CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 130/19

In the matter between:

DAVID LOUIS AYSCOUGH WILKINSON	First Applicant
AMANDA BRIDGET TRUTER	Second Applicant
and	
GEORGINA ELIZABETH CRAWFORD N.O.	First Respondent
PETER DAVIS N.O.	Second Respondent
(*in their capacities as the duly appointed trustees for the time being of the L J DRUIFF TRUST Registration No. T 1280)*	
ANNE-MARIE VIVIENNE STEVENS	Third Respondent
GEORGINA ELIZABETH CRAWFORD	Fourth Respondent
GERALDINE MARLAND	Fifth Respondent
ANTHONY LEWIN	Sixth Respondent
MASTER OF THE HIGH COURT, CAPE TOWN	Seventh Respondent
RUTH JESSICA DRUIFF	Eighth Respondent
JED MICHAEL DRUIFF	Ninth Respondent
NICOLAS LESTER DRUIFF	Tenth Respondent

PHILLIPA ANN CAMERON Eleventh Respondent

Neutral citation: *Wilkinson and Another v Crawford N.O. and Others* [2021] ZACC 8

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Victor AJ

Judgments: Mhlantla J (majority): [1] to [101]
Majiedt J (dissenting): [102] to [163]
Jafta J (dissenting): [164] to [208]

Heard on: 11 February 2020

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 April 2021.

Summary: Trust Deed — interpretation — freedom of testation — public policy — section 39(2) of the Constitution

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Condonation is granted.

2. The late Mr David Louis Ayscough Wilkinson is substituted by Mrs Jean Vanessa Wilkinson N.O. and Mr Shayne Wilkinson N.O. as the first applicant.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the Supreme Court of Appeal is set aside.
6. The following words in the Trust Deed of the late Mr Louis John Druiff – "children", "descendants", "issue" and "legal descendants" exclude adopted children.
7. The exclusion referred to in paragraph 6 constitutes unfair discrimination against adopted children and, consequently is contrary to public policy and is therefore unenforceable.
8. The adopted children of the late Ms Dulcie Helena Harper, Mr David Louis Ayscough Wilkinson and Ms Amanda Bridget Truter are declared to be capital beneficiaries of a quarter share of the trust capital.
9. The LJ Druiff Trust must pay the costs of this application.

JUDGMENT

MHLANTLA J (Khampepe J, Madlanga J, Theron J and Victor AJ concurring):

Introduction

[1] This matter concerns the interpretation of a trust deed. The trust deed was executed at a time when legislation excluded adopted children from inheritance in terms of a testamentary instrument unless it conveyed a clear intention to include them. It calls upon

this Court to consider the question of unfair discrimination against adopted children and the role of public policy when giving effect to private trusts.[1]

[2] The application is for leave to appeal against the order and judgment of the Supreme Court of Appeal.[2] Before dealing with the law pertaining to this application, it is apposite at this stage to set out its factual background.

Background facts

[3] This application was instituted by the adopted children of the now-deceased Ms Dulcie Helena Harper (Ms Harper). The first applicant was Mr David Louis Ayscough Wilkinson, who is now late. He is represented by his executors. The second applicant is Ms Amanda Bridget Truter. Ms Harper was the only surviving child of the late Mr Louis John Druiff at the time proceedings were instituted in the High Court. The respondents are duly appointed trustees,[3] who include Mr Druiff's biological grandchildren and great-grandchildren.[4]

[4] On 28 January 1953, Mr Druiff executed a notarial deed of trust (Trust Deed).[5] At that time, Mr Druiff had four children, three of whom had their own biological children. One of Mr Druiff's children, Ms Harper, was married, but had no children. Ms Harper averred that during her father's lifetime, she had confided in him about the fact that she had had two miscarriages and was therefore considering adoption. Mr Druiff was aware that she was experiencing difficulties in carrying a baby to full term and had advised Ms

[1] This matter was heard at the same time as *King N.O. v De Jager* [2021] ZACC 4; 2021 JDR 0283 (CC).

[2] *Harvey N.O. v Crawford N.O.* [2018] ZASCA 147; 2019 (2) SA 153 (Supreme Court of Appeal judgment).

[3] The trustees are Georgina Elizabeth Crawford N.O. and Peter Davis N.O.

[4] The grandchildren and great-grandchildren are Ms Anne-Marie Vivienne Stevens, Ms Georgina Elizabeth Crawford, Ms Geraldine Marland, Mr Anthony Lewin, Ms Ruth Jessica Druiff, Mr Jed Michael Druiff, Mr Nicolas Lester Druiff and Ms Phillipa Ann Cameron.

[5] Mr Druiff created the trust "for the benefit of his children and their descendants by reason of love and affection which he bears [for] them".

Harper that she was still young (30 years old at the time) and ought not to make a hasty decision, and should wait to see what the future held.

[5] The relevant clauses of the Trust Deed for purposes of this matter are clauses 4, 5 and 6. In terms of clause 4, the beneficiaries of the trust were Mr Druiff's four children and their children. That clause reads, in relevant part:

> "The trustee or trustees shall stand possessed of the trust fund and shall invest and reinvest the capital of the trust fund, and the net revenue and income derived therefrom, or part thereof, shall either be allowed to accumulate, and the amount so accumulated added to the capital of the trust fund, or the whole of the net income and revenue, or part thereof, shall be applied for the benefit of all or any of the following persons, who may be alive at the time, namely:
>
> (a) Gladys Elizabeth Clark (born Druiff).
> Married without community of property to Robert Bruce Clark.
>
> (b) Nina Dorothy Lewin (born Druiff).
> Married without community of property to Leo Lewin.
>
> (c) Lester Phillip Druiff.
>
> (d) Dulcie Helena Wilkinson (born Druiff).
> Married without community of property to Michael Ayscough Wilkinson.
>
> (e) The child or any children of the said Gladys Elizabeth Clark (born Druiff).
>
> (f) The child or any children of the said Nina Dorothy Lewin (born Druiff).
>
> (g) The child or any children of the said Lester Phillip Druiff.
>
> (h) The child or any children of the said Dulcie Helena Wilkinson (born Druiff).
>
> It shall be entirely at the discretion of the trustees as to how much of the revenue shall be accumulated and how much applied for the benefit of the aforesaid beneficiaries and no beneficiary shall be entitled to dispute the authority of the trustees in the exercise of the discretion hereby conferred upon them.

> The trustees shall have the power in their absolute discretion at any time during the trust period to apply for the benefit of any beneficiary above referred to, part or the whole of the capital of the trust fund."

[6] The Trust Deed gave the trustees the discretion to apply the trust fund for the benefit of the beneficiaries. Upon Mr Druiff's death, this discretionary power would end and the net revenue and income was to be divided equally between his four children and paid to them. If any child had predeceased Mr Druiff, his or her share was to devolve upon his or her descendants *per stirpes*.[6]

[7] Clause 5 regulated the period of the trust and read:

> "If the whole of the capital has not been applied for the benefit of the beneficiaries, as provided in [clause] 4 hereof, the Trust shall remain in force for a period of one year after the death of the said Louis John Druiff."

[8] Clause 6 of the Trust Deed regulated the position following the termination of the trust. It reads as follows:

> "At the expiration of the trust period as hereinbefore provided the trustees shall realise the capital, or balance of capital, and divide the amount so realised equally between the said four children of the said Louis John Druiff. In the event of any child dying prior to the termination of the trust, his or her share shall devolve upon his or her legal descendants per stirpes. If such child has no legal descendants, his or her share shall be divided equally between the remaining children or their legal descendants per stirpes. If at such time there are no children alive and no legal descendants of such children, then the Trustees shall divide the capital between such persons as may be nominated as the heirs in the will of the Donor, or if the Donor has failed to make a will, between the next-of-kin of the said Donor."

[6] Where succession takes place *per stirpes* the estate is divisible not according to the number of persons entitled to succeed, but according to the number of parent heads whom the heirs represent, the share of each parent head being divided among his or her representatives.

[9] The import of clause 6 is that in the event of any child dying before the termination of the trust, his or her share shall devolve upon his or her "legal descendants" *per stirpes*.

[10] On 23 May 1953, approximately four months after the execution of the Trust Deed, Mr Druiff executed a will and also amended clause 5 of the Trust Deed. The amended clause 5 provided the following–

> "[i]f the whole of the capital has not been applied for the benefit of the beneficiaries in [clause] 4 hereof, the trust shall remain in force until the death of the said four children of the donor, namely, as each of the said four children dies, his or her one-fourth share of the capital of the trust shall be paid to his or her descendants per stirpes, in equal shares. If at such time any of the descendants, who is entitled to receive a share of the capital, is under the age of 28 years, such share of the capital shall continue to be held in trust and the revenue thereof paid to such descendant or beneficiary, or to his or her guardian, until he or she attains the age of 28 years, when the capital shall be paid to him or her. If any of the said four children of the donor dies without leaving issue, his or her, one-fourth share shall devolve upon the remaining children and shall form portion of the capital of the trust and be subject to the terms and conditions of the trust."

[11] The import of the amended clause 5 was that, if any of Mr Druiff's children died before the termination of the trust, his or her share would devolve upon his or her "descendants" *per stirpes*. If a child had no descendants, his or her share would be divided equally between the remaining children or their descendants *per stirpes*.

[12] Mr Druiff died in 1953. The effect of his death was that the discretionary power conferred on the trustees ended and the net revenue and income was divided equally between his children and paid to them. What remained was the capital which would be paid to Mr Druiff's grandchildren as each of his children died. Sometime after the death of her father, Ms Harper adopted two children, the late Mr David Louis Ayscough Wilkinson and Ms Amanda Bridget Truter, the two applicants who instituted this application.

Litigation history

High Court

[13] Out of fear that her children would not benefit under the Trust Deed, Ms Harper approached the High Court for relief. She sought a declarator that the words "children", "descendants", "issue", and "legal descendants" as used in clauses 4, 5 (as amended) and 6 of the Trust Deed included her children, notwithstanding that they were adopted. Alternatively, that the Trust Deed be amended in terms of section 13 of the Trust Property Control Act[7] (Trust Act) in order to apply to her children.

[14] The High Court considered the provisions of the Children's Act (1937 Children's Act),[8] which was in force at the time the Trust Deed was executed.[9] This Act contained a proviso that obliged a testator, when bequeathing an asset to an adopted child, to convey a clear intention to do so. On this basis, the High Court concluded that Mr Druiff's omission to expressly include adopted children indicated that he intended to exclude them.[10] It therefore held that only the biological descendants of his children can be capital beneficiaries of the Trust Deed.[11]

[15] The High Court also considered the principle of freedom of testation and the underlying rights it implicated, such as the right to property and dignity.[12] It held that, while giving effect to Mr Druiff's intention may constitute discrimination against adopted

[7] 57 of 1988.

[8] 31 of 1937.

[9] *Harper v Crawford N.O.* 2018 (1) SA 589 (WCC) (High Court judgment).

[10] Id at para 26.

[11] Id.

[12] For these assertions, the High Court relied on *Minister of Education v Syfrets Trust Ltd N.O.* 2006 (4) SA 205 (C) (*Syfrets*); and *BOE Trust Ltd N.O. (in their capacities as co-trustees of the Jean Pierre De Villiers Trust)* [2012] ZASCA 147; 2013 (3) SA 236 (SCA) at para 28.

children, it could not be said that it was unfair discrimination since the right to equality must be weighed against the right to freedom of testation pursuant to section 36 of the Constitution.[13] The High Court also noted that the equality clause does not, in every case, provide a basis for an attack on the validity of a will or trust.[14] With regard to section 13 of the Trust Act,[15] the Court held that it finds no application in this matter since the two jurisdictional facts required are absent.[16] The High Court thus dismissed the application with costs.

Supreme Court of Appeal

[16] The applicants appealed to the Supreme Court of Appeal. Ms Harper died on 10 December 2017, before the hearing of the appeal. She was substituted by the executor of her estate.

[13] The High Court judgment above n 9 at para 33 said the following: "[e]ven if it were found that upon a proper interpretation of the trust deed adopted children are discriminated against as envisaged by section 9(4) of the Constitution, it is not unfair discrimination and one must then undertake the process of weighing up the right to equality against the right of freedom of testation (or, more broadly, the right to dispose of one's property). This process involves the limitation clause in section 36(1) of the Constitution". This statement was made without a finding that there was a law of general application.

[14] Id at para 33.

[15] Section 13 of the Trust Act reads as follows –

> "If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which—
>
> (a) hampers the achievement of the objects of the founder; or
>
> (b) prejudices the interests of beneficiaries; or
>
> (c) is in conflict with the public interest,
>
> the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

[16] High Court judgment above n 9 at para 35.

[17] The Supreme Court of Appeal was split four to one.[17] The majority judgment, penned by Ponnan JA, considered the ordinary or grammatical meaning of "child" or "grandchild" and, relying on *Cohen*,[18] held that the ordinary meaning of "child" includes blood relations only.

[18] The majority also considered the 1937 Children's Act, which was in force at the time of the execution of the Trust Deed. It emphasised that it was clear from the first proviso to section 71(2) of that Act[19] that adopted children were not entitled to any property unless there was a clear intention from the instrument that adopted children were meant to benefit; the test is not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them.[20] The majority took cognisance of the fact that the Trust Deed was drawn up by professional persons and thus, Mr Druiff would presumably have been advised of the need to include adopted children in express terms if he intended for them to benefit.[21] Therefore, the majority held that, despite being aware of the possibility of adoption, Mr Druiff did not manifest an intention to benefit adopted descendants.

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[17] Supreme Court of Appeal judgment above n 2.

[18] *Cohen N.O. v Roetz N.O.* [1991] ZASCA 173; 1992 (1) SA 629 (A).

[19] Section 71(2) reads as follows –

> "Subject to the provisions of section 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent but shall not—
>
> (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 intestate from any relative of his adoptive parent."

[20] Supreme Court of Appeal judgment above n 2 at para 50.

[21] Id at para 51.

[19] The majority also dealt with public policy considerations. It held that public policy is rooted in the Constitution and some testamentary provisions may not pass constitutional muster in light of the equality and non-discrimination imperatives. However, it held that public trusts are judged more strictly than private ones,[22] and this matter concerns what occurs in the private sphere of the donor and is "not manifestly discriminatory".[23] The majority further held that a blunt application of the right to equality could lead to insurmountable practical difficulties.[24] It held that the facts of this application did not concern a trust deed that contains "gratuitously discriminatory provisions of an egregious kind",[25] and it had no juridical basis to rewrite the Trust Deed, as to do so would undermine testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.[26] In sum, the majority held that "although there are cases where the interests of society require a court to interfere on the grounds of public policy, this is manifestly not such a case".[27] The Court also dismissed the claim to vary the terms of the Trust Deed in terms of section 13 of the Trust Act, thus dismissing the appeal with costs.

[20] The minority judgment, penned by Molemela JA, held that the issue of public policy did not arise because the language of the Trust Deed, coupled with the surrounding circumstances, did not reveal an intention to exclude adopted children.[28] It held that the

[22] Id at para 53. The Supreme Court of Appeal notes a scholarly remark, citing at para 63, Thomas "The Intention of the Testator: from the Causa Curiana to Modern South African Law" in Coriat et al (eds) *Inter Cives Necnon Peregrinos: Essays in Honour of Boudewijn Sirks* (Vandenhoeck and Ruprecht, 2014), at 727-38 where it is stated that "the divide between public and private sphere should be the deciding factor if freedom of testation is to be taken seriously."

[23] Supreme Court of Appeal judgment id at para 62.

[24] Id at para 69.

[25] Id at para 70.

[26] Id.

[27] Id.

[28] Id at para 23.

legal fiction created by section 71(2) in which adopted children were deemed to be the "legitimate"[29] children of the adoptive parent could be rebutted if the instrument, read as a whole, revealed a contrary intention.[30] The minority held that the words "child" and "any" are inclusive and constitute a clear pointer to the inclusion of adopted children. Moreover, the term "legal descendants" means that it is highly improbable that a donor would prefer to refer to their existing or future biological grandchildren or great-grandchildren as "legal descendants". The prefix "legal" serves to broaden the classes of beneficiaries to include adopted children.

[21] With regard to background circumstances, the minority held that based on the discussion between Ms Harper and Mr Druiff, there was no reason to consider the latter's advice as a reflection of any aversion towards benefitting adopted grandchildren. In addition, the Trust Deed does not explicitly disinherit any person or class of beneficiaries and that the impugned words are neutral terms.[31] The minority thus concluded that there was no basis for finding that Mr Druiff's manifest intention was to exclude adopted children.

In this Court

[22] Aggrieved by the decision of the Supreme Court of Appeal, the applicants now seek leave to appeal to this Court. The applicants seek a declarator that the words "children", "descendants", "issue", and "legal descendants" (impugned words) include the adopted grandchildren. Related to this and in light of the Supreme Court of Appeal's finding that the impugned words exclude adopted children, the applicants submit that this Court is required to consider whether a court can interpret a trust deed in a manner that is contrary to public policy and that has the effect of discriminating against adopted children in

[29] I use "legitimate" only because it was the term used in the legislation of the time.

[30] Supreme Court of Appeal judgment at para 29. In other words, an intention to exclude the adopted children.

[31] Id at para 31. This can be compared to *Cohen* above n 18 whereby the donor specified "eldest child" right up to the fourth generation.

contravention of section 9 of the Constitution. In the alternative, they ask this Court to vary the Trust Deed in terms of section 13 of the Trust Act so that the impugned words include them.

Issues

[23] The main issue is whether the impugned words in the Trust Deed exclude adopted children. If so, whether that exclusion constitutes unfair discrimination against adopted children on the basis of birth as well as on an analogous ground of adoptive status and is thus contrary to public policy and unenforceable. In order to determine the second question, it will be necessary to consider the pleadings to establish whether the issue of unfair discrimination had been properly pleaded before this Court. Before addressing the key issue, I must first dispose of the preliminary issues, namely, condonation; substitution; and leave to appeal.

Condonation

[24] The application for leave to appeal is late by three months. The applicants explain that after the death of their mother, the litigation was to be funded by her estate. The executor decided not to pursue a further appeal when the Supreme Court of Appeal dismissed their appeal. They wished to bring an application in this Court but lacked financial resources. Their attorneys were subsequently approached by an official of Legal Aid South Africa (Legal Aid). The official indicated that due to the importance of the issue, there was merit in an application for leave to appeal and that Legal Aid would consider funding the application for leave to this Court. The applicants, thereafter, made written submissions to Legal Aid and only in April 2019 were their attorneys granted permission to proceed with the application to this Court. The applicants further submit that the delay has not resulted in any of the respondents being unduly prejudiced as their potential share in the trust is invested in an interest-bearing account, and that the

respondents will benefit from the growth of the investment, should the applicants be unsuccessful in this Court.

[25] The application for condonation is unopposed and the explanation for the delay is reasonable. Furthermore, no prejudice will be suffered by the respondents. Therefore, condonation should be granted.

Application for substitution

[26] On 30 January 2020, this Court was informed of the death of the first applicant, Mr David Louis Ayscough Wilkinson. Shortly thereafter, Ms Jean Vanessa Wilkinson N.O. and Mr Shayne Wilkinson N.O., in their capacities as co-executors of his estate, applied to be substituted as the first applicant. The co-executors stated that they supported the continuation of these proceedings, hence the application for substitution. The respondents did not oppose the application.

[27] In the circumstances, the co-executors have made out a case for substitution and this relief should be granted accordingly.

Leave to appeal

[28] The applicants submit that this matter engages this Court's jurisdiction as it raises constitutional issues that ought to be considered by this Court. These constitutional issues are, first, the High Court and the majority of the Supreme Court of Appeal failed to apply section 39(2) of the Constitution and interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. Second, the consequence of the decision of the Supreme Court of Appeal is that adopted children have been unfairly discriminated against solely on the basis of their birth or status. In addition, the applicants submit that the matter raises arguable points of law. In context, these appear to be the same points that, according to them, ground our constitutional jurisdiction. They go on to submit that these

points are arguable and, in doing so, deal with each of the *Paulsen* factors on whether a point of law is arguable.[32] Based on the outcome I reach, it is not necessary to set out what they say in this regard.

[29] In my view, jurisdiction in this matter cannot be pegged on the basis that it implicates section 39(2) of the Constitution, which concerns the interpretation of legislation. This is because we are concerned with the interpretation of the Trust Deed of a private trust and not legislation. Nevertheless, this matter does engage this Court's constitutional jurisdiction. In addition to the interpretation issue, it concerns the question whether freedom of testation in the context of a private trust impinges upon freedom from unfair discrimination, a right enshrined in the equality clause of the Bill of Rights.

[30] The next hurdle is whether it is in the interests of justice to grant leave to appeal. Since this matter also raises the question whether freedom of testation should yield to equality in the context of a private trust, given the public interest and importance of this Court reaching a decision, it is desirable that leave to appeal be granted. In addition, this Court has never before been called upon to consider the question whether the exclusion of adopted children from benefiting under a testamentary instrument constitutes unfair discrimination against those children on the basis of birth as well as on an analogous ground such as adoptive status. There are also prospects of success. Therefore, leave to appeal must be granted. Thus it becomes unnecessary to say anything further about jurisdiction and leave to appeal on the basis of section 167(3)(b)(ii) of the Constitution (i.e. what we loosely call "general jurisdiction"). It is especially so because the points of law relied upon appear to be the same as those that found constitutional jurisdiction.

[32] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 23.

Merits

Applicants' pleaded case

[31] When determining issues on appeal, it is imperative to consider the pleadings. Ordinarily, a litigant's case must be pleaded in the founding papers and not for the first time in argument.[33] This Court has explained that this requirement is necessary to give notice to the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case.[34] In the founding papers in this Court, the applicants' rebuttal of the Supreme Court of Appeal's judgment is primarily based on the minority judgment's reasoning, namely that the core issue is one of interpretation of the impugned words in light of Mr Druiff's intention. The arguments advocating for the development of the common law based on public policy considerations were raised primarily in the applicants' written submissions.

[32] However, the general rule that a litigant must make out its case in its founding affidavit, is subject to the following exception, which was set out in *My Vote Counts*, where this Court said:

> "a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party."[35]

[33] In applying the above to these facts we must first consider whether the point is legal in nature. The development of the common law and public policy considerations where there is alleged unfair discrimination is manifestly a legal issue, as opposed to a factual

[33] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 177.

[34] *Prince v President, Cape Law Society* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22. This was said in the context of a pleaded case in respect of a constitutional challenge but would apply in respect of all pleadings.

[35] *My Vote Counts* above n 33 at para 177.

one. Second, we must consider whether the point was foreshadowed in the pleaded case. It clearly was. The applicants say in their founding affidavit that an adjunct question to the interpretation issue is "whether [a] court can interpret a Trust Deed in terms of archaic principles which today would be contrary to public policy and would not pass [c]onstitutional muster". This can be read as an indication that the applicants were laying the foundation for a public policy argument in addition to the interpretation argument. The third factor to consider is whether the respondents would be prejudiced should a determination be made by this Court in respect of the belated point.[36] The respondents extensively argued the merits of the public policy issue. Their contention is that the submissions in that respect fall to be dismissed on the grounds that, when balanced against the right to freedom of testation, public policy does not require that discrimination in private wills, unlike public charitable trusts, be outlawed. In addition to this, the public policy argument was pleaded before the High Court,[37] and the majority judgment of the Supreme Court of Appeal dealt extensively with public policy, unfair discrimination and freedom of testation considerations.[38] Therefore, it cannot be said that the respondents are prejudiced by the argument only being expanded upon in the written submissions before this Court.

[34] Therefore, although the primary case pleaded by the applicants in their founding papers was mainly based on the interpretation argument, I am satisfied that the request for development of the common law in light of public policy considerations was sufficiently foreshadowed therein as it was identified as an adjunct issue. I now proceed to consider the merits of each of the main issues in this matter.

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[36] The respondents submit that the development of the common law was never pleaded and the applicants' "entire case, as pleaded rested solely on the interpretation argument".

[37] High Court judgment above n 9 at paras 10 and 13-4. Supreme Court of Appeal judgment above n 2 at para 4 noted that the public policy argument was pleaded before the High Court.

[38] Supreme Court of Appeal judgment above n 2 at paras 51 to 71.

Interpretation of the Trust Deed

[35] The golden rule of interpretation of testamentary instruments is to "ascertain the wishes of the testator from the language used".[39] As a general rule, words and phrases must be given the meaning they had at the time the testamentary instrument was made.[40] It is thus imperative to consider what the words used by the testator mean or what the testator meant by using the words.[41]

[36] The requisite starting point is to consider whether Mr Druiff intended the impugned words "children", "descendants", "issue" and "legal descendants" to include adopted children. In order to do so, it is imperative to grapple with the interpretation of the impugned terms as used by the testator at the time the will and Trust Deed were executed.[42] This will entail a consideration of the significance, if any, of the use in clause 6 of the Trust Deed of the term "legal descendants": does the use of that term indicate a clear intention

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[39] *Robertson v Robertson's Executors* 1914 AD 503 at 507.

[40] Corbett et al *The Law of Succession in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2001) at 457. See also *Greeff v Estate Greeff* 1957 (2) SA 269 (A) at 275C-D in which it was held that, words and phrases used by the testamentary document must be given the meaning which they bore at the time the will was executed.

Corbett et al note at 36 and 458 respectively that "[a]s the will takes effect only on the date of the testator's death the will is said to speak from the date of death" and "a will is ambulatory and speaks from the time of the testator's death, the latter date may have to be looked to in order to ascertain what a word includes".

However, in *Johnstone's Executrix v Master, Supreme Court* 1919 TPD 112 at 115 it was held by Mason J that:

> "[T]he words of the will are to be construed in accordance with their meaning at the period when the will was made, but that the operation and effect of the will is determined by the law in force at the time of the testator's death."

[41] Corbett et al id at 457.

[42] *Bothma-Batho Transport (Edms) BpK v S Bothma and Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) at para 12 where it was held that not only should the literal meaning be given weight to, but the words should be considered in light of "all relevant and admissible context, including the circumstances in which the document came into being." In *Sea Plant Products Limited v Watt* 2000 (4) SA 711 (C) at 720G Van Heerden J held that "the point of departure in interpreting a trust deed is therefore the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole."

In *Moosa v Jhavery* 1958 (4) SA 165 (N) at 169D-E Caney J held:

> "In my opinion the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time which must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention."

to include adopted children? If not, and they are excluded, the next consideration will be to establish when vesting occurred; this is relevant to determine whether the law precludes effect being given to the testator's intention. Finally, if it is found that the will does not convey a clear intention to include adopted children, it will be necessary to consider whether this Court should give effect to these testamentary wishes or whether they are contrary to public policy as infused with constitutional values and thus unenforceable.

[37] The natural starting point then, has to be to determine the meaning of the words at the time they were written. But before doing so, I must consider the legislation that was in force when the Trust Deed was executed and how adopted children were catered for in that legislation.

The 1937 Children's Act

[38] The legislation that was in force when the Trust Deed was executed was the 1937 Children's Act. The respondents rely on that Act and the amended clause 5 and submit that because the Trust Deed was executed before the adoption of the late Ms Harper's children, the adopted children could not be entitled to any property, unless the intention to devolve the property upon them was clearly conveyed by the testator. The respondents submit that the intention and meaning of a trust deed are to be discerned in light of the surrounding circumstances at the time of its execution. Subsequent events, including statutes, cannot be used to alter the original intention. The respondents also contend that Mr Druiff had professional assistance and therefore could have clearly conveyed an intention to include adopted children had he wanted to.

[39] The relevant provision is section 71(2), which provided:

> "Subject to the provisions of section 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 parent."

[40] Section 71(2)(a) pertinently excluded adopted children from entitlement to any property devolving upon the children of the adoptive parent by virtue of, among other things, a testamentary instrument executed before the date of adoption, unless the instrument clearly conveyed the intention that the property shall devolve upon an adopted child. The 1937 Act was repealed and replaced by the 1960 Children's Act.[43] The provisions of section 74(2) of the 1960 Act were, for practical purposes, identical to those in section 71(2) of the 1937 Act.[44] The 1960 Children's Act was repealed by the Child Care Act.[45] Section 20(2) of the Child Care Act, which is otherwise couched in identical terms to those of the earlier enactments, omits the proviso excluding adopted children from inheriting unless clearly provided for.[46] Therefore, statutory limitations on inheritance by

[43] 33 of 1960 (1960 Children's Act).

[44] Section 74(2) of the 1960 Children's Act reads as follows –

> "(2) Subject to the provisions of section 82, 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 that property shall devolve upon the adopted child;
>
> (b) inherit any property *ab intestatio* from any relative of his adoptive parent."

[45] 74 of 1983.

[46] Section 20(2) of the Child Care Act reads as follows –

> "An adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage."

adopted children were (and remain) omitted. The current Children's Act[47] follows the approach of the Child Care Act and provides in section 242(3):

> "An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adoptive child."

[41] The purpose of the 1937 and 1960 provisos was to ensure that the deeming provisions created by the Acts would not encroach on the inherent bias favouring inheritance by blood relations only.[48] Therefore, the default approach was the exclusion of adopted children from a beneficiary class such as "children" or "descendants" unless there was a clear intention to include them.

[42] Two key cases offer guidance on the proviso. *Boswell*[49] centred on the proper interpretation of the words "zonder een kind of kinders na te laten" (without leaving a child or children) and the effect that section 74(2) of the 1960 Children's Act had on such an interpretation.[50] A clause in the will provided that if one or more of the legatees were to die without leaving a child or children, the inherited land or lands of the deceased would devolve on the other children or their legal descendants, under the same conditions. One of the legatees passed away and did not bear any children, but was survived by a legally adopted son.[51]

[43] The respondent in that matter relied on the legal fiction created by section 74(2) of the 1960 Children's Act which stipulated that "an adopted child for all purposes whatsoever

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[47] 38 of 2005.

[48] Murray "Law of Succession (Including Administration of Estates)" *Annual Survey of South African Law* (1975) 266 at 291.

[49] *Boswell v van Tonder* 1975 (3) SA 29 (A).

[50] Id at 33.

[51] Id.

by law shall be deemed to be the lawful child of the adoptive parents".[52] The Appellate Division held that section 74(2) of the 1960 Children's Act expressed the consequences of adoption and did not determine how testamentary documents ought to be interpreted.[53] In interpreting section 74(2), the Appellate Division made the following findings: (a) the Legislature did not intend to interfere with the freedom of the testator to dispose of his property as he wished;[54] (b) the deeming provision, which provided that an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent, did not embody a rule of interpretation applicable to all testamentary trusts, namely a rule that words such as "children" or "descendants" appearing in those instruments were not to bear their ordinary meaning but a wider meaning which included an adopted child;[55] (c) had the Legislature intended to make such a rule, one would have expected a provision to that effect, in terms similar to those of section 13(2) of the English Adoption Act, 1950;[56] (d) that in contrast to the relevant provisions of the English Adoption Act, section 74(2) did no more than describe the consequences of an adoption;[57] and; (e) the presumption in favour of the operation of such fiction could be displaced if by applying the ordinary rules of interpretation a contrary testamentary intention appeared.[58] This led the court to conclude that, as a result of section 74(2) of the Children's Act, the will did not grant any rights in respect of the adopted child.[59]

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[52] Id at 36A and G-H.

[53] Id at 38G-H.

[54] Id at 37.

[55] Id at 39B.

[56] Id at 38E-F. This section in the English Adoption Act read as follows –

> "In any disposition of real or personal property made, whether by instrument *inter vivos* or by will (including codicil) after the date of an adoption order -
>
> (a) any reference (whether express or implied) to the child or children of the adopter, shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person..."

[57] Id at 38G-H.

[58] Id at 40F.

[59] Id at 36H-37A.

[44] In *Cohen*, the issue was whether the testators intended to include an adopted child within the meaning of "eldest child". The Appellate Division followed the principles laid down in *Boswell*. It held that once that intention has been ascertained, it becomes necessary to consider the 1937 Children's Act and the Child Care Act (and for our purposes the current Children's Act) when considering whether they operate in a manner that precludes the intention being given effect to.[60] In coming to its decision on the first question, the Appellate Division said that the will in question appeared to have been prepared by a professional person at a time when the 1937 Children's Act was operative.[61] Thus, the Appellate Division inferred from this that the testator would have been informed of the necessity to expressly include adopted children if this was the intention.[62] That Court noted that the effect of section 71(2) of the 1937 Children's Act was that:

> "No child adopted after the execution of an 'instrument' could inherit property devolving on any child of his adoptive parent under such instrument unless it 'clearly conveys the intention that the property shall devolve upon the adopted child'."[63]

[45] When the Appellate Division turned to the issue of the deeming provision of the Child Care Act, it held that the legal fiction created therein did not alter what was held in *Boswell* and the fiction must give way if the scheme of the will does not clearly convey an intention to include adopted children as beneficiaries.[64]

[46] I have read the judgment of my brother Jafta J (third judgment) and have considered the interpretation he gives to section 71(2) of the 1937 Children's Act. He concludes that the proviso does not apply in this instance. This is because, as he understands it, for the

[60] *Cohen* above n 18 at 39.

[61] Id at 640.

[62] Id.

[63] Id.

[64] Id at 640A-C.

proviso to apply, the testamentary instrument must not only be executed before the date of the order of adoption but the relevant property must devolve on the biological children of the adoptive parent and, absent biological children (as was the case with Ms Harper), the proviso does not apply and adopted children are free to inherit.[65]

[47] I do not interpret the section this way. Section 71(2) starts by confirming that an adopted child shall, for all intents and purposes, be deemed in law to be the "legitimate"[66] child of the adoptive parent. The effect of this deeming provision was that an adopted child like a biological child was, in law, the child of the adoptive parent. Following this introduction to the section, subsection 71(2)(a) then provides that notwithstanding the deeming provision, in respect of a testamentary instrument concluded before a child has been lawfully adopted, that child shall not be entitled to any property devolving on "any child" of the adoptive parent unless the instrument conveys a clear intention that adopted children are entitled to benefit.

[48] As I read it, owing to the deeming provision, the term "any child" includes both biological and adopted children. I read the proviso to mean that if a testamentary instrument provides that property will devolve upon a child or children, the property will devolve upon an adopted child or children only if the instrument conveys a clear intention that this be so. This is the case whether the adoptive parent only has adopted children. The proviso intended to make it clear that for purposes of interpreting a testamentary instrument (that was concluded before any lawful adoption had occurred) terms such as "child" did not include adopted children (although for all other purposes they would), unless it was clearly indicated that such terms were intended to include them. If the parent had only adopted children (like Ms Harper for example) and the testamentary instrument was concluded before their adoption and failed to indicate a clear intention that adopted children

[65] Third judgment at [198] to [201].

[66] Again, I use "legitimate" only because it was the term used in the legislation of the time.

must inherit or to include them in terms such as "child", the disposition would fail. Of course, if the testamentary instrument was concluded after the children were adopted and words such as "child" were used, the proviso would not apply to them.

Meaning of the impugned words

[49] The impugned words can be found in clause 4, the amended clause 5, and clause 6 of the Trust Deed. The three clauses are inconsistent in how they use the impugned words. Clause 4, amongst other things, sets out the beneficiaries of the trust and provides that the "child" or "children" of the beneficiaries may benefit under the trust. On the date of Mr Druiff's death, the discretionary powers of the trustees would fall away and the income was to be divided equally and paid to the four children. The amended clause 5 regulates the period of the trust and is the provision that appoints capital beneficiaries. It provides that the trust shall be in force until all four of Mr Druiff's children have died, and that as each child dies, his or her share of the capital would be paid to his or her "descendants". It also provides that if any of the four children dies without leaving "issue" his or her share shall devolve upon the remaining children. Clause 6, which regulates the termination of the trust, provides, inter alia, that in the event of any child dying before the termination of the trust, his or her share shall devolve upon his or her "legal descendants" *per stirpes*.

[50] Two of the clauses, that is, clause 4 and the amended clause 5, refer to "children", "issue" and "descendants". There is no express mention in the Trust Deed of adopted grandchildren. The terms "descendant" and "child", when the proviso applied, were held in *Boswell* and *Cohen* to refer to blood relations only. The term "issue" has been held to be synonymous with the term "children".[67] It follows that clause 4 and the amended clause 5 of the Trust Deed do not convey a clear intention to include adopted grandchildren as beneficiaries. At the time of execution of the Trust Deed, Mr Druiff was aware that his

[67] See *Ex parte MacDonald* 1929 WLD 23 and *Executor Estate Jackson v Myers* 1940 CPD 600.

daughter was considering adoption, yet he did not convey a clear intention that adopted grandchildren could benefit under the trust.

Interpretation of "legal descendants"

[51] Clause 6, by contrast, refers to "legal descendants". Assuming that the term "descendant", like "child", did not go beyond blood descendants or blood relations, one must consider whether the qualifier added in clause 6, which specifies that "legal descendants" will benefit, evinces a clear intention to include adopted children. The third judgment agrees with the applicants that the term "legal descendants" includes adopted children.

[52] As I understand it, the third judgment reasons that, following Ms Harper's death in 2017, the amended clause 5 of the Trust Deed would no longer be relevant to the question whether adopted children were to inherit under the Trust Deed. This is because, as the last of Mr Druiff's four children, her death triggered clause 6.[68] The third judgment correctly posits that the term "legal descendants" is used in clause 6 while it is not used in clause 4 and the amended clause 5 – there, only the words "children", "descendant" and "issue" are used. The third judgment is of the view that the term "legal descendant", as used in clause 6, indicates a change of intention in favour of adopted children, and the term "legal" cannot be used to describe one's biological descendants, therefore it must be understood to describe someone whose relationship with the parent is sourced from a legal process.[69]

[53] The Supreme Court of Appeal in *Naude*[70] identified adoption as:

[68] Third judgment at [188].

[69] Id at [179].

[70] *Naude v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA).

> "[T]he *legal process* through which the rights and obligations between a child and its natural parent or parents are terminated, and a new parental relationship enjoying full legal recognition is created between the child and its adoptive parent or parents. . . [And the child was deemed as having been] born of a lawful marriage."[71]

[54] Therefore, the inclusion of a "lawful" descendant would arguably include both children born in a lawful marriage (as opposed to those born to unmarried parents) and adopted children. For both, a legal (hence "lawful") process is required in creating the relationship that results in the child concerned being the child of the parent concerned. It is therefore plausible that the term "legal descendants" as used in clause 6 could encompass biological and lawfully adopted children. That effectively makes the term "legal descendants" neutral.

[55] However, when one considers section 71 of the 1937 Children's Act in its totality, the section itself speaks to the effect of adoption and in particular reads that an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent but shall not be entitled to any inheritance unless there is a provision in the will or trust deed that indicates a clear intention for that child to inherit. Therefore, reading "legal descendant" to be the inclusion, as required by the proviso, would neglect the fact that such "lawfulness" is effectively created by the same provision. Therefore, as I see it, section 71(2) requires the testator to do something that is substantially more for the adopted children to be included. The point remains: does what has been expressed in the instrument sufficiently evince a clear conveyance of an intention for the property to devolve upon an adopted child? To my mind, "legal descendants" does not do the trick.

[71] Id at 548-9.

Interplay between clauses 4, 5 and 6

[56] As discussed above, clauses 4 and 5 on their own do not evince a clear intention to include adopted children. Even if we accept, as the third judgment does, that the term "legal descendants" in clause 6 evinces a clear intention to include any descendants who became descendants through a legal process (including adopted children), there are inconsistencies between the amended clause 5 and clause 6 that render the interpretation of the Trust Deed unclear *vis-à-vis* the intention to include adopted children. On the one hand, the amended clause 5 does not refer to "legal" descendants at all and provides that the trust would remain in force until the death of all four children and as each child dies, his or her share would be paid to his or her "descendants". Clause 6 on the other hand, does not only regulate what should happen once the Trust Deed has terminated (i.e. once all four children had passed), but specifically provides that "in the event of a child dying prior to the termination of trust his or her share shall devolve to his or her 'legal descendants'". These two provisions are therefore contradictory insofar as they both regulate the consequences of the death of any of the original four children. It is unclear when a child's share of the trust property should devolve to their "descendants" in terms of the amended clause 5 or their "legal descendants" under clause 6. Another interesting point is that although clause 6 is titled "Termination of Trust", it nonetheless attempts to regulate how the property should devolve in the event of a child dying before the termination of the trust.

[57] It is noteworthy that the amended clause 5 was incorporated into the Trust Deed approximately four months after the Trust Deed (including clause 6) was executed. It was therefore included in the Trust Deed with full knowledge of the provisions and language used in the existing clause 6. The decision not to align the conflicting provisions adds to the lack of clarity in the Trust Deed in respect of the intention to include adopted children. Alternatively, clause 6 was rendered redundant by the introduction of the amended clause 5.

[58] Further, clause 6 would only be applicable to the legal descendants of the last dying child (as the trust would only terminate upon their death), and not to the other three children's legal descendants.

[59] In order for there to be a clear intention, the wording used must be free from obscurity or ambiguity. Taking into account the testamentary instrument as a whole, the inconsistencies between clause 4, the amended clause 5 and clause 6 and the oddity of a different regime applying to the descendants of the last dying child, it cannot be said that the phrase "legal descendant" in clause 6 conveys a *clear* intention to include Mr Druiff's adopted grandchildren.

Vesting

[60] Another potential route to avoid the application of the proviso is to circumvent the application of the 1937 Children's Act altogether by considering: (a) whether the rights vested upon the death of Ms Harper and not on Mr Druiff's passing; and (b) if this is so, whether one considers the statutes in existence at the time of Ms Harper's death (that is, the current Children's Act that does not contain the proviso).

[61] As will be recalled, Mr Druiff's trust was entirely discretionary up until the time of his death. This therefore means that the beneficiaries (both the children and the grandchildren) had no vested rights and as such any income or capital that they may receive was determined purely by the discretion of the trustee(s). Further, it is crucial to note that the Trust Deed made provision for two main types of beneficiaries: "income" beneficiaries referring to the children of the testator and "capital" beneficiaries being the grandchildren. It is common cause that the trust's discretionary nature ended with the death of the donor; at that point the children had a vested right to the income. What is in dispute, however, is the stage at which the grandchildren's rights vested.

[62] It is accepted that vesting, when the beneficiary becomes the holder of a right, takes place depending on the intention of the testator as indicated in the testamentary document.[72] There is a presumption in favour of immediate vesting,[73] and thus prima facie that interest would vest immediately upon the testator's death.[74] However, a testator may postpone it to another moment after their death. Vesting comprises of "two sub-moments, namely *dies cedit*, the time when a beneficiary obtains a vested right to claim delivery of the bequeathed benefit unconditionally, and *dies venit*, the time at which the beneficiary's right to claim delivery of the benefit becomes enforceable."[75] Put differently, "an inheritance or other interest in a deceased estate vests in the beneficiary when the right thereto has become unconditionally fixed and established in the beneficiary".[76] South African law is clear that vesting accords with *dies cedit*, in terms of Roman-Dutch law.[77]

[63] The applicants submit that the Supreme Court of Appeal and the High Court neglected developments in public policy, regarding the laws concerning adopted children, and failed to recognise that it evolves over time[78] pursuant to the values of the Constitution.[79] Further, the appropriate time to interpret the Trust Deed, in consideration of the applicants' status, is the present time – since the amended clause 5 stated that the Trust Deed would remain in force until the death of all four of Mr Druiff's children, which would then see a quarter of the share of the capital paid to his descendants *per stirpes*. The

[72] *Smith v Estate* 1949 (1) SA 534 (A) at 544; *Wasserman v Sackstein* 1980 (2) SA 535 (O) at 540D-E; and *Webb v Davis* [1998] ZASCA 10; 1998 (2) SA 975 (SCA) at 981H-I.

[73] Corbett et al above n 40 at 510 see fn 26. See also *Webb* id at 993B-C.

[74] *Estate Cato v Estate Cato* 1915 AD 290 at 305-6.

[75] Jamneck et al *The Law of Succession in South Africa* 2 ed (Oxford University Press, Cape Town 2012) at 134.

[76] It is useful to consider the distinction between *dies cedit* and *dies venit* which was considered in *De Leef Family Trust v Commissioner for Inland Revenue* [1993] ZASCA SA 46*;* 1993 (3) SA 345 (A) at 356 where it was stated that *dies cedit* was described as the moment the right is due and owing; *dies venit* on the other hand is when 'the time for enjoyment has arrived and delivery or transfer of its subject matter may be claimed', in other words: when the right becomes enforceable.

[77] Cameron et al *Honoré's South African Law of Trusts* 5 ed (Juta & Co Ltd, Cape Town 2002) at 556-7.

[78] *Syfrets* above n 12 at para 24.

[79] *BOE Trust Ltd* above n 12 at para 11**.**

applicants submit that on a purposive interpretation of the current Children's Act, it should be applied retrospectively and that public policy at the time of vesting should prevail.

[64] In this matter, *dies cedit* occurred in 1953 on the death of Mr Druiff and *dies venit* was postponed until the death of each of his four children. For present purposes, *dies venit* occurred in December 2017 when Ms Harper passed away.

[65] The applicants' argument is without merit. Vesting cannot save their case since the interpretation question needs to have regard to the law at the time of drafting and execution in order to ascertain the testator's wishes and the meaning of the impugned words – not at the time of vesting. The law at the time of vesting is relevant only to consider whether there is a law that precludes giving effect to the testator's intention. In *Cohen*, it was stated that effect must be given to the wishes of the testators unless that is precluded by statute or common law.[80] It follows that the applicants were excluded from benefiting under the Trust Deed.

[66] Now that it has been established that the Trust Deed cannot be interpreted to include Mr Druiff's adopted grandchildren as beneficiaries, I will consider, as was pleaded by the applicants, whether this interpretation discriminates against adopted children in a manner that is contrary to public policy and therefore unenforceable.

Is the Trust Deed contrary to public policy?

[67] The applicants submit that the interpretation of the Trust Deed by the High Court and Supreme Court of Appeal infringes their constitutional rights, in particular, the right to equal treatment as enshrined in section 9 of the Constitution. They emphasised that equal treatment has been recognised by this Court in *Van Heerden* as the bedrock of our

[80] *Cohen* above n 18 at 638-9.

constitutional democracy.[81] They submit, that the High Court and Supreme Court of Appeal failed to interpret the legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights, and the interpretation of the provision discriminates against adopted children on the basis of their birth and status, thus contravening section 9 of the Constitution.[82] Discrimination on that basis impairs their fundamental human dignity. They submit that adopted persons have suffered from past patterns of disadvantage, and this is evidenced by the Legislature's intervention.

[68] The respondents submit that the applicants cannot rely directly on the Bill of Rights, in particular, the alleged violations of section 9(3), due to the non-retrospectivity rule. They challenge the applicants' failure to address the development of the common law pursuant to section 39(2) of the Constitution. They further maintain that there is no right

[81] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 22 (*Van Heerden*). The applicants rely specifically on the following dictum in *Van Heerden* –

> "The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."

[82] In terms of section 9 of the Constitution –

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

to inherit and that upon balancing fundamental rights, freedom of testation (as informed by the constitutional rights to property, privacy and dignity) does not rank lower than equality.

[69] It is trite that freedom of testation is a central principle of testate succession and testators are permitted to dispose of their assets freely, except insofar as the law places restrictions on this freedom.[83] One of these restrictions is that clauses in testamentary instruments that are contrary to public policy are unenforceable.[84] This restriction limiting the principle of freedom of testation existed before the enactment of the Constitution and was inherited from Roman Law.[85] Since the advent of the Constitution, however, public policy is informed by the Constitution and its ingrained values.[86] The Constitution is therefore our starting point in determining the content of public policy. And, based on the need to give meaning and effect to all rights in the Constitution equally, it is perspicuous that several balancing factors must be considered by a court in determining whether a testamentary provision is contrary to public policy.

[70] Freedom of testation itself is constitutionally protected as it implicates the rights to property, dignity and privacy.[87] This Court has acknowledged that freedom of testation "is

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[83] De Waal and Schoeman-Malan in *Law of Succession* 5 ed (Juta & Co Ltd, Cape Town 2015) at 3. This restriction has been applied to trusts in several instances: see for example, *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) (*Emma Smith*), *Syfrets* above n 12 and *BOE Trust* above n 12.

[84] *Syfrets* above n 12 at para 23; and *Aronson v Estate Hart* 1950 (1) SA 539 (A); [1950] 2 All SA 13 (A) at 555-60.

[85] *Levy N.O. v Schwartz N.O.* 1948 (4) SA 930 (W) at 937.

[86] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 28. Ngcobo J stated that—

> "Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law."

[87] In respect of the right to property and dignity, the Court in *Syfrets* above n 12 at para 18 noted in an obiter statement that freedom of testation "forms an integral part of a person's right to property, and must therefore be taken to be protected in terms of section 25." In *BOE Trust* above n 12 at para 27 the Supreme Court of Appeal held stated that –

fundamental to testate succession".[88] Therefore, freedom of testation is of significant importance in any public policy analysis and the testator's common law and constitutional rights must be given due regard in any balancing exercise.

[71] The respondents' contention that the applicants cannot rely on the equality clause and the public policy of today due to the "non-retrospectivity rule" is misplaced. Public policy is determined or measured as it is at the time that the testamentary instrument, or any provision therein, is enforced, not the point at which it is executed.[89] To find otherwise would mean that a litigant could only vindicate constitutional rights for conduct that occurred after the commencement of the Constitution. This is not so. The real question is this: can courts be expected to enforce testamentary instruments whose provisions are contrary to public policy at the time of enforcement?

[72] Courts do not have the general power to vary trusts. However, there are exceptions to this rule both under common law, and in terms of the Trust Act.[90] Generally, a court has the power to vary a trust under the common law where it is necessary in order to avoid frustrating the trust object or prejudicing the beneficiaries.[91] Courts also have the power to vary trust provisions under the common law in light of constitutional considerations. This was notably done in *Syfrets*, a matter which considered a public charitable trust which awarded bursaries to students, but which were however restricted to students of "European descent" and not of Jewish descent, and from which female students were further

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> "Not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."

[88] *Moosa N.O. v Minister of Justice* [2018] ZACC 19; 2018 (5) SA 13 (CC); 2018 (10) BCLR 1280 (CC) at para 18.

[89] *Syfrets* above n 12 at para 26.

[90] Cameron et al above n 77 at 518. Cameron et al at 527 say that despite the powers given by section 13 of the Trust Act, the court's common law powers to vary trusts remain intact.

[91] Id at 534.

excluded.[92] There, rather than applying section 13 of the Trust Act, the Court dealt with the application on the basis of the common law having regard to the Bill of Rights. The Court considered whether the contested provisions were contrary to public policy and therefore unenforceable.[93] The Court noted specifically that it was considering public policy at the present time and "not as it was in 1920".[94] It found that the testamentary provisions constituted unfair discrimination and were therefore contrary to public policy. Following that conclusion, the Court held that "this Court is empowered, in terms of the existing principles of the common law, to order a variation of the trust deed in question by deleting the offending provisions from the will".[95] Public policy has also played a significant role when courts are considering varying trusts in terms of section 13 of the Trust Act.

[73] However, those matters all concerned public charitable trusts. This matter concerns a private trust that has no public characteristics. And due to the private nature of the trust, the freedom of testation of the donor ought to be interfered with minimally.[96] However, while public charitable trusts are subject to stricter scrutiny than private trusts, private trusts, like all testamentary instruments, are still subject to the general restriction that testamentary provisions which are contrary to public policy are unenforceable. Cameron et al have commented that racially repugnant exclusions in trusts for example are no longer valid under the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.[97] They added that the fact that "the bequest is 'private' does not meet the objection since it would be repugnant to public policy for the courts to enforce them."[98]

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[92] *Syfrets* above n 12 at para 1.

[93] Id at para 16.

[94] Id at para 26.

[95] Id at para 47.

[96] *BOE Trust* above n 12 at para 27.

[97] 4 of 2000. See Cameron et al above n 77 at 176.

[98] Id.

I agree with this proposition. The private and public divide in trust law does not mean that a court is permitted to countenance any kind of unfair discrimination in a trust simply because it is considered private. That being said, in considering the balancing factors that must be taken into account by a court in determining whether a provision in a private testamentary trust is contrary to public policy, the private nature of the trust must be given due consideration.

[74] As established above, a proper interpretation of the Trust Deed does not evince a clear intention on the part of Mr Druiff to include adopted children. The consequent exclusion of adopted children seemingly constitutes a differentiation and arguably some form of discrimination on the basis of birth or the analogous ground of adoptive status. If it is established that such exclusion amounts to unfair discrimination, it will be contrary to public policy and can be declared unenforceable without the need for this Court to develop the common law.

[75] I say this because in *King*, the majority held that as the common law presently stands, clauses that are contrary to public policy are not enforceable, and consequently it is not necessary to develop the common law once it has been found that a provision in a will is unfairly discriminatory. This is because, with regard to a claim based on public policy, applicants are entitled to assert that a clause is unenforceable for being contrary to the value of equality and for that reason, the clause is contrary to public policy.[99] The judgment further states that applicants do not need the common law to be developed in order to succeed in a claim of this nature.[100] Nor can the respondents resist the claim on the ground that freedom of testation permits the breach of equality.[101] The majority held that a testator may decide to exclude some of his or her children from inheriting their property and –

[99] *King* above n 1 at para 96.

[100] Id.

[101] Id.

> "[This] does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute *unfair* discrimination, it is permitted by freedom of testation if she had acted within the law."[102]

[76] Although in *King* this Court was considering the provisions of a will and not a trust deed, it is perspicuous that the principles established therein apply to testamentary bequests in general. This matter is concerned with provisions in the Trust Deed that are testamentary in nature, therefore the same principles find application here.

[77] In light of the above, the question to be determined is whether the impugned words in the Trust Deed, which exclude adopted children, *unfairly* discriminate against the adopted children. If the answer is yes, the impugned words are contrary to public policy and will, therefore, be unenforceable.

[78] Based on the conclusion I reached in the interpretative exercise above, the words "children"; "descendant"; "issue" and "legal descendants" in the Trust Deed refer to biological grandchildren only. Therefore, there is a differentiation between biological and adopted grandchildren. In my view, the differentiation is on the basis of birth, a listed ground in section 9(3) of the Constitution or adoptive status as an analogous ground. I am of the view that 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.

[102] Id at para 154.

[79] I have read the judgment of my brother Majiedt J (second judgment). The second judgment is of the view that the listed ground of birth does not include adoptive status.[103] The second judgment reasons that "[a]dopted children are obviously not blood relatives . . . [and] that adopted children cannot rely on an equality right in this instance. Affording the ground of birth this wide, generous meaning – to be included as blood relations – is untenable."[104] I disagree. The point about the discrimination being on the ground of birth relates to the fact that at its core there is a differentiation between adopted children and biological children. The former, who in law, and for all intents and purposes, are the children of the adoptive parents, experience this differentiation purely on the basis that they are not *born* of the adoptive parents. The obverse is true. Other children of the same parents are not treated differently for no reason other than the fact that they are *born* of these parents. If this differentiation is not based on birth, I do not know what is.

[80] In *Bhe*,[105] Langa CJ emphasised the need to remove patterns of stigma experienced by the vulnerable group of children born extra-maritally.[106] In my opinion adopted children are similarly stigmatised and, like children born extra-maritally, suffer an impairment of dignity.[107] And this stems from the very nature of the legal relationship created by adoption in our law.

[81] Scholars have recognised that birth as a ground of discrimination is not limited to the relationship between married parents, but can also include whether a child is a refugee,

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[103] Second judgment at [146].

[104] Id.

[105] *Bhe v Khayelitsha Magistrate (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[106] Id at para 59. The vulnerable groups referenced in *Bhe* were children born extra-maritally. The same logic in respect of the patterns of social stigma attached to extra-marital children can be similarly applied to adopted children as will be discussed below.

[107] Compare *Bhe* above n 105 at para 59.

fostered, or as in this case, adopted.[108] Cheadle et al note that "if that status at birth meant that the child was restricted from benefits or opportunities, that ground of 'birth' would be triggered".[109]

[82] I accept that this is the first time this Court acknowledges discrimination on the basis of birth to refer to adopted children. However, there are important *dicta* stemming from international law and foreign jurisdictions pointing us in this direction.

[83] Section 39(1) of the Constitution requires consideration of international law, and permits consideration of foreign law when interpreting the Bill of Rights.[110] Article 2 of the United Nations Convention on the Rights of the Child (UNCRC)[111] provides:

> "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

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[108] Albertyn and Goldblatt "Equality" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 2682.

[109] Cheadle et al *South African Constitutional Law: The Bill of Rights* 2 ed (LexisNexis Butterworths, Durban 2017) at 4-43.

[110] Section 39(1) of the Constitution reads:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

[111] Convention on the Rights of the Child, 20 November 1989. South Africa ratified the Convention on 16 June 1995.

[84] Although the UNCRC does not expressly mention discrimination against adopted children, it does denounce discrimination against children on the ground of birth and discrimination based on characteristics of the parent or by virtue of the child-parent relationship. In my view, discrimination against adopted children on the basis of birth is captured by the broad and inclusive nature of Article 2.

[85] Turning to regional and foreign law, the European Court of Human Rights (ECtHR), albeit in the minority judgment of Judge Sir Nicolas Bratza, in *Pla and Puncernau*[112] recognised that the European Convention on Human Rights precludes the state from discriminating between individuals by "creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights".[113] It is clear that what differentiates biological and adopted children is their birth status, and the unequal treatment on such ground amounts to discrimination.

[86] By drawing an analogy to children discriminated against on the basis of being born to unmarried parents, the ECtHR affirmed in *Inze*[114] that reforms to a Bill governing inheriting farms were "designed to eliminate, inter alia, the disadvantages suffered by 'illegitimate' and adopted children as compared with 'legitimate' children".[115] The ECtHR also affirmed that "very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the [European] Convention [on Human Rights]".[116]

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[112] *Pla and Puncernau v Andorra*, no 69498/01, ECHR 2006.

[113] Id per Judge Sir Nicolas Bratza's judgment at 16.

[114] *Inze v Austria*, no 8695/79, ECHR 1987.

[115] Id at para 26. In this case, the applicant was born out of wedlock and contested his right to inherit his mother's farm (as opposed to his step-father and younger half-brother), maintaining that he was a victim on account of the discrimination based on his "illegitimate birth".

[116] Id at para 41. See also *Camp and Bourimi v The Netherlands* no 28369/95, ECHR 2000 at para 38.

[87] In Canada, discrimination against adopted children is prohibited under the Canadian Human Rights Act[117] and is categorised as discrimination on the basis of "family status".[118] The Ontario Human Rights Code defines "family status" as the status of being in a parent and child relationship.[119] It protects non-biological parent-and-child relationships, such as families formed through adoption,[120] and in doing so affirms that families formed by adoption may not be viewed as if they are less "real" or valid than biological families. Birth as a ground of discrimination is not a specifically mentioned ground, but it is taken to still be a ground for discrimination, albeit encompassed under "family status".[121]

[88] Therefore, discrimination against adopted children based on their adoptive status falls squarely within the scope of "birth" as a listed ground in section 9(3) of the Constitution. This view is further buttressed by the unfair impact of discrimination on the basis of birth, which is discussed below.

[89] While discrimination based on birth (which is a listed ground) is presumed to be unfair, it is valuable to still unpack what it is that makes discrimination on the basis of birth unfair. Adoption is regarded as a means for which considerable benefits can be provided

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[117] Article 3(1) of the Canadian Human Rights Act RSC 1985 c H6.

[118] Id. Section 3(1) reads:

> "For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."

[119] Section 10 of the Human Rights Code RSO 1990 c H19.

[120] Ontario Human Rights Commission *Human Rights at Work* 3 ed (Carswell, Ontario 2008).

[121] In the United States of America, a common practice is for birth records to be sealed – in the interest of anonymity and confidentiality – while a new birth certificate is issued in the name of the adoptive parents. According to Sanger "Separating from Children" (1996) 96 *Columbia Law Review* 375 at 489, the intention is to advance the interest of "the adoptive parents, the birth mother, and the child – to get on with their reconstituted lives *protected from the stigmas* of childlessness, premarital sex, and *illegitimacy*." Protecting an adopted child against the stigma of "illegitimacy" clearly aims to prevent discrimination against adopted children on the ground of birth.

to deprived groups, and through which their needs can be met.[122] Adopted children are a vulnerable group in this country, and as a class have faced a history in which the perpetuation of discrimination towards them has been rife. The Legislature's decision to override the provisos that favoured blood relations is telling of past exclusion.[123] This is not unique to South Africa – in the United States of America for example "courts have rejected petitions to open adoption records, partly because doing so would expose children to the 'stigma of illegitimacy'".[124] In the South African context "social stigma and impairment of dignity" attaches to adopted children, in the same manner that it attaches to other children who do not fall neatly into the "nuclear family" and who are not biologically born of two married parents.

[90] For an adopted child to be recognised, for all intents and purposes, to be part of their adoptive family is inextricably tied to the adopted child's rights to human dignity, to have the best interests of the adopted child prioritised, and to family life.[125] Human dignity is expressly enshrined as a founding value in section 1(a) of the Constitution and as a justiciable as well as enforceable right in section 10 of the Constitution.[126] There is a nexus between the rights to equality and human dignity, where the latter acknowledges the "intrinsic worth of all human beings".[127] To not be treated as a fully-fledged member of a family because one was not born to their adoptive parents stifles the value of, and right to, human dignity. Allowing adopted children to be discriminated against on the ground of

[122] Rochat et al "Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa" (2016) 30 *Children & Society* 120 at 120.

[123] Id at 124.

[124] Maldonado "Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children" 2011 63 *Florida Law Review* 345 at 349.

[125] Id at 32.

[126] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 at fn 69.

[127] Id.

their birth would greatly undermine the very purpose of adoption and would quite plainly infringe the dignity of those children.

[91] The best interests of the child as a principle and right is relevant here.[128] This constitutional principle is widely accepted in our jurisprudence.[129] The best interests of the child principle also serves to complement and buttress the right to family life.[130] While there is no explicit right to family life in the Constitution, the importance of family life has been emphasised by this Court. In *Dawood*,[131] for example, O'Regan J stated that "families come in many shapes and sizes" and that "the definition of family also changes as social practices and traditions change".[132] In *Du Toit*,[133] this Court noted that "family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change".[134] It stated further:

> "Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28(1)(b) of the Constitution . . . It is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them."[135]

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[128] Section 28(2) of the Constitution provides:

> "A child's best interests are of paramount importance in every matter concerning the child."

[129] *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 55.

[130] See Currie and De Waal *The Bill of Rights Handbook* (Juta & Co Ltd, Cape Town 2013) at 620.

[131] *Dawood* above n 126 at para 31.

[132] Id.

[133] *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006.

[134] Id at para 19.

[135] Id at para 18.

[92] This Court espoused that the essence and social purpose of adoption is "to provide the stability, commitment, affection and support important to a child's development"[136] and to uphold the values reflected in the Preamble of the Convention on the Rights of the Child.[137]

[93] Furthermore, the importance of family life is also recognised in Article 18 of the African Charter on Human and Peoples' Rights.[138] The ECtHR, in *Marckx*[139] accepted that "the right of succession between children and parents and between grandchildren and grandparents, was so closely related to family life that it came within the sphere of Article 8".[140]

[94] Therefore, the vulnerability experienced by adopted children warrants protection by virtue of the best interests of the child principle, coupled with the importance of family life. In this case, the application of the proviso, and hence the exclusion of adopted children solely on the basis of their birth, only serves to perpetuate the discrimination that they, as a class, have been (and continue to be) subjected to.

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[136] Id at para 21.

[137] Id at fn 13 and fn 21

[138] African Charter on Human and Peoples' Rights, 27 June 1981. South Africa ratified on 9 July 1996.

Article 18 reads:

> "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
>
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
>
> 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
>
> 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."

[139] *Marckx v Belgium*, no. 6833/74, ECHR 1979.

[140] Id at paras 51-2.

[95] Based on today's public policy, infused as it is with constitutional values, it is indeed possible to apply the impugned words in the Trust Deed to include adopted children.

[96] The second judgment is of the view that "birth must be afforded its ordinary meaning" and therefore only refer to blood relatives. For the reasons illustrated above, I disagree. In any event, the Trust Deed is also unfairly discriminatory on the analogous ground of "adoptive status".

[97] It is trite that differentiation on any illegitimate ground that is unfair falls foul of section 9(3) of the Constitution. This applies not just to the listed grounds in section 9(3), but grounds that are analogous thereto, in that they are based on attributes or characteristics that have the potential to impair human dignity or affect persons in a comparably serious manner.[141] The factors to be taken into account in determining whether the discrimination based on an analogous ground is unfair, include, inter alia, the position of the complainants in society, whether they have been victims of past discrimination and whether the discrimination has led to an impairment of their fundamental dignity. Historically, adopted children have experienced a pattern of societal and legislative discrimination that renders them a vulnerable group in society. That discrimination undoubtedly impacts the dignity of such persons based solely on their adoptive status and can therefore be categorised as unfair discrimination on an analogous ground.

[98] Therefore, the interpretation of the Trust Deed that excludes adopted children unfairly discriminates against them on the basis of their birth (or alternatively on the analogous ground of adoptive status) and is therefore contrary to public policy and unenforceable.

[141] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300; 1997 (11) BCLR 1489 at paras 47-8.

Section 13 of the Trust Act

[99] In the alternative to the interpretation argument and the associated public policy issue, the applicants rely on section 13 of the Trust Act to submit that this Court can vary the impugned provisions in this matter to include the adopted children in question. The applicants have succeeded in their main claim. It is therefore not necessary for this Court to consider the alternative prayer.

Remedy

[100] The words "children", "descendants", "issue" and "legal descendants" used in the Trust Deed exclude adopted children. The exclusion constitutes unfair discrimination against adopted children and therefore it is contrary to public policy. Accordingly, this Court cannot enforce that exclusion. In *Levy*,[142] Price J held that where part of a bequest is contrary to public policy, it should be treated as *pro non scripto*. In line with *Levy*, the exclusion must therefore be treated as *pro non scripto* and the bequest should be given effect as if the exclusion of adopted children does not exist. The first and second applicants must be declared capital beneficiaries of a quarter share of the trust capital. It follows that the appeal must succeed and the order of the Supreme Court of Appeal must be set aside. The LJ Druiff Trust must pay the costs of this application.

Order

[101] In the result, the following order is made:

1. Condonation is granted.
2. The late Mr David Louis Ayscough Wilkinson is substituted by Mrs Jean Vanessa Wilkinson N.O. and Mr Shayne Wilkinson N.O. as the first applicant.
3. Leave to appeal is granted.

[142] *Levy* above n 85.

4. The appeal is upheld.
5. The order of the Supreme Court of Appeal is set aside.
6. The following words in the Trust Deed of the late Mr Louis John Druiff – "children", "descendants", "issue" and "legal descendants" exclude adopted children.
7. The exclusion referred to in paragraph 6 constitutes unfair discrimination against adopted children and, consequently is contrary to public policy and is therefore unenforceable.
8. The adopted children of the late Ms Dulcie Helena Harper, Mr David Louis Ayscough Wilkinson and Ms Amanda Bridget Truter are declared to be capital beneficiaries of a quarter share of the trust capital.
9. The LJ Druiff Trust must pay the costs of this application.

MAJIEDT J (Mathopo AJ concurring):

Introduction

[102] Ruminating on the concept of freedom in the context of property, John Locke – the renowned 17th century English philosopher and a leading proponent of individual property rights at the time – said:

> "Freedom is not, as we are told, a liberty for every man to do what he lists . . . but a liberty to dispose, and order as he lists, his person, actions, possessions and his whole property, *within the allowance of those laws under which he is;* and therein not subject to the arbitrary will of another, but freely to follow his own."[143] (Emphasis added.)

[143] Laslett (ed) *John Locke - Two Treatises of Government* 2 ed (Cambridge University Press, Cambridge 1967) ch VI at 57.

"Allowance within the laws" in the context of testamentary dispositions is at the heart of this matter.

[103] I have had the pleasure of reading the comprehensive, well-crafted judgment of my colleague, Mhlantla J (first judgment). In respect of (a) the applicability of the 1937 Children's Act; (b) its interpretation of the term "legal descendants" and (c) the date of *dies cedit*, the first judgment's findings are well-reasoned and I support them. The first judgment deals comprehensively with the interesting and thought-provoking approach adopted in the third judgment, penned by Jafta J. I fully support the first judgment in this respect. However, I arrive at a different outcome on the merits. This judgment only deals with the areas of divergence between my approach and that of the first judgment.

[104] In upholding the appeal, the first judgment holds that, by excluding adopted children, the impugned Trust Deed provision unfairly discriminates against them on the basis of birth as well as status, and is thus contrary to public policy and unenforceable.[144] It proposes the remedy of interpreting the words "children", "descendants", "issue" and "legal descendants", contained in the impugned Trust Deed provision, so as to include adopted children.[145] I respectfully disagree with these findings. As I seek to demonstrate, adoption cannot reasonably be included under "birth" as a listed ground of unfair discrimination under section 9(3) of the Constitution. *Bhe*,[146] which is indirectly relied upon in the first judgment to advance this proposed interpretation of "birth", is distinguishable on the facts and on the law and does not support this conclusion.

[105] What the first judgment seeks to do, is to interpret the impugned words in the Trust Deed provision – "children", "descendants", "issue" and "legal descendants" – so as to

[144] First judgment at [98].

[145] Id at [100] to [101].

[146] *Bhe* above n 105.

include adopted children. In interrogating this, we must consider whether there is unfair discrimination against adopted children and the role of public policy in private trusts. That consideration must be done with a proper regard for freedom of testation as a constitutionally recognised and protected principle and as the bedrock of the law of succession. There must also be a proper understanding of the fundamental value of equality as a possible basis to limit freedom of testation. For the reasons that follow, I do not agree that this matter calls for the limitation of the freedom of testation.

The pertinent facts

[106] The facts are extensively narrated in the first judgment and the salient aspects are summarised here for purposes of emphasis only. It bears repetition that the donor, Mr Louis John Druiff, at all material times had the benefit of professional legal advice. In particular, the Trust Deed appears to have been drawn up by an attorney.[147]

[107] One can reasonably infer that the attorney who assisted Mr Druiff to have explained to him the law as it was at that time, particularly regarding beneficiaries and potential beneficiaries.[148] This is of particular importance, given that the common cause facts as enunciated in the first judgment demonstrate that at the time of the execution of the Trust Deed Mr Druiff was acutely aware of the fact that his daughter, Ms Dulcie Harper, was unable to carry a pregnancy to term. They had discussed this at length. Ms Harper had conveyed to him her intention to adopt a child, but Mr Druiff persuaded her otherwise, indicating that she should not give up on having a biological child as she had youth on her side. Ms Harper pertinently recounts that Mr Druiff was aware at the time of the execution of the Trust Deed that she was considering adoption. Self-evidently, Ms Harper's predicament must have been a pressing issue at the time.

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[147] On the probabilities, that attorney was Mr Gie of the firm Herold Gie and Broadhead, whose name features in the Trust Deed, the amendment to the Trust Deed and in Mr Druiff's will.

[148] Compare: *Kinloch N.O. v Kinloch* 1982 (1) SA 679 (A) at 693H. See also *Cohen* above n 18; and *In Re: Estate Late AJA Heyns* [1991] ZASCA 173; 1992 (1) SA 629 (A) at 640.

[108] The Trust Deed was executed on 28 January 1953 and was amended on 23 May 1953. Mr Druiff passed away before the lawful adoptions of the first applicant, Mr Wilkinson, in 1955 and the second applicant, Ms Truter, in 1957. The ineluctable conclusion is that Mr Druiff, fully cognisant of Ms Harper's pressing dilemma and the concomitant very real prospect of her adopting a child or children in the future, took an informed and calculated decision to exclude adopted children from the Trust Deed. He chose to include only blood descendants in the Trust Deed. There is consequently no need to second-guess Mr Druiff's intention – on the common cause facts, he plainly made his choice with full knowledge of its import and consequences.

[109] Absent direct evidence from Mr Druiff, his intention must be deduced from the facts. The best available evidence from Ms Harper and the compelling inference to be drawn from the facts and circumstances point in one direction only – the deliberate exclusion of adopted children. This is not a case where the descendants died without having any children. The blood descendants were pertinently and calculatedly included in the Trust Deed. The following passage in *Webb* is apposite:

> "In this case there is no need to try to glean the testator's intention from isolated words and phrases in the will. His intention can be gathered with relative certainty from the general scheme of the will and the material facts and circumstances known to him when he made it."[149]

[110] In addition, the Trust Deed was amended on 23 May 1953 by replacing clause 5 with a completely new clause.[150] This was an important change, since clause 5 is not only the key provision for the appointment of capital beneficiaries, but in its amended form it also removed the trustees' discretionary powers to distribute the income. From the date of

[149] *Webb* above n 72 at para 12.

[150] First judgment at [10].

amendment, the trust's net revenue and income had to be distributed evenly among Mr Druiff's four children. Mr Druiff's death had the effect that the period during which "*[t]he child or any child*" of Mr Druiff's biological children could benefit from the trust income and revenue at the discretion of the trustees came to an end. Of further importance for present purposes is that, in terms of the amended clause 5, upon the death of each of the donor's four biological children their blood descendants *per stirpes* would become entitled to one quarter of the remaining trust capital. Thus, the capital had to be paid to each child's blood descendants *per stirpes* in equal shares when each of the biological children of the donor passed away.

[111] This far-reaching amendment to the Trust Deed further buttresses the view that the donor had, on an informed and calculated basis, set out to include only blood descendants in the Trust Deed. Further support for the respondents' case is to be found in the persuasive reasoning of the Appellate Division in both *Boswell*[151] and *Cohen,*[152] cited in the first judgment.[153] These cases also dealt with the interpretation of testamentary provisions and with the question of whether adopted children were to be included in that interpretation. *Cohen*, in particular, is directly on point as it dealt with wording similar to that of the Trust Deed here. The remarks made in *Cohen* are instructive:

> "There is much to be said for the view that the ordinary meaning of the word 'child' or 'grandchild' does not go beyond a testator's own child (his bloedkind [blood child]) or an own child of such child."[154]

[151] *Boswell* above n 49.

[152] *Cohen* above n 18.

[153] First judgment at [42] to [45].

[154] *Cohen* above n 18 at 639E. See also *Brey v Secretary for Inland Revenue* 1978 (4) SA 439 (C) at 442H-443D.

[112] The first judgment holds that based on the proviso, Mr Druiff's intention at the time of execution was not to include adopted children.[155] That intention must of course be gleaned from the prevailing circumstances at the time.[156] It appears to me to be more accurate to state that Mr Druiff's intention at that time was plainly and unequivocally to benefit only his own children. That can be discerned from the fact that he had sought to convince his daughter to continue trying to carry a pregnancy to full term. I disagree with the view that the High Court and the majority in the Supreme Court of Appeal misinterpreted the facts.[157] Those Courts correctly found that the donor took a pertinent and informed decision to exclude adopted children.[158] So much then for the evidence, which is overwhelmingly against the applicants. Before discussing the essence of this dissent on the public policy issue, it is necessary to make brief remarks about: (a) the applicable legislation, the 1937 Children's Act, and (b) the effect of the amendment of the Trust Deed.

Applicable legislation

[113] As the first judgment correctly holds, the provisions of the 1937 Children's Act apply here.[159] That is an important consideration, particularly when it is understood in the context of the cogent evidence. As long ago as 1919 it was held that:

> "[t]he words of the will are to be construed in accordance with the meaning at the period when the will was made, but . . . the operation and effect of the will is determined by the law in force at the time of the testator's death."[160]

[155] First judgment at [50].

[156] *Moosa* above n 40 at 169D-F.

[157] Id.

[158] High Court judgment above n 9 at paras 23 and 35; and Supreme Court of Appeal judgment above n 2 at para 51.

[159] First judgment at [38] and [47] - [48].

[160] *Johnstone's* above n 40 at 115.

[114] This exposition of the law is uncontentious and is clearly correct. We must therefore interpret the impugned Trust Deed provisions as they were understood at the time, having regard to the prevailing legislation.[161] In addition, the 1937 Children's Act would also apply on the basis that *dies cedit* occurred in 1953, when Mr Druiff passed away.[162]

[115] Section 71(2) of the 1937 Children's Act is unequivocal that adoptive children shall not be entitled to inherit property, which devolved upon the adoptive parent by virtue of, amongst other things, a testamentary instrument executed prior to the date of the order of the adoption. The section appears in full in the first judgment,[163] but the relevant part bears repetition:

> "(2) Subject to the provisions of section 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate [sic] child of the adoptive parent but shall not—
>
> (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."

[116] The Legislature took great care not to reach back in time. Neither the subsequently enacted 1960 Children's Act, nor the Child Care Act, were given retrospective effect. This is also the position in respect of subsequent legislation relating to children and succession. Section 15 of the Law of Succession Amendment Act,[164] which inserted a presumption regarding adopted children in section 2D(1) of the Wills Act,[165] expressly provides:

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[161] Corbett et al above n 40 at 457-8 and 508. See also: *Greeff* above n 38 at 275C-D.

[162] Cameron et al above n 77 at 556-7. As to *dies cedit* and *dies venit*, generally, see *De Leef Family Trust* above n 75 at 356C-357D and *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) at 364G-365G.

[163] First judgment at [39].

[164] 43 of 1992.

[165] 7 of 1953.

> "The provisions of this Act are, subject to the provisions of section 7 of the Wills Act (Act No 7 of 1953), not applicable to the will of which the testator died before the commencement of this Act."

The applicable law was therefore different where a will was executed prior to the granting of the order of adoption. The underlying rationale is understandable: testatrices or trust donors could arrange their affairs and take decisions with certainty and on an informed basis, and, consequently, their choices regarding the disposal of their property remained intact.

[117] The proviso in section 71(2) of the 1937 Children's Act is consequently of key importance. That proviso, and the one contained in the 1960 Children's Act, were directed at ensuring that the inherent bias to bequeath property to blood relations remained extant. But for the provisos, there was a danger of the deeming provisions in the relevant sections in those two statutes subverting that important principle.[166] Express provision therefore had to be made in testamentary instruments for the inclusion of adopted children.

Freedom of testation

[118] Freedom of testation is not merely a common law principle. Freedom of testation is founded upon the fundamental rights to dignity,[167] privacy[168] and property[169] enshrined in the Constitution. It includes the right to dispose of property during one's lifetime as well as at death. With regard to the right to dignity, it is an acknowledgement that the relationships that mattered to the testatrix in life, and which informed her testamentary

[166] See the discussion by Murray above n 48 at 266-307.

[167] Section 10 of the Constitution.

[168] Section 14 of the Constitution.

[169] Section 25 of the Constitution. See also De Waal and Schoeman-Malan above n 83at 5; and *BOE Trust* above n 12 at paras 26-7.

choices, are worthy of respect.[170] It implicates her right to privacy in a particularly fundamental way. A testatrix's decisions on whom to include and exclude in bequests, are manifestations of personal love and affection, loyalties and kinship. Those decisions are taken in a most intimate, personal sphere – they occur within what this Court has called the person's "inner sanctum",[171] and within "the core most protected realms of privacy".[172] In *Bernstein*, this Court expounded on the relationship between privacy and conflicting communal rights:

> "[E]ach right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[173]

And in *De Lange*, this Court explicated that "[t]he closer courts get to personal and intimate spheres, the more they enter into the inner sanctum and thus interfere with our privacy and autonomy".[174]

[119] Thus, a high premium is placed on freedom of testation and the Legislature and courts alike should be slow to limit these rights by too readily interfering with an

[170] *BOE Trust* id at para 27.

[171] *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67.

[172] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8;2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 42.

[173] *Bernstein* above n 171 at para 67.

[174] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC) at para 80.

individual's testamentary freedom. We must heed the caution so often expressed by this Court, in respect of a reticence to interfere.[175] Under the common law, this freedom was curtailed in instances where testamentary provisions offended public policy. In our constitutional era, public policy is rooted in the Constitution.[176] To override an individual's testamentary choices is to criticise those choices. That criticism is not only of the testatrix's proprietary choices, but also of her personal preferences. Ultimately, this criticism constitutes an intrusion into the testatrix's common law and constitutionally protected reasonable expectation not to have her privacy invaded. At best, what we say to her is that her subjective world view, personal loyalties, affections and sense of duty were so unreasonable – for being contrary to society's expectations – that those choices warrant intrusion and must be overridden by a court. At its worst, legislative and judicial intervention may dictate to the testatrix whom she may and may not love, and may exact punishment on the testatrix's preferred heirs by denying them the testatrix's property and its concomitant freedoms.

[120] Testatrices as property owners have a right to choose to whom to leave their property when they die. This basic proposition, that individuals enjoy freedom of testation, is the cornerstone of our law of succession.[177] Corbett *et al* opine that "South African law appears to take the principle of freedom of testation further than any other Western legal system".[178]

[121] This principle entails:

> "[T]he freedom to dispose of the assets which form part of . . . her estate upon death in any manner (s)he deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator

[175] In, amongst others, *Bernstein* above n 171, *Magajane* above n 172 and *De Lange* above n 174.

[176] *Barkhuizen* above n 86 at para 28.

[177] See De Waal and Schoeman-Malan above n 83.

[178] Corbett et al above n 40 at 40.

> as it appears from such testator's will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property. An owner's power of disposition includes disposal upon death by any of the means recognised by the law, including a last will. The acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law."[179]

[122] Freedom of testation as a cornerstone of our law of testate succession is not unique to this country. A classic exposition of this important principle appears in the English case of *Goodfellow* where Cockburn CJ explained:

> "Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposition of that of which he thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.
>
> . . .
>
> The English law leaves everything to the unfettered discretion of the testator, on the principle that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law."[180]

[179] Du Toit *"*The Constitutionally Bound Dead Hand? The Impact of the Constitutional Rights and Principles on Freedom of Testation in South African law*"* 2001 *Stell LR* 222 at 224.
[180] *Banks v Goodfellow* (1870) 5 LR QB 549 at 563-5.

[123] Du Toit points out that this principle is also to be found in Australia and England, which are common law jurisdictions, and in Germany and the Netherlands, two civil law jurisdictions. He says:

> "[F]reedom of testation is regarded as the founding principle of the law of testate succession in all four systems. This freedom is supported by the recognition of private ownership and private succession in all four legal systems."[181]

In these four jurisdictions, freedom of testation is limited in instances of prescriptive testamentary conditions or forfeiture clauses based on race, nationality or religion. These restrictions, however, do not apply to clear disinherison on discriminatory grounds.

[124] In *Moosa*, regarding a polygamous Muslim marriage, this Court was asked to make a finding that assets should always be divided equally among the surviving spouses of the testator so as to advance the value of equality. In declining to do so, it held:

> "The applicants suggest that a finding that assets should always be divided equally among surviving spouses would advance the value of equality. But a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to testate succession. It would therefore be ill-advised for this Court to make any such pronouncement."[182]

[125] This is, of course, not to say that freedom of testation is absolute. The law restricts it in a number of ways. This principle was articulated by Innes ACJ more than a century ago:

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[181] Du Toit "The Limits Imposed Upon Freedom of Testation by the Boni Mores: Lessons From Common Law and Civil Law (Continental) Legal Systems" (2000) 11 *Stell LR* 358 at 365-6 at 383.

[182] *Moosa N.O.* above n 88 at para 18.

> "Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the Court is bound to give effect to them, unless we are prevented by some rule of law from doing so."[183]

[126] What comes to mind is restriction by way of statutory limitations such as taxes, maintenance obligations in respect of dependent children as well as maintenance in respect of surviving spouses. There are also the common law principles, which provide that testamentary conditions may be invalidated on the grounds of uncertainty, illegality, immorality, impossibility and for being contrary to public policy. In addition, our courts have under the constitutional dispensation struck down clauses in quasi-public charitable wills or testamentary trusts, most notably in respect of discriminatory provisions in wills or trusts which provide for public scholarships, bursaries or other benefits. But there is only one instance in this country where a private out-and-out disinherison such as the present instance, has been overridden by a court.[184]

[127] The rationale behind outlawing blatant discriminatory provisions in charitable public trusts is rather obvious. In order to be truly beneficial to the general public, those trusts must not exclude otherwise eligible beneficiaries on grounds that offend public policy.[185] Public policy is understood here as the norms and values which represent "the legal convictions of the community; it represents those values that are held most dear by the society".[186] In those instances, freedom of testation must give way to public policy imperatives as informed by our Constitution. As it was explained in *Emma Smith,* a case which concerned the amendment of a trust deed to remove racial and gender discriminatory clauses:

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[183] *Robertson* above n 39 at 507.

[184] This was recently decided by this Court in *King* above n 1 at paras 49 and 163.

[185] *Emma Smith* above n 83; *Canada Trust Company v Ontario (Human Rights Commission) (C.A.)* 1990 CarswellOnt 486 (*Canada Trust*) at para 107.

[186] *Barkhuizen* above n 86.

> "The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past."[187]

[128] In *Canada Trust*, the Ontario Court of Appeal had to consider an appeal against a finding that the terms of a trust were not invalidated by either (a) reason of public policy as declared in the Canadian Human Rights Code 1981; (b) other public policy reasons; (c) discrimination because of race, creed citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or (d) uncertainty. In upholding the appeal on the ground of public policy, that Court explicated:

> "To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not . . . be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect."[188]

[129] Self-evidently, a measure of judicial reticence is required in respect of bequests in private testamentary instruments. Courts must intervene sparingly and only in those cases where public policy contraventions warrant judicial intrusion in a testatrix's private sphere. In *Emma Smith*, the Supreme Court of Appeal was urged to refrain from amending a trust deed by removing the offending provisions, lest its intervention had the effect of dissuading others from making private bequests for educational purposes in the future. In rejecting this argument, it noted that:

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[187] *Emma Smith* above n 83 at para 42.

[188] *Canada Trust* above n 185 at para 40.

> "The curators argued that the judicial amendment of a public charitable trust's provisions will have a chilling effect upon future private educational bequests. I cannot agree. We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for members of his faith or a club member intending to benefit the children of fellow members."[189]

[130] A similar argument was also made and rejected in *Canada Trust*:

> "A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection. . . This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community. It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void."[190]

[131] Our law is clear that public charitable trusts warrant close judicial scrutiny in respect of public policy aspects. This is because they are meant to benefit the general public. Accordingly, exclusions which amount to discrimination and offend the values held dear by society, cannot be permitted. These types of bequests usually endure over indefinite or long periods of time at a public level. The potential infringement of dignity is therefore far more prolonged than would normally be the case in private bequests. The position is the same in other comparable jurisdictions, a topic which will be discussed shortly. There is no sound basis that warrants similar judicial intrusion in respect of bequests in private testamentary instruments. No one has a right to inherit. Bequests are *ex gratia* (moral rather than legal) dispositions, actuated by a testatrix's free, unfettered discretion (albeit

[189] *Emma Smith* above n 83 at para 41.

[190] *Canada Trust* above n 185 at 107.

subject to the restrictions set out before) as part of her property rights. This entails a testatrix having the power to distribute her personal charity freely as she wishes, according to her own personal preferences, foibles, and eccentricities. She exercises these choices in her inner sanctum, the most protected realm of her privacy. In doing so, she relies not only on her fundamental right to privacy, but also on her fundamental rights to dignity and to property. In interpreting the right of freedom of testation as part of these fundamental rights, we can have regard to foreign jurisprudence, which I discuss next.[191]

Comparable foreign jurisdictions

Canada

[132] In Canada, the Constitution informs the dictates of public policy. Its Charter of Rights and Freedoms contains a general limitations clause. The leading case on public policy, *Canada Trust*, has already been alluded to.[192] There, the Ontario Court of Appeal recognised the freedom of an owner of property to dispose of her property as she chose and noted that this was an important interest that has long been recognised in Canada. However, that Court held that, as the trust under consideration was premised on notions of racism and religious superiority, which contravened contemporary Canadian public policy, its intervention was warranted. The Court consequently struck out the offending terms and removed all the restrictions based on race, colour, creed, religion, ethnic origin and gender.

[133] Then followed *Spence*,[193] the leading Canadian case on discrimination in private testamentary instruments. A Black testator disinherited one of his daughters, allegedly by reason of her having had a child fathered by a White man. Alleging that her disinheritance

[191] Section 39(1)(c) of the Constitution reads:

> "When interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law."

[192] *Canada Trust* above n 185.

[193] *Spence v BMO Trust Company* 2015 ONSC 615.

was based on racial discrimination, the daughter challenged the will on public policy grounds and sought that it be set aside. On appeal, the Ontario Court of Appeal dismissed this challenge. It held that a testator's freedom to distribute her property as she wishes is a deeply entrenched common law principle which furthers an important social interest.[194] The court further held that public policy should be invoked only in clear instances, in which harm to the public is substantially incontestable and that the courts do not have an overarching authority to examine the validity of a bequest in a private will on public policy grounds. It said that the common law principle of testamentary freedom protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds, unless legislation precludes it. A contrary finding would subvert testamentary freedom and would be contrary to established judicial restraint, which is generally employed when considering the setting aside of private testamentary gifts on public policy grounds.[195]

[134] Noting that public policy had been invoked in cases where bequests were made subject to the fulfilment of a particular condition, which was offensive to public policy, such as a restraint on marriage, religious freedom or an incitement to commit a crime or to engage in illegal activity, the Court nonetheless observed:

> "The pivotal feature of these cases is that the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will, or obliged the executors or trustees of the will to act in a manner contrary to law or public policy in order to implement the testator's intentions. In these circumstances, the court will intervene to void the offending testamentary conditions on public policy grounds."[196]

[135] The Court cautioned that:

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[194] *Spence v BMO Trust Company* 2016 ONCA 196 at para 30.

[195] Id at para 75.

[196] Id at para 56.

> "[T]o apply the public policy doctrine to void an unconditional and unequivocal testamentary bequest in cases where, as here, a disappointed potential heir has been disinherited absolutely in favour of a different, worthy heir, would effect a material and unwarranted expansion of the public policy doctrine in estates law. Absent a valid legislative provision to the contrary, or legally offensive conditional terms in the will itself, the desire to guard against a testator's unsavoury or distasteful testamentary dispositions cannot be allowed to overtake testamentary freedom. The need for a robust application of the principle of testamentary freedom is especially important in the context of a testator's central right to choose her residual beneficiaries."[197]

Ultimately, the Court concluded that expanding the public policy exception to testamentary freedom would increase uncertainty in the law of succession and open the litigation floodgates.[198] *Spence* remains the leading Canadian authority on this issue , as the Supreme Court refused an application for leave to appeal the judgment of the Court of Appeal.

Australia

[136] In Australia, testamentary freedom is equally valued. It underpins common law jurisprudence in the area of succession.[199] In the absence of a Constitution with a Bill of Rights, there is no constitutional basis to limit freedom of testation. In *Griffith*, the extent of testamentary freedom was explained by Gleeson CJ:

> "[T]here may be cases in which one person's estimation of another's claims may seem harsh and unwarranted, and perhaps even unnatural. . . A person may disinherit a child for reasons that would shock the conscience of most ordinary members of the community, but that does not make the will invalid."[200]

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[197] Id at para 85.

[198] Id at para 123.

[199] Certoma *The Law of Succession in New South Wales* 4 ed (Thomson Reuters, Pyrmont 2010) at 6. This also pertains to Australian jurisdiction.

[200] *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284 at 291.

[137] Various public policy grounds exist in Australian law which, if established, may warrant rendering a testamentary disposition void. Thus, the courts have set aside testamentary provisions that imposed illegal conditions; excluded the jurisdiction of a court or precluded a beneficiary from litigating in respect of the particular provision; effected a separation between parent and child or restrained marriage. Australian courts have shown a reluctance to interfere with the apparently unjust motivations of testators, whether the motivations appear on the face of the will or not, unless the relevant dispositions harm public interest. In this regard, the Australian position appears to accord with that in Canada.

[138] In a review of *Spence*, Lentini expresses the view that "[t]he Australian position on testamentary freedom is analogous to that in Ontario as referred to and relied upon by the Court of Appeal for Ontario in *Spence*".[201] Lentini concludes:

> "Challenging the validity of a will or disposition on the ground of the will-maker's distasteful or discriminatory motivations is not a sound basis to attack the will, and entertaining such a ground arguably risks opening the floodgates to disappointed beneficiaries relying on irrelevant extrinsic evidence.
>
> If a similar fact scenario arose in Australia, it is likely that Australian courts would reach a similar conclusion to that reached by the Court of Appeal for Ontario."[202]

England

[139] The United Kingdom does not have a Bill of Rights that entrenches fundamental rights upon which freedom of testation can be tested against or limited. Some of the rights contained in the European Convention on Human Rights have, however, acquired full legal

[201] Lentini "Wills that 'Shock the Conscience': An Australian Perspective on *Spence v BMO Trust Company*" (2016) 10 *Elder Law Review* 1 at 5.

[202] Id at 10-1.

force and effect in the United Kingdom by virtue of the Human Rights Act.[203] In *Blathwayt*, the House of Lords had to consider a testamentary provision that provided for the forfeiture of trust benefits if, amongst other things, any of the beneficiaries "[were or became] a Roman Catholic".[204] The Court held that the conditional forfeiture clause did not conflict with public policy and that the testator's wishes were to be respected.[205] Du Toit suggests that, although *Blathwayt* remains the leading English authority in respect of prescriptive testamentary forfeiture clauses based on race, religion and nationality, the indirect horizontal application of the Human Rights Act may well bring about a change in this regard.[206]

Germany

[140] Private ownership and private succession are constitutionally protected in article 14(1) of the German Basic Law, which guarantees property and the right to inherit and provides that their content limits are to be determined by the law. These guaranteed rights are regarded in German Law as "a commensurate guarantee of freedom of testation".[207] Private bequests are judged in Germany on the basis of a good morals criterion. If the implementation of a testamentary bequest cannot be justified on good morals, it will be invalidated.[208] The application of this criterion is guided by the article 14(1) freedom of testation as well as by other guaranteed fundamental rights in the Basic Law such as the rights to equality (article 3), to freedom of religion and belief (article 4), to freedom of association (article 9) and to privacy (articles 10 and 13).

[203] 1998.

[204] *Blathwayt v Lord Cawley* [1975] 3 All ER 625 at 628.

[205] Id at 637, 639, 649 and 650.

[206] Du Toit above n 181 at 365-6.

[207] Id at 380-1.

[208] Id at 382.

[141] In German law a testatrix is under no obligation to treat her beneficiaries on an equal footing. A testatrix therefore has unfettered discretion to include certain beneficiaries and to exclude others, subject only to the good morals criterion.

The Netherlands

[142] The position in the Netherlands is similar to that in Germany, both of them being civil law systems. Freedom of testation is one of the founding principles of the Dutch law of succession. This principle is based on the recognition of private ownership and private succession. As is the case in Germany, although these rights are not constitutionally entrenched, other fundamental rights in the Dutch Constitution play a role in the application of the good morals criterion.[209] It is generally accepted that these rights enjoy an indirect horizontal application and that they can, in principle, affect the general approach to prescriptive testamentary provisions.[210] Similar to the German position, if a bequest cannot be implemented because it is unjustifiable on application of the good morals criterion, it will be invalidated. This principle is encapsulated in article 3:40 of the Dutch Burgerlijk Wetboek which provides that "[a] juristic act which is, as a result of either its contents or its purport, contrary to the good morals or offensive to the public order, is void".[211] Dutch courts have invalidated testamentary provisions that amounted to a general restraint of marriage; negated maintenance obligations; prohibited the alienation of bequeathed assets; and established a prohibited *fideicommissum* using the good morals yardstick.[212]

[143] In summary, it is plain that in both common law and civil law jurisdictions, freedom of testation is at the core of the law of succession. It is generally limited only by considerations of public policy in some common law jurisdictions, and by a good morals

[209] These include rights to equality (article 1), to freedom of religion and belief (article 6), to freedom of association (article 8) and to privacy (article 10).

[210] Du Toit above n 181 at 375.

[211] Id at 378.

[212] Id.

criterion in civil law jurisdictions. As stated, the type of challenge like the one to the impugned provisions of the trust deed in this instance has never been upheld by our courts. That brings me to the key question: does the trust deed unfairly discriminate against adopted children? In answering this question, I will also consider the first judgment's indirect application of *Bhe*.

Unfair discrimination against adopted children

[144] The first judgment correctly concedes that this will be the first time that this Court finds that discrimination on the basis of birth includes adopted children.[213] Its indirect reliance on *Bhe* in support of the view that adopted children are unfairly discriminated against simply because they are not born to adoptive parents, is far-reaching and without merit. The first judgment finds that the impugned provision unfairly discriminates against adopted children based on the immutable characteristics of their birth or status. This conclusion is arrived at by developing the section 9(3) listed prohibited ground of birth to include adoption.

[145] In *Bhe*, the pleaded case was that section 23 of the Black Administrations Act[214] and its regulations infringed upon the right to human dignity of, amongst others, extra-marital children by unfairly excluding them on the ground of birth from inheriting property in terms of intestate succession.[215] Accordingly, this Court held that unfair discrimination on the ground of birth in section 9(3) should be interpreted to include a prohibition of differentiation between children on the basis of whether a child's biological parents were married at the time the child was conceived or born. Writing for the majority, Langa DCJ held:

[213] First judgment at [82].

[214] 38 of 1927.

[215] *Bhe* above n 105 at paras 2-3 and 31.

> "The prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of "birth", it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not."[216]

[146] While I unhesitatingly accept that the *Bhe* interpretation of the ground of birth did not intend to create a closed list, the word "birth" is in my view not reasonably capable of including adoption. That is because birth, as a prohibited ground, relates to circumstances surrounding one's birth at the time of birth and not subsequent to that. Adoption, on the other hand, is concerned with the placement in the permanent care of a person in terms of a court order that creates a legal relationship between the child and the parent only. Consequently, the development of the law to hold that birth includes adoption is misplaced. Inasmuch as the first judgment appears to espouse the view that birth is inclusive of blood relation and that, therefore, the discrimination here is based on blood relation, that cannot be correct. Adopted children are obviously not blood relatives. That is exactly the point here, namely that adopted children cannot rely on an equality right in this instance. Affording the ground of birth this wide, generous meaning – to be included as blood relations – is untenable. "Birth" must be afforded its ordinary meaning; to seek to expand the meaning in the manner that the first judgment does, is to unduly strain the word.

[147] It is necessary to remind ourselves what the majority in *Bhe* said about birth as a prohibited ground of discrimination:

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[216] Id at para 59.

"Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra- marital birth at common law flowed from the Dutch principle that 'een wijf maakt geen bastaard', the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-a-vis the child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them which was harmful and degrading.

It is important, however, in assessing the discrimination and stigma attached to extra- marital birth to distinguish between common law and customary law. As Jones records:

> 'The African means of dealing with extramarital birth is essentially accommodative in intent and character; it is oriented towards social inclusivity. The mechanism of maternal-filiation provides an extramarital child with a father, with a male ritual and social sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible – they counter what would otherwise be clearly evident deficits in an extramarital child's social make-up – and are preserved and upheld by way of taboo against reference to the child's real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extramarital child's position is not compromised by the circumstances of his or her birth.'

Nevertheless, extra-marital sons had reduced rights of inheritance under customary law, as they would only inherit in the absence of any other male descendants. Contemporary

> research suggests too that there is social stigma attached to extra-marital children, though the stigma probably varies depending on the circumstances and community concerned."[217]

Bhe, therefore, does not support the finding in the first judgment that in this matter adopted children were unfairly discriminated against, not even by an indirect application. Equating this case with one involving discrimination on the basis of birth outside marriage, like *Bhe,* is untenable. And article 2 of the UNCRC does not take the matter any further, as it merely repeats the content of section 9(3) of the Constitution.

[148] The right to equality, like any other right in the Bill of Rights, must be interpreted contextually, taking into account our past and the future sought to be established in terms of the Constitution.[218] Where the right to equality is relied upon as a basis for impugning any law or conduct, a court should carefully evaluate the challenge. It will do so by taking into account whether the law or conduct being impugned has the potential to impair the dignity of the litigant and those in similar position – based on their historical positions – before it finds in favour of that litigant.[219] The first judgment does not demonstrate what this historical disadvantageous position is that adopted children have occupied in society that warrants the development of the ground of birth in section 9(3).

[149] In a contextual interpretation of the right to equality, what must be taken into account includes the history, the powers at play as well as the interests affected by unfair discrimination. Not every differentiation amounts to discrimination. Even when such differentiation is proved to amount to discrimination, the unfairness thereof has to be established.[220] And this unfairness is ascertained by asking the question whether the discrimination has an unfair impact on the individual.

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[217] Id at paras 57-9.

[218] Currie and De Waal above n 130 at 211.

[219] *Harksen* above n 141 at para 48.

[220] Id.

[150] The majority's dictum in *Hugo* on the meaning of unfair impact is instructive:

> "To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[221]

[151] This principle was affirmed in *Harksen* where this Court stated that:

> "In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:
>
> (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."[222]

[152] The first judgment seeks to develop our law to recognise that discrimination on birth includes adoption, solely based on the differentiation brought about by section 71(2) of the

[221] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1; 1997 (6) BCLR 708 (CC) (*Hugo*) at para 43.

[222] *Harksen* above n 141 at para 52.

1937 Children's Act, as well as the legal position in other jurisdictions. This approach is flawed, because it disregards the difference between differentiation and unfair discrimination, the testator's right to human dignity, which underpins freedom of testation and, most importantly, fails to interpret the right to equality contextually. Furthermore, it fails to acknowledge that no one has a fundamental right to inherit. The prohibition against unfair discrimination in our Constitution is aimed at removing certain patterns of stigma from our society.[223] Section 71(2) of the 1937 Children's Act merely differentiated between adopted children and biological children to the extent that it required the testatrix to expressly indicate if she intended to benefit adopted children. This additional requirement did not mean that adopted children were completely deprived of the opportunity to inherit or deemed unworthy of inheriting property. According to De Waal and Schoeman-Malan, the provision was instrumental in interpreting testamentary documents and determining who the testator wanted to benefit in those instances where the testator used the word "children" or "grandchildren".[224] This is because adoption by its very nature creates a legal relationship between the adopted child and adoptive parents and not anyone else.

European cases cited in the first judgment

[153] There is one further aspect of the approach adopted in the first judgment that warrants consideration. Reference is made to two cases from the ECtHR.[225] Before I discuss these cases and demonstrate how they are distinguishable from the present matter, it is important to note that our law should be developed because it requires development and not because we are trying to keep up with development trends in other jurisdictions. We must develop the law in section 9(3) of our Constitution to realise our constitutional ethos only if, as a fact, there is a vulnerable, stigmatised group that requires protection.

[223] *Bhe* above n 105 at para 59.

[224] De Waal and Schoeman-Malan above n 83 at 116.

[225] First judgment at [85] and [86] and fn 113.

Development of the law becomes necessary only when the presence of stigma and unfair harm requires us to do so.

[154] In *Pla and Puncernau* the testatrix had executed a will in terms of which she established an equivalent of *fideicommissary* in favour of her grandsons.[226] The relevant testamentary provision provided that the testatrix's son would hold the property on behalf of the grandsons and if the son was unable to, the estate would be passed to the testatrix's first daughter or the second daughter's son.[227] The son later entered into a valid marriage, adopted a son and executed a codicil in terms of which he made this son his heir.[228] The testatrix's great-grandchildren sought to set aside the codicil and to be declared the rightful heirs. The ECtHR had to determine whether the adopted son can be regarded as the son for purposes of succession. Relying on article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), which prohibits discrimination on, among other grounds, birth,[229] the ECtHR dismissed the interpretation proposed by the applicants that a distinction should be drawn between adopted and biological children, because the testatrix's will did not make such a distinction and that adopted children are for all intents and purposes in the same legal position as biological children.[230]

[155] *Pla and Puncernau* is, however, distinguishable from the present matter. When the will was executed in that case, there was, unlike here, no legislation requiring testators to

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[226] *Pla and Puncernau* above n 112 at paras 11-2.

[227] Id at para 11.

[228] Id at para 13-4.

[229] Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[230] *Pla and Puncernau* above n 112 at para 60.

expressly indicate if they intended to benefit adopted children. A further difference is that this Court is not required to determine the constitutionality of the impugned trust provision, but the correct interpretation thereof.

[156] Then there is *Inze*. In that case, the applicant was born out of wedlock and contested his right to inherit his mother's farm (as opposed to his step-father and younger half-brother), maintaining that he was a victim of discrimination because he was born out of wedlock.[231] Upon his mother's death, the farm in question was subject to the special regulations in the Carinthian Hereditary Farms Act of 1903 (the Provincial Act).[232] In 1975, the applicant instituted a claim over the farm and argued that he should be allowed take over the deceased's farm instead as he was the eldest son and further challenged the constitutionality of the operation of section 7(2) on the basis that it had been abrogated by operation of article 14 of the Convention.[233]

[157] Following a series of defeats in both the Regional Court and the Supreme Court, the applicant referred the matter to the European Commission of Human Rights (Commission), which he later abandoned as he entered into a settlement agreement with his half-brother.[234] The Commission, following the preparation of two Bills, which were intended to eliminate the disadvantages suffered by children born out of wedlock and adopted children, declared the applicant's claim admissible and referred it to the ECtHR for determination on the constitutionality challenge as well as damages for prohibition of inheritance in

[231] *Inze* above n 114 at para 8.

[232] Id at para 10. That Act prohibited the division of farms of a certain size for purposes of succession and provided that one of the heirs must take over the entire property and buy out the other heirs. Section 7 of the Provincial Act further provided that should the heirs be unable to reach an agreement as to who should take over (1) older heir takes precedence over younger heir (2) children related by blood take precedence over adopted children and children born out of wedlock.

[233] *Inze* above n 114 at para 18.

[234] In terms of the settlement, he renounced his claim in respect of the farm in exchange for a certain piece of land, which had been promised to him by the deceased during her lifetime.

contravention of Article 14 of the Convention. The ECtHR held that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'."[235] It further held that very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth. It concluded that the refusal to allow the applicant to take over was a breach of Article 14 of the Convention.

[158] In *Camp and Bourimi*,[236] the issue before the ECtHR was whether the Netherlands' Supreme Court's finding that the letters of legitimation of a child did not apply retrospectively, was in contravention of Article 14 of the Convention. It had to consider the principal contention that this constituted differentiation between children who were born in wedlock from birth and those who were not.

[159] The ECtHR held that the daughter whose family ties with her father were not legally recognised until letters of legitimation had been granted, was unable to inherit from her father, unlike children who did have such ties, either because they were born in wedlock or had been recognised by their father. This undoubtedly constitutes a difference in treatment between persons in similar situations, based on birth. It therefore held that, for the purposes of Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification". This entails that, if the differentiation does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised", it would be discriminatory. The ECHR affirmed *Inze* in holding that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention. It concluded that the daughter's exclusion from her father's

[235] *Inze* above n 114 at para 41.

[236] *Camp and Bourimi* above n 116.

inheritance was disproportionate and that there has consequently been a breach of article 14 of the Convention.

[160] I have discussed these cases in some detail to demonstrate that they do not lend support to the development of our law as the main judgment seeks to do, nor do they assist in interpreting the right in terms of section 39(1). They are similar to *Bhe*. In these matters the ECtHR had to consider whether there had been a breach of article 14. Like *Bhe*, they are distinguishable, for the reasons advanced earlier.

[161] As I see it, when section 9(3) prohibits unfair discrimination on the ground of "birth", it should be interpreted to include a prohibition of differentiation between children based on grounds or circumstances existing at conception or birth, which in the past had the potential of impairing the dignity of those children later on in life. This is the essence of this Court's decision in *Bhe*, and nothing more. It is improper to go further by developing the law to include adoption when it is not legally tenable. That development undermines freedom of testation, which with its underlying fundamental rights to dignity, privacy and to property, does not rank lower than the right to equality. It represents an unjustifiable intrusion into a testatrix's inner sanctum. And it infringes not only her right to privacy, but also her rights to dignity and to property.

[162] We are not dealing here with the type of testamentary bequest where, for example, a daughter is precluded in the will from marrying someone of a particular race or religion. That kind of conditional bequest is a lifestyle dictate that offends societal values and its legal convictions. It has a profound effect on a beneficiary's dignity and grievously infringes her rights. Here we are faced with an outright exclusion of a certain class of persons, namely adopted children. There is a stark difference between outright testamentary exclusions and discriminating against persons who do not belong to a

particular class.[237] Nor is this a case where there is an unlawful condition attached to a bequest. In a case like this, where we are concerned with an out-and-out disinheritance in a private trust deed, we must exercise judicial reticence. As indicated, courts are reluctant to vary the provisions of a testamentary instrument in order to include a particular person or class of beneficiaries. The reason for this is that the court will then in effect be making a testamentary choice for the testatrix that she may not have wanted at all, and which may result in a further debate and contestation about the fairness of the bequest.

Conclusion

[163] The reasoning of the majority in the Supreme Court of Appeal cannot be faulted. It correctly lays emphasis on the important right of freedom of testation and draws the important distinction between cases of discriminatory exclusions or unlawful conditional bequests on the one hand, and outright exclusions on the other. For these reasons, I would grant condonation and leave to appeal but dismiss the appeal. Costs ought to be paid from the Trust.

JAFTA J (Mogoeng CJ concurring):

[164] I have had the benefit of reading the judgments prepared by my colleagues Mhlantla J and Majiedt J. Although there are conclusions reached in each judgment that I agree with, I do not support the outcomes proposed in those judgments. In my view, the question whether Ms Harper's adopted children should benefit under the relevant Trust Deed should be answered with reference to the language employed in the deed itself. Reliance on the proviso in section 71(2) of the 1937 Children's Act is misplaced.

[237] Wood-Bodley "Freedom of testation and the bill of rights: Minister of Education v Syfrets Trust Ltd NO" (2007) 124 *SALJ* 687.

Meaning of the Trust Deed

[165] Before it was amended, the Trust Deed read:

> "4. Duties of Trustees
>
> A. The trustee or trustees shall stand possessed of the trust fund and shall invest and reinvest the capital of the trust fund, and the nett revenue and income derived therefrom, or part thereof, shall either be allowed to accumulate, and the amount so accumulated added to the capital of the trust fund, or the whole of the nett income and revenue, or part thereof, shall be applied for the benefit of all or any of the following persons, who may be alive at the time, namely:-
>
> (a) Gladys Elizabeth Clark (born Druiff).
> Married without community of property to Robert Bruce Clark.
>
> (b) Nina Dorothy Lewin (born Druiff).
> Married without community of property to Leo Lewin.
>
> (c) Lester Philip Druiff.
>
> (d) Dulcie Helena Wilkinson (born Druiff).
> Married without community of property to Michael Ayscough Wilkinson.
>
> (e) The child or any children of the said Gladys Elizabeth Clark (born Druiff).
>
> (f) The child or any children of the said Nina Dorothy Lewin (born Druiff)
>
> (g) The child or any children of the said Lester Phillip Druiff.
>
> (h) The child or any children of the said Dulcie Helena Wilkinson (born Druiff).
>
> It shall be entirely at the discretion of the trustees as to how much of the revenue shall be accumulated and how much applied for the benefit of the aforesaid beneficiaries and no beneficiary shall be entitled to dispute the authority of the trustees in the exercise of the discretion hereby conferred upon them.
>
> The trustees shall have the power in their absolute discretion at any time during the trust period to apply for the benefit of any beneficiary above referred to, part or the whole of the capital of the trust fund.
>
> B. On the death of the said Louis John Druiff the discretionary powers set out above shall cease and the nett revenue and income shall be divided equally between and paid to the said four children of the donor. If any child has died at such time, his or her share devolve upon his or her descendants per stirpes.

> 5. Period of Trust
>
> If the whole of the capital has not been applied for the benefit of the beneficiaries, as provided in paragraph 4 hereof, the trust shall remain in force for a period of one year after the death of the said Louis John Druiff.
>
> 6. Termination of Trust
>
> At the expiration of the trust period as hereinbefore provided the trustees shall realise the capital, or balance of capital, and divide the amount so realised equally between the said four children of the said Louis John Druiff. In the event of any child dying prior to the termination of the trust, his or her share shall devolve upon his or her legal descendants per stirpes. If such child has no legal descendants, his or her share shall be divided equally between the remaining children or their legal descendants per stirpes. If at such time there are no children alive and no legal descendants of such children, then the trustees shall divide the capital between such persons as may be nominated as the heirs in the will of the donor, or if the donor has failed to make a will, between the next-of-kin of the said donor."

[166] Clause 4 of the Trust Deed directs trustees to apply the trust fund for the benefit of the four children of Mr Louis John Druiff who executed the Trust Deed in January 1953. Those children included Ms Harper. At the time, three of them were married and Ms Harper was then married to Mr Michael Wilkinson but that marriage was terminated and she later remarried a certain Mr Harper and changed her surname to Harper.

[167] In addition to the donor's biological children who are listed by name, clause 4 adds as beneficiaries "the child or any children" of the donor's biological children. What is curious about this description is that it does not simply say the donor's grandchildren or any children of each of the named donor's children. But the clause uses a repetitive description of "the child or any children" which distinguishes between the first mentioned "child" and "any children" by employing the word "or" between them. Properly read, this suggests that "any children" wide as it ordinarily is, was not intended to include one child, where there was only one. If any of the donor's children, as listed in clause 4(e) to (h), had

one child only, the words "any children" would not apply to their case because their single child would have been covered by "the child" description.

[168] I accept that it is not plain from the language of clause 4A that the donor intended that adopted children be beneficiaries. But this is immaterial for present purposes because the trustees' discretionary power that was conferred by that clause ceased to exist upon the death of the donor in 1953.

[169] Clause 4B tells us that upon death of the donor, "the nett revenue and income shall be divided equally between them and paid to the said four children of the donor". But if any of the donor's children had predeceased him, that child's share shall devolve upon his or her descendants. At the time the donor died, all four of his children were still alive.

[170] Originally, clause 5 had fixed the duration of the Trust at one year from the date of the donor's death. However, this clause was amended in May 1953 and it now reads:

> "5. PERIOD OF TRUST
>
> If the whole of the capital has not been applied for the benefit of the beneficiaries as provided in paragraph 4 hereof, the trust shall remain in force until the death of the said four children of the donor, namely, as each of the said four children dies his or her one-fourth share of the capital of the trust shall be paid to his or her descendants *per stirpes*, in equal shares. If at such time any of the descendants, who is entitled to receive a share of the capital, is under the age of 28 years, such share of the capital shall continue to be held in trust and the revenue thereof paid to such descendant or beneficiary, or to his or her guardian until he or she attains the age of 28 years, when the capital shall be paid to him or her. If any of the said four children of the donor dies without leaving issue, his or her one-fourth share shall devolve upon the remaining children and shall form portion of the capital of the trust and be subject to the terms and conditions of the trust."

[171] Importantly clause 5, as amended, extended the duration of the Trust until all four children of the donor died. Whenever one of them dies, his or her one-fourth share of the

capital shall be paid to his or her descendants *per stirpes*, in equal shares. But if a descendant is below the age of 28 years, his or her share shall be held in trust and any revenue generated by it shall be paid to the descendant in question or his or her guardian. Upon turning 28 years old, the capital shall be paid to that descendant. For the sake of completeness, if one of the donor's four children were to die without leaving a child behind, his or her one-fourth share would devolve upon the remaining siblings and form part of the capital of the Trust.

[172] The latter term does not apply to the present matter because Ms Harper was still alive when the present matter was initiated in the High Court. As at that time, Ms Harper was entitled to receive benefits from her one-fourth share. What Ms Harper and her adopted children sought from the High Court was a declaration that her adopted children were entitled to receive benefits under the Trust Deed as they believed that if the words used in the Trust Deed like "children", "issue", "descendants" and "legal descendants" are construed to include the adopted children, Ms Harper's children would be entitled to benefit from the Trust.

[173] In other words there was uncertainty on whether Ms Harper's adopted children would be entitled to receive her one-fourth share upon her death. Since Ms Harper was the last surviving child of the donor, her death would mean that the Trust terminated and clause 6 of the Trust Deed would apply. Therefore, the question whether her adopted children would inherit her share must be determined with reference to clause 6, which governs the termination of the Trust.

[174] However, it does not appear that when clause 5 was amended, any consideration was given to amend clause 6 as well, to align it with the amended clause 5. As a result, what appears in the amended clause 5 is repeated in clause 6. For example, the division of the remaining capital into four equal shares between the donor's children and what should happen to the share of those who die during the subsistence of the Trust. It will be recalled

that before amendment, clause 5 only stipulated the duration of the Trust, commencing after the donor's death if there was a balance of the capital.

[175] Clause 6 was intended to regulate what happens to the Trust's capital on termination of the Trust. It begins by stating that capital would be divided equally between the four children of the donor. If one of them dies before termination, his or her share "shall devolve upon his or her legal descendants".

[176] It will be remembered that when the donor executed the Trust Deed, he did not intend that the Trust would terminate when the last of his children died. Therefore, what he intended in clause 6 was that at the expiration of a year from his date of death, his children then would receive equal shares of the capital. And if any of them died before termination, his or her share shall devolve upon his or her legal descendants. The amendment to clause 5 changed some of this arrangement. The division of the capital came in advance of termination. And this gives rise to difficulties in reading the Trust Deed coherently.

[177] However, all the clauses of the Trust Deed need to be read harmoniously. A careful reading of clauses 4 to 6 reveals that the donor used the words "child" and "children" to describe beneficiaries in clause 4A. Although the phrase "any children of" is capable of a meaning inclusive of adopted children, it does not appear that in the context of clause 4A, it was intended to carry that meaning.

[178] Clause 5 employs the word "descendants" to describe beneficiaries who were entitled to inherit through the donor's four children. Again in that context, it appears that reference is made to biological descendants.

[179] But in clause 6 the language employed changes from the one used in clause 5. Instead, clause 6 describes those who would benefit through the donor's children as "legal

descendants". This change of language signifies a change of intention.[238] If the donor meant descendants as envisaged in clause 5, why would he qualify the word descendants? The significance of the use of the word "legal" is that the donor wanted to ensure that the class of descendants entitled to benefit upon termination of the Trust would be wider. It would not be limited to biological descendants, as in the case of clause 5.

[180] An adopted child becomes a child of the adoptive parent through a legal process. The epithet "legal" cannot properly be used to describe one's biological descendant. On the contrary, it is appropriate to describe someone whose relationship with the parent is sourced from a legal process. In the context of clause 6, to read "legal descendants" as carrying the same meaning as descendants used in clause 5 would amount to ignoring the word "legal".

[181] The words "legal descendants" are used thrice in clause 6. Whenever reference is made to descendants it is qualified by "legal". Not even once does the clause use descendants without that qualification.

[182] It is evident from the text of clause 6 that the donor provided for all eventualities he could think of. Apart from dividing the capital in equal shares between the donor's children, the clause regulates what should happen to the share of those who might die before termination. Their shares were to devolve upon their legal descendants. But if at the time of termination, one of the donor's children had no legal descendants, his or her share would pass to heirs nominated in the donor's will. If the donor died intestate, that share would go to the donor's next-of-kin.

[238] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 77; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 52; *R v Sisilane* 1959 (2) SA 448 (A) at 453E; and *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (A) at 1279.

[183] However, the difficulty arises when clause 6 is read with the amended clause 5. Clause 5, in extending the duration of the Trust, reads "the trust shall remain in force until the death of the said four children of the donor". Of course, the donor must have been cognisant of the fact that his four children would not die on the same day. He did not say that the Trust will end when one of them dies. But he stated that it will end when all four die. To put this beyond doubt, the clause states that as each of the four children dies, his or her share be paid to his or her descendants.

[184] This suggests that the share of the deceased child of the donor would no longer be part of the Trust. As each such child died, their share was taken out of the Trust. This happened in respect of Ms Harper's three siblings whom she outlived. It appears that upon the death of the third sibling, what was left in the Trust was only Ms Harper's share. It is her sole share which was subject to the terms of clause 6. The shares of the siblings were not affected because they were paid to their descendants upon the death of each sibling.

[185] The difficulty that arises from the reading of clauses 5 and 6 is that each lays down a different condition for paying the shares of the donor's children to descendants and each describes those descendants differently. Under clause 6 payment occurs only upon termination of the Trust, even if one or more of the siblings dies before the termination date. On the contrary, under clause 5 payment occurs upon the sibling's death, even if that occurs before termination. But this difficulty does not alter the meaning to be assigned to "legal descendants" in clause 6. Instead, what it does is to underscore the contradiction between the two clauses.

[186] While it is true that clauses 5 and 6 are not consistent in describing who ought to receive the share of the donor's children who die before termination, this does not mean that when each clause is read separately, what each means is unclear. It is not uncommon that different clauses of a document contradict each other. The question is what a court should do when faced with contradictory clauses.

[187] It is a duty of this Court, as it was of the other courts, to try to reconcile the two clauses. One way of doing that would have been to apply the right clause. Properly construed, clause 5 does not apply to what should happen to the trust property upon termination. Clause 5 serves two purposes. First, it extends the duration of the Trust until all children of the donor died. Second, it permitted the trustees to pay a quarter share of every child of the donor who dies before termination. The payment was to be made to descendants of each deceased child of the donor.

[188] Upon the death of Ms Harper, the Trust terminated and it was clause 6 which applied. The fact that clause 5 contradicted it in some aspect did not mean that clause 6 should not be applied. It was clause 6 and it alone which regulated what should happen to Ms Harper's share in the Trust. It would be remarkable indeed to hold that a clause that was deliberately included in the Trust Deed by the donor should not be enforced solely on the ground that there was a conflict between it and another clause, which was not designed to govern termination of the Trust.

[189] The relevant principle of our law is that the Court must do its best to harmonise clauses of a will and give effect to the intention of the testator as reflected in the will. The same principle applies to conflicting statutory provisions or constitutional provisions. In *United Democratic Movement*, this Court affirmed the principle in these words:

> "A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them."[239]

[239] *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as Amicus Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83.

[190] Giving effect to all clauses does not mean that one must apply them all, even where some of them do not apply. Here, clause 5 cannot be applied to determine who should receive Ms Harper's share following her death. To do so would be to disregard the intention of the donor who made it unequivocally clear that matters relating to termination were to be governed by clause 6.

[191] By design, clauses 5 and 6 are not consistent. They cannot operate side by side at the same time because they were created to achieve conflicting objectives. Clause 5 keeps the Trust alive whereas clause 6 terminates it. In this sense, they are mutually exclusive. Each applied at a different stage of the Trust.

The SCA's interpretation of the Trust Deed

[192] The majority in the Supreme Court of Appeal proceeded from the premise that at the time of executing the will, "the donor was armed with the knowledge that Ms Harper might not be able to bear children".[240] That Court reasoned that the words "legal descendants" must be assigned the meaning of "descendants through the bloodline", as held in *Cohen.*[241] The main flaw in the majority's reasoning is that it misconstrued *Cohen.* First, *Cohen* did not require the interpretation of the words "legal descendants". Instead, the Court there had to construe "descendants". Therefore, *Cohen* did not say "legal descendants" means biological descendants, to the exclusion of adopted children.

[193] Nor can it be said that because in *Cohen* "descendants" was interpreted to mean blood relations, it follows that "legal descendants" here carries the same meaning. To do so would be to disregard the use of the word "legal". There is no legal basis for

[240] Supreme Court of Appeal judgment above n 2 at para 48.

[241] *Cohen* above n 18.

disregarding a word deliberately employed by the donor and the majority has provided none.

[194] In addition, although in *Cohen* the Court had held that the ordinary meaning of "descendants" is relations through the bloodline, it did not close the door to the word being used in a different sense. The Court emphasised that in the context of the will it was concerned with, the word was used in its ordinary sense. In this regard Smalberger JA said:

> "The word 'descendants' in its normal or usual meaning, therefore includes only blood relations in the descending line and excludes adopted children. The same is true of its Afrikaans equivalent. . . There is nothing to indicate that the testators intended to use the word other than in its normal sense. The references in special condition (iii) to the testators' 'said children' or 'our surviving children' are clearly to those children named in the will (i.e. the testators' own children). Having regard to the meaning of the word 'descendant', the reference to 'grandchildren' can, in the context, only be to grandchildren descended by blood from the testators."[242]

[195] Therefore, the authority on which the majority in the Supreme Court of Appeal relied for giving "legal descendants" the meaning of blood relations does not support that proposition. On the contrary, *Cohen* emphasised that the context in which this appeared in the relevant will was that "descendants" there was used in its normal sense. Here, because of the qualification "legal" and the apparent context, it can hardly be said the word is used in the ordinary sense. And this was overlooked by the majority.

Reliance on section 71(2) of the 1937 Act

[196] The majority in the Supreme Court of Appeal further relied on section 71(2) of the 1937 Children's Act which provided:

[242] Id at 640A-C.

> "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."

[197] It is apparent from the text of the proviso that the adopted child who is deemed to be a legitimate child of the adoptive parents is precluded from inheriting by virtue of the adoption. But on the explicit scheme of the proviso, the prohibition applies to two specified situations (a) and (b). In respect of (b), that adopted child may not inherit property *ab intestato* (by intestacy) from relatives of his or her adoptive parents. For present purposes (b) means that the adopted children of Ms Harper may not inherit property *ab intestato* from any of her relatives. The prohibition under (b) is not subject to any conditions.

[198] On the contrary, the prohibition under (a) is subject to two conditions. The first one is that the adopted child is not "entitled to any property devolving on any child of his adoptive parent". It is evident from these words that this condition relates to property. The adopted child is precluded from having title on a specifically described property. He or she may not have title on property devolving upon a child of his or her adoptive parent.

[199] For this condition to be met in this matter, there must be proof that Ms Harper, as the adoptive parent, had other children and property that devolved on those children. On the facts on record, she has no other children of hers upon whom her one-fourth share from the Trust devolved. Therefore, for the condition to be satisfied, the adoptive parent must have had children other than adopted ones and property that devolved on those children.

[200] Despite the failure to meet this condition, the first judgment holds that the proviso was triggered here.[243] But that judgment does not provide an explanation for applying the proviso, on the face of non-compliance with one of its conditions. Our law is clear. Where the invocation of a statutory provision is subject to pre-conditions, the provision cannot be invoked if the conditions are not met.[244] I am not aware of a principle that suggests otherwise.

[201] The second condition is that the will or trust deed must have been executed "prior to the date of adoption". I agree with the first judgment that the proviso does not apply if the adoption order was granted before execution of the Trust Deed. In that event there is no legal impediment that stands in the way of the adopted child and preventing him or her from inheriting under the Trust Deed, like any other child of the donor. This seriously undermines the proposition that "child" or "children", when used in a trust deed, mean or refer to biological children only. The same words would include adopted children, if their adoption preceded the execution of the trust deed.

[202] Both conditions must objectively exist before the proviso is triggered. This is so because both of them are mentioned as part of one continuous sentence. Therefore, there is no legal basis for treating them differently.

[203] Once it is accepted, as it must be, that the proviso does not apply to this matter, the requirement that an adopted child may inherit under a trust deed if it "clearly conveys the intention that property shall devolve upon the adopted child" falls away. It falls away in the same way as when the trust deed is executed after adoption.

[243] First judgment at [47] to [48].

[244] *Minister of Law and Order v Hurley* [1986] ZASCA 53; 1986 (3) SA 568 (A) and *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

[204] But more importantly, it seems to me that applying section 71 of the 1937 Children's Act to the interpretation of a trust deed is inappropriate. It may lead to absurd consequences, depending on when the trust deed was executed. If the trust deed was executed before adoption, the words "child" and "children" would exclude adopted children. But if the trust deed was executed after adoption, the same words would include adopted children, without the donor altering anything in the trust deed.

[205] Moreover, the section does not define those words. In the circumstances, it is difficult for me to appreciate how the section becomes relevant to determining the sense in which a donor has used those words in his or her testament.

[206] For all these reasons, I conclude that section 71 has no bearing on the interpretation of wills or trust deeds. What the section does is to qualify or restrict the scope of its deeming provision. It does this for the purpose of protecting the interests of other children of the adoptive parent. This objective is achieved by excluding the adopted children from acquiring property that devolves on the other children of the adoptive parent. Where there are no other children on whom property devolves, the proviso would serve no purpose.

[207] To sum up, the proviso does not apply here because Ms Harper did not have other children on whom her one-fourth share devolved. Accordingly, the majority in the Supreme Court of Appeal erred in invoking the proviso where it did not apply.

[208] In the present circumstances I would declare that clause 6 of the Trust Deed covered adopted children as beneficiaries of the capital divided equally between the donor's children. This would mean that Ms Harper's share would devolve upon her adopted children.

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