CONSTITUTIONAL COURT OF SOUTH AFRICA

James King N.O. and Others v Cornelius Albertus De Jager and Others

CCT 315/18

Date of hearing: 11 February 2020
Date of judgment: 19 February 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 19, February 2021, at 09h00, the Constitutional Court handed down judgment in respect of an application for leave to appeal against an order of the Supreme Court of Appeal. The application concerned the validity of an out-and-out disinheritance clause in a private will that excluded female lineal descendants from inheriting certain fideicommissary property.

On 28 November 1902 Mr Karel Johannes Cornelius De Jager and his wife Mrs Catherine Dorothea De Jager signed a will in terms of which they gave certain farms to their children. The inheritance was subject to the condition that the farms would pass from their children to male descendants only, until the third generation. This condition applied until 1994 when the interim Constitution came into effect, according to the Constitutional Court.

In 1957 the properties in question were inherited subject to that condition by male desecndants of the testators who were the third generation of descendants. These heirs included Mr Kalvyn De Jager and his two brothers, Cornelius and John. Mr John De Jager later died without a male child and his share in the farms was divided equally between Mr Kalvyn De Jager and Mr Cornelius De Jager. Upon the death of Mr Cornelius De Jager, his half share in the farms passed to his sons Albertus, Frederick and Arnoldus, who are the first to third respondents in these proceedings.

Mr Kalvyn De Jager who held the other half share of the farms died in 2015. He did not have male children. He had five daughters, Ms Trudene Forword, Ms Annelie Jordaan, Ms Elna Slabber, Ms Kalene Roux and Ms Surina Surfontein. In terms of clause 7 of testators

will, the half share of Mr Kalvyn De Jager could not pass to his daughters and yet he had left it to them under his will.

The question that arose for decision by the courts was whether clause 7 was still enforceable in view of the Constitution. This was because it was accepted by all that the clause constituted unfair discrimination against female descendants.

Before the High Court, the applicants sought an order to declare the alleged discriminatory clause invalid and to vary the will to include female heirs to the properties. This was opposed by the first to third respondents being the sons of the deceased's brother. The High Court dismissed the application on the basis that the clause was contained in a private will that did not have a public character; that as the clause was only intended to operate until the third generation in the De Jager family, it was not indefinite and lastly that because the clause was only discriminatory against certain descendants and not preventing all women from inheriting, section 8 of the Promotion of Equality Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) did not apply.

Aggrieved by the decision, the applicants appealed to the Supreme Court of Appeal, which appeal was dismissed, regrettably with no reasons.

Before this Court the applicants argued that the High Court erred in its determination and sought relief to amend the clause to meet the dictates of public policy by substituting the word "sons" in the clause with "children".

The first judgment penned by Mhlantla J (Khampepe J, Madlanga J and Theron J concurring), held that leave to appeal be granted as the matter raises constitutional issues, namely, that public policy is determinable only through reference to the founding values of the Constitution and that the matter involves the development of the common law in line with the Constitution. Further, the novelty of the issue for determination, prospects of success and public interest weighed in favour of leave to appeal being granted.

The first judgment characterised the issues for determination as whether a discriminatory out-and-out disinheritance provision in a private will can be declared unenforceable based on public policy underpinned by our constitutional values rather than the direct application of section 9 of the Constitution or the Equality Act. The first judgment held that the impugned clause was inimical to the values in the Constitution and public policy. It was further held that based on the facts of this matter; it is necessary to extend the common law rule that clauses that are contrary to public policy unenforceable, to private disinheritance testamentary provisions.

The second judgment penned by Jafta J (Mogoeng CJ, Majiedt J, Mathopo AJ and Victor AJ concurring) agrees with the first judgment insofar as granting leave to appeal and declaring that the impugned clause is unenforceable. The reasoning in the second judgment is however different.

The second judgment held that there is no need to prefer the value of equality over those of freedom and dignity or to develop the common law as the law has long recognized that clauses that are contrary to public policy are unenforceable. In respect of the High Court judgment, the second judgment found that the High Court erred in distinguishing between public and private testaments as the distinction is artificial and cannot be sustained and further that the High Court's overly narrow interpretation of section 8 of the Equality Act was wrong because the scheme and language of section 8 supports its applicability to the impugned clause. Lastly, as the impugned clause discriminates on one of the grounds listed in section 9(3) of the Constitution, the discrimination was presumed unfair and it was for the first to third respondents to show that the discrimination was fair, which they failed to do. The impugned clause was consequently declared invalid and unenforceable with the result that the deceased's will is free from the offending condition and the properties in question would form part of his estate from which the applicants would inherit.

The third judgment penned by Victor AJ disagreed with the first judgment's approach of developing the common law of freedom of testation to prohibit unfair discrimination. Rather, it agreed with the second judgment that the common law need not be developed and the matter should rather be resolved by applying the provisions of the Equality Act. It thus concurred with the second judgment and reached the same conclusion but from a multi-layered perspective.

The third judgment held that the proper approach was direct application as opposed to indirect application of the Bill of Rights. It reasoned that while the first judgment correctly pointed out the deficiencies of the common law freedom of testation, the option of developing the common law was not available due to the principle of constitutional subsidiarity. It held that the Equality Act is now the benchmark to evaluate the conduct of a private person which has an impact on another person's right to equality or right to be free from unfair discrimination.