Constitutional Order" 2000 *SAJHR* 193-205

Chirwa 2006 *Law, Democracy & Development*

Chirwa DM "The horizontal application of constitutional rights in a comparative perspective" 2006 *Law, Democracy & Development* 21-48

Croucher 2012 *Australian Journal of Legal Philosophy*

Croucher RF "How free is free? Testamentary freedom and the battle between "family" and "property" 2012 *Australian journal of legal philosophy* 37, 9-27

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town)

Davis and Klare 2010 *SAJHR*

Davis DM and Klare K "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 403-509

De Visser 2008 *Local Government Bulletin*

De Visser J "Subsidiarity in the Constitution: Slapstick asymmetry or a 'rights based' approach to powers?" 2008 *Local Government Bulletin* 16-17

De Waal "Testamentary Formalities in South Africa"

De Waal MJ "Testamentary Formalities in South Africa" in Reid K, De Waal MJ and Zimmermann R (eds) *Comparative Succession Law Testamentary Formalities* Vol 1 (Oxford Cape Town) 382-402

De Waal 1997 *Stellenbosch Law Review*

De Waal MJ "The Social and Economic Foundations of the Law of Succession" 1997 *Stellenbosch Law Review* 162-175

De Waal 2017 *Annual Survey of South African Law*

De Waal MJ "Succession (including Administration of Estates)" 2017 *Annual Survey of South African Law* 1137-1158

Du Toit 1999 *Stellenbosch Law Review*

Du Toit F "The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law" 1999 *Stellenbosch Law Review* 232-242

Du Toit 2000 *Stellenbosch Law Review*

Du Toit F "The Limits Imposed upon Freedom of Testation by the Boni Mores: Lessons from Common Law and Civil Law (Continental) Legal Systems" 2000 *Stellenbosch Law Review* 358-384

Du Toit 2001 *Stellenbosch Law Review*

Du Toit F "The Constitutionally Bound Dead Hand - The Impact of Constitutional Rights and Principles on Freedom of Testation in South African Law" 2001 *Stellenbosch Law Review* 222-257

Du Toit 2012 *TECLF*

Du Toit F "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests - A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?" 2012 *TECLF* 97-113

Du Toit 2017 *Manitoba Law Journal*

Du Toit F "Re The Esther G. Castanera Scholarship Fund and Recent South African Judgements on Discriminatory Bursary Trusts" 2017 *Manitoba Law Journal* 141-171

Du Toit, Harding and Humm 2022 *Stellenbosch Law Review*

Du Toit F, Harding M and Humm A "King NNO v De Jager 2021 4 SA 1 (CC): Three Perspectives" 2022 *Stellenbosch Law Review* 501-528

Ferreira and Pretorius 2020 *Obiter*

Ferreira S and Pretorius CJ "Interpretation of a trust deed - *Harvey v Crawford* 2019 (2) SA 153 (SCA)" 2020 *Obiter* 447-460

Hopkins 2001 *De Rebus*

Hopkins K "International law in South African Courts" 2001 *De Rebus* 25-27

Humbly *et al Introduction to Law and Legal Skills*

Humbly T *et al* (eds) *Introduction to Law and Legal Skills* 1st ed (Oxford Cape Town)

Iles 2007 *SAJHR*

Iles K "A fresh look at limitations: Unpacking section 36" 2007 *SAJHR* 68-92

Jamneck and Rautenbach *The Law of Succession in South Africa*

Jamneck J and Rautenbach C *The Law of Succession in South Africa* 3rd ed (Oxford Cape Town)

Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective*

Johnson D, Pete S and Du Plessis M *Jurisprudence: A South African Perspective* 1st ed (Lexis Nexis Durban)

Johnson 2011 *Estate Planning & Community Property Law Journal*

Johnson ID "There's a Will, but No Way - Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It" 2011 *Estate Planning & Community Property Law Journal* 105-126

Kgosimore 2000 *Crime Research in South Africa*

Kgosimore D "The Bill of Rights in the Constitution of the Republic of South Africa and its Application within the Criminal Justice System" 2000 *Crime Research in South Africa* 1-10

Klare 2008 *Constitutional Court Review*

Klare K "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt: Lead essay / response" 2008 *Constitutional Court Review* 129-154

Kok 2002 *SAJHR*

Kok A "Motor Vehicle Insurance, the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act" 2002 *SAJHR* 59-85

Kok 2008 *SAJHR*

Kok A "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform" 2008 *SAJHR* 445-471

Lehmann 2014 *Acta Juridica*

Lehmann K "Testamentary freedom versus testamentary duty: In search of a better balance" 2014 *Acta Juridica* 9-40

Liebenberg 2008 *Acta Juridica*

Liebenberg S "The value of freedom in interpreting socio-economic rights" 2008 *Acta Juridica* 149-176

Locke *Two Treaties of Government*

Locke J *Two Treaties of Government* (1680) available at: <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf> accessed 17 November 2021

Locke 1989 *Population and Development Review*

Locke J "Locke on Parental Power" 1989 *Population and Development Review* 749-757

Loenen 1997 *SAJHR*

Loenen T "The equality clause in the South African constitution: Some remarks from a comparative perspective" 1997 *SAJHR* 401-429

MacDonald *Why Race Matters in South Africa*

MacDonald M *Why Race Matters in South Africa* (Harvard University Press 2006 Cambridge)

Matsemela 2015 *Journal of Law, Society and Development*

Matsemela P "Modern freedom of testation in South Africa: Its application by the Courts" 2015 *Journal of Law, Society and Development* 93-119

Modiri 2013 *PER*

Modiri JM "Race as/and the trace of the ghost: Jurisprudential escapism, Horizontal Anxiety and the right to be racist in BOE Trust Limited" 2013 *PER* 582-614

Mostert and Badenhorst *Property and the Bill of Rights* 3FB4

Mostert H and Badenhorst PJ "Property and the Bill of Rights: Structure of a section 25 inquiry" in *Bill of Rights Compendium* (Lexis Nexis Durban updated October 2014- SI 24) para 3FB4

Muller *et al* 2019 *General Principles of South African Property Law*

Muller G *et al* (eds) *General Principles of South African Property Law* 1st ed (LexisNexis Durban 2019)

Nishihara 2001 *PER*

Nishihara H "The significance of constitutional values" 2001 *PER* 1-16

Olivier, Van den Berg and Strydom *Trust Law and Practice*

Olivier PA, Van den Berg GP and Strydom S *Trust Law and Practice* (LexisNexis Durban) para B19

Pace and Van der Westhuizen *Wills and Trusts*

Pace RP and Van der Westhuizen WM *Wills and Trusts* (LexisNexis Durban Updated November 2019 – SI 23) para A2

Platt 1894 *Political Science Quarterly*

Platt CM "Positive Law and Other Laws" 1894 *Political Science Quarterly* 53-63

Rautenbach 2002 *Journal of South African Law*

Rautenbach IM "Engaging the Text of Section 8 of the Constitution in Applying the Bill of Rights to Law Relating to Private Relations" 2002 *Journal of South African Law* 747-756

Rautenbach 2003 *SALJ*

Rautenbach IM "Overview of Constitutional Court decisions on the Bill of Rights" 2003 *SALJ* 166-193

Rautenbach and Venter *Constitutional Law*

Rautenbach IM and Venter R *Constitutional Law* 7th ed (LexisNexis Durban 2018)

Roux 2013 *De Rebus*

Roux E "Freedom of Testation - Can a person disinherit a spouse?" 2013 *De Rebus* 40-49

Rüfner "Testamentary formalities in Roman Law"

Rüfner T "Testamentary formalities in Roman Law" in Reid K, De Waal MJ and Zimmermann R (eds) *Comparative Succession Law Testamentary Formalities* Vol 1 (Oxford Cape Town) 2-25

Strydom 2012 *Without Prejudice*

Strydom J "Understanding section 25(1) of the Constitution: Property Law" 2012 *Without Prejudice* 70-72

Tladi 2002 *De Jure*

Tladi DD "Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution" 2002 *De Jure* 306-317

University of Cape Town *Chapter Seven: Introduction to the Bill of Rights*

University of Cape Town *Chapter Seven: Introduction to the Bill of Rights* (date unknown) available at:
<https://openbooks.uct.ac.za/uct/catalog/download/30/44/1484?inline=1>
accessed 10 March 2022

Van der Walt 2004 *Southern African Public Law*

Van der Walt AJ "An overview of developments in constitutional property law since the introduction of the property clause in 1993" 2004 *Southern African Public Law* 46-89

Van der Walt 2008 *Constitutional Court Review*

Van der Walt AJ "Normative pluralism and anarchy: reflections on the 2007 term: Lead essay / response" 2008 *Constitutional Court Review* 77-124

Van der Walt *Introduction to the law of property*

Van der Walt AJ *Introduction to the law of property* 7th ed (Juta Cape Town 2016)

Van Staden 2020 *AHRLJ*

Van Staden M "Constitutional Rights and their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa" 2020 *AHRLJ* 485-511

Venter 2001 *PER*

Venter F "Utilizing constitutional values in constitutional comparison" 2001 *PER* 1-22

Venter 2001 *Acta Academica*

Venter P "Early modern conceptions of 'natural law'" 2001 *Acta Academica* 1-39

Wood-Bodley 2007 *The South African Law Journal*

Wood-Bodley MC "Freedom of testation and the Bill of Rights: Minister of Education v Syfrets Trust Ltd NO" 2007 *The South African Law Journal* 687-702

Case law

AB v Minister of Social Development 2016 SA 570 (CC)

Aronson v Estate Hart 1950 1 SA 539 (A)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Bhe v Magistrate, Khayelitsha 2005 1 BCLR (CC)

BOE Trust Ltd 2013 3 SA 236 (SCA)

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)

De Weyer v SPCA Johannesburg 1963 1 SA 71 (T)

Dladla and Another v City of Johannesburg 2018 2 SA 327 (CC)

Emma Smith Educational Fund v University of KwaZulu-Natal 2010 6 SA 518 (SCA)

Ex Parte BOE Trust Ltd 2009 6 SA 460 (WCC)

Ex parte Gitelson 1949 2 SA 881 (O)

First National Bank of South Africa Ltd t/a Westbank v Commissioner, South African Revenue Service 2002 4 SA 768 (CC)

Greyling v Greyling 1978 2 SA 114 (T)

Harksen v Lane 1998 1 SA 300 (CC)

Harper v Crawford 2017 4 SA 30 (WCC)

Harvey v Crawford 2019 2 SA 153 (SCA)

Holomisa v Argus Newspapers Ltd 1996 2 SA 588 (W)

Ismail v Ismail 1983 1 SA 1006 (A)

J W v Williams-Ashman 2020 4 SA 567 (WCC)

Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC)

Khumalo v Holomisa 2002 5 SA 401 (CC)

King v De Jager 2017 6 SA 527 (WCC)

King v De Jager [2021] ZACC 4 (19 February 2021)

Levy v Schwartz 1948 4 SA 930 (W)

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

Moosa v Minister of Justice 2018 5 SA 13 (CC)

NK v Minister of Safety & Security 2005 6 SA 419 (CC)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

Prinsloo v Van der Linde 1997 3 SA 1012 (CC)

Qwelane v South African Human Rights Commission 2021 ZACC 22 (31 July 2021)

Robertson v Robertson's Executors 1914 AD 503

Rylands v Edros 1997 1 BCLR 77 (C)

S v Makwanyane 1995 3 SA 391 (CC)

S v Mhlungu 1995 3 SA 867 (CC)

South African National Defence Union v Minister of Defence 2007 5 SA 400 (CC)

Wilkinson v Crawford [2021] ZACC 8 (16 April 2021)

Legislation

Administration of Estates Act 66 of 1965

Children's Act 31 of 1973

Constitution of the Republic of South Africa, 1996

Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965

Intestate Succession Act 81 of 1987

Pension Funds Act 24 of 1956

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002

Trust Property Control Act 57 of 1988

Maintenance of Surviving Spouses Act 27 of 1990

National Education Policy Act 4 of 2000

Wills Act 7 of 1953

International law instruments

Charter of the United Nations (1945)

Universal Declaration of Human Rights (1948)

Internet sources

Merriam Webster date unknown <https://www.merriam-webster.com>

Merriam Webster date unknown *Dead Hand* <https://www.merriam-webster.com/dictionary/deadhand> accessed 7 September 2021

University of the Western Cape April 2021 www.uwc.ac.za/news-and-announcements.

University of the Western Cape April 2021 *UWC's Professor Francois du Toit features prominently in Constitutional Court case on discrimination against adopted children* <https://www.uwc.ac.za/news-and-announcements/news/uwcs-professor-francois-du-toit-features-prominently-in-constitutional-court-case-on-discrimination-against-adopted-children-and-freedom-of-testation> accessed 8 August 2022