REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 211/09

In the *ex parte* application of:

BOE TRUST LIMITED N.O.	First Applicant
ILMARY KEDDY N.O.	Second Applicant
FREDERICK GORDON BROWNELL N.O.	Third Applicant

(in their capacities as co-trustees of the Jean Pierre De Villiers Trust (MT5208/2006))

JUDGMENT DELIVERED ON

MITCHELL A.J.

[1] The applicants are the trustees of the Jean Pierre de Villiers Trust, a trust created by the will of Daphne Brice de Villiers, his widow. After various special bequests to her siblings, nephews, nieces and godchildren, the residue of her estate was left in trust.

[2] The applicants seek an order amending the terms of the trust in the manner set out below. The application has been prompted by the attitude that the applicants take to the following provisions of the trust:

> *'The remaining income shall be applied by my trustees for the provision of small bursaries to assist White South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain.*
>
> *The selection of these students, and the size and duration of the bursaries shall, after discussions between them, be the joint responsibility of the four Organic Chemistry Professors of the Universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfrets Trust Limited. The only provisos in the selection of suitable candidates are that, in addition to a competence in Organic Chemistry, such students must exhibit both the desire and the ability to benefit culturally from a period spent at such a university and that they must return to South Africa for a period to be stipulated by the Professors listed.'*

The provisions will be referred to hereafter, as in the founding papers, as *'the bursary bequest'*.

[3] Their attitude is expressed in the founding affidavit in the following terms:

> *'11. It is contended by the applicants that the word "White" used in the first of the quoted paragraphs of the Will falls to be deleted because it is directly or indirectly discriminatory against potential beneficiaries of the bursaries contemplated in the Will on the basis of race or colour, and is therefore contrary to:*

11.1 public policy and/or public interest; and/or

11.2 infringes the right to equality embodied in section 9(1) of the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution");

11.3 the provisions of section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;

11.4 the directive principles contemplated in sections 3 and 4 of the National Educational Policy Act 27 of 1996; and/or

11.5 the principles delivered in the judgment in this Honourable Division in the case of Minister of Education and another v Syfrets Trust NO and another 2006 (4) SA 205 (C).'

The relief that they seek is the deletion of the word '*White'* from the quoted provisions of the will.

[4] Given their concerns, the applicants instructed their attorney to communicate with the registrars of each of the universities named in the will to ascertain '*whether any of them would accept the bursary bequest on the conditions articulated in the Will'*. I assume that what was intended was an enquiry as to whether the professors of organic chemistry would participate in the selection process and make the stipulation as set forth in the second clause of the bursary bequest. The responses (from Professor Fourie of the Legal Services Department of Stellenbosch University, The Registrar: Student Academic Services of the University of Cape Town and the Registrars of the Universities of Pretoria and Cape Town) all indicate that these institutions

would not participate in the selection process unless the bursaries were to be made available to students of all races.

[5] The late Jean Pierre de Villiers was, himself, an applied chemist holding doctorates in chemistry from the Universities of Oxford and Pretoria, according to a letter from the third applicant, annexed to the founding affidavits. This explains, I assume, why the beneficiaries of the bequest are students of organic chemistry.

[6] On 28 January 2009 a rule nisi, returnable on 26 February 2009, was issued by Van Staden AJ. Service of the rule was to be effected on the Master of the High Court as well as by way of registered post on the Registrars of all South African Universities. Such service was effected and the matter came before me on the return day. There was no opposition and Mr *Howie*, on behalf of the applicants, sought confirmation of the rule.

[7] It is suggested in the founding affidavit, and Mr *Howie* so argued, that the court has the power to effect the deletion of the word *'White' 'on any one or more of the following grounds'*:

> *'12.1 section 13 of the Trust Property Control Act 57 of 1988, which permits the Court, in certain instances, to delete or vary provisions in a Trust instrument;*
>
> *12.2 the common law, which prohibits bequests that are illegal or immoral or contrary to public policy; and*

12.3 direct application of the Constitution, more particularly, the equality and anti-discriminatory provisions of section 9.'

[8] These grounds are the same as those advanced before Griesel J in this Division in the matter of *Minister of Education and Another v Syfrets Trust NO and Another*[1], a matter bearing some similarities to this and on which much reliance was placed by Mr *Howie*.

PUBLIC POLICY AND CONSTITUTIONAL CONSIDERATIONS

[9] The principle of freedom of testation formed part of the Roman and Roman-Dutch law, has been received into the South African law and, in some respects, taken further than in other Western legal systems[2]. Insofar as it may be necessary to seek confirmation that the right to freedom of testation remains protected under the Constitution, reference may be made to s 25(1) of the 1996 Constitution. In my opinion, it is clear that the right to property includes the right to give enforceable directions as to its disposal on the death of the owner.

[10] As with any other right to property the freedom of testation is not without restriction. It may be restricted, as it is, by laws of general application. By way of example, such restrictions are found in the Immovable Property

[1] 2006 (4) SA 205 (C) – The grounds are set out in para [9] of that judgment.
[2] Corbett *et al The Law of Succession in South Africa*, 2nd edition (2001), 39-40

(Removal and Modification of Restrictions) Act[3], limiting the ability of a testator to provide for more than two successive *fideicommissary* substitutions. The Maintenance of Surviving Spouses Act[4], by creating a claim for maintenance by such spouse, ranking after claims of other creditors, but before heirs and legatees, also effectively restricts the freedom of a testator to disinherit his or her spouse.

[11] The right to freedom of testation is further limited, as Griesel J pointed out in his judgment in the *Syfrets Trust* case, by considerations of public policy. The common law has long recognised that conditions attached to a bequest may be void as being contrary to public policy[5].

[12] Public policy is not a static concept. Conduct considered in the past to accord with public policy may no longer do so, and vice versa. In particular, since 1994 public policy has been shaped by the values incorporated into the Constitutions of 1993 and 1996. Griesel J found that the exclusion on the basis of race, gender and religion in the trust considered by him was contrary to public policy today in the light of the provisions of the 1996 Constitution, being unfair discrimination within the meaning of s 9(3)[6].

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[3] No. 94 of 1965
[4] No. 27 of 1990
[5] Corbett *et al*, *op cit*, 129 *ff* where conditions inimical to the institution of marriage are examined
[6] *Syfrets Trust* case, supra, paras [33] and [34]

[13] Public policy has been described as an unruly horse[7] and it undoubtedly is at times. It is a matter on which individual opinion might differ and, for this reason, it is the role of the courts to consider each case on its own merits and to balance the often conflicting interests that come into play[8]. It is apparent that the applicant trustees and those responding to their enquiry on behalf of the four universities, consider that the provisions of the bursary trust are contrary to public policy for the reason that they restrict the beneficiaries to white graduates, and therefore unfairly discriminate against other graduates on the ground of race, contrary to the provisions of s 9(3) of the 1996 Constitution.

[14] I am not satisfied that the provisions concerned are as clearly contrary to public policy as the trustees believe. Section 9(3) of the Constitution proscribes discrimination which is unfair. It is recognised that discrimination designed to achieve a legitimate objective is not unfair. Such legitimate objectives are, for example, the need to redress past injustices based on gender and race.

[15] During the post-constitutional years much has been said and written about the increasing trend amongst white graduates of our universities to emigrate upon completion of their education, thereby depriving the country of benefit of their skills obtained at the expense of the South African tertiary education system. While I have not been able to find a scientifically-based

[7] By Burrough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252 (130 ER 294 at 303)
[8] Corbett *'Aspects of the Role of Policy in the Evolution of our Common Law* (1987) 104 SALJ 52 at 67-69

study to confirm this trend, there is much anecdotal material suggesting that this is the case. The testatrix has thought fit to require beneficiaries of the bursary trust to return to South Africa for a period determined by the universities concerned after obtaining their doctorates. It seems at least possible that, in so doing, she was seeking to ameliorate this skills loss and indeed, to promote importation of skills obtained overseas. Certainly, it seems to me that the implementation of the bequest in accordance with its terms would have that effect.

[16] In addition, as Griesel J was careful to point out[9] not all clauses in wills or trust instruments which differentiate between different classes of beneficiary are invalid. Given that no one has a right to receive a benefit under a will or trust, it seems to me that, in principle, the freedom of testation must include the right to benefit a particular class of persons and not others. Only where that conduct can be categorised as unfair discrimination should it be held contrary to public policy[10].

[17] However, for reasons which will become apparent, I do not need to make a firm finding on this question.

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[9] *Syfrets Trust* case (supra) para [48]

[10] See the discussion of the judgment of Griesel J by Van der Westhuizen and Slabber, 2007 TSAR 206 and in particular their references to how the issue is dealt with in other jurisdictions, at 209-211.

THE TRUST PROPERTY CONTROL ACT

[18] Section 13 of the Trust Property Control Act 57 of 1988 empowers the court to vary the terms of a trust in certain circumstances. The section reads as follows:

> *'13 Power of court to vary trust provisions*
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> *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-*
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> *(a) hampers the achievement of the objects of the founder; or*
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> *(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.'*

The court is given extensive powers not only to delete but also to vary provisions in a trust instrument (including, of course, a testamentary trust, such as that here at issue), order the termination of the trust or to grant any other order which it deems just.

[19] In matters that cannot be dealt with in terms of the Act, the power of a court dealing with a provision in a will or trust instrument that is contrary to public policy are more limited. The offending provision may be struck out, if it is severable from the rest of the disposition, failing which the whole of the disposition must be set aside. In this respect the situation is, in my opinion, analogous to that pertaining to contracts containing clauses contrary to public policy[11]. A finding that a provision in a will or trust instrument is contrary to public policy does not, *per se*, give the court the power to vary the provision as it thinks appropriate.

[20] In order to enable the court to intervene, the Act requires the court to form an opinion that the provision has brought about consequences that the founder of the trust did not contemplate or foresee. Absent the formation of such opinion, the court is not empowered by the section to interfere with the directions of the founder other than by striking down a severable provision or the whole bequest. It is the jurisdictional fact upon which the power to vary (terminate or grant any other order) rests.

[21] Clearly, a shift in public policy between the time that the trust was founded and the time when a court is called upon to consider the question might be a factor leading to the formulation of the requisite opinion. Although Griesel J found it unnecessary to rely on the provisions of the Act in order to

[11] See the discussion of this question in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 15 I – 16 G and see Christie, *The Law of Contract in South Africa* 5th edition (2006) 388-391, Van der Merwe *et al*, *Contract: General Principles* 3rd edition (2007) para 7.3.1

grant the order which he did in the *Syfrets Ltd* matter[12] there seems little doubt that a finding was justified that Dr Scarbrow did not foresee, when he wrote his will in the first two decades of the 20th century, that the constitutional dispensation that 70 years later would render his bursary bequest contrary to public policy.

[22] The same cannot be said of the testatrix in this matter. Her will was executed on 14 July 2002, eight years into the new constitutional dispensation. It cannot be suggested that she was unaware of the changes wrought after 1994, nor do the applicants seek to make such a case. Indeed, the applicants do not attempt to make out any case that circumstances unforeseen by the testatrix have had any effect on the implementation of the bursary bequest in order to justify an interference by the court under the power conferred by s 13 of the Act.

[23] What has rendered the bursary bequest impossible to implement is the attitude taken by those who responded to the trustees' enquiry on behalf of the four universities, based on their perception that the bursary bequest is contrary to public policy.

[24] The testatrix, however, did contemplate that the bursary bequest might become impossible to carry out. Whether or not she envisaged that the attitude

[12] Para [16], p 215 D-E

of the universities would be the precipitating factor is irrelevant. She provided for this eventuality as follows:

> *'In the event that it should become impossible for my trustee to carry out the terms of the trust, I direct that the income generated by the trust be used annually to provide donations equal in size to each of the following charitable organisations:*
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> *THE HEART FOUNDATION OF SOUTH AFRICA;*
> *OPTIMA COLLEGE;*
> *THE SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS;*
> *BOY'S TOWN;*
> *THE SALVATION ARMY;*
> *MEALS-ON-WHEELS;*
> *S.O.S. CHILDREN'S VILLAGES;*
> *AVRIL ELIZABETH HOME;*
> *NATIONAL SEA RESCUE INSTITUTE;*
> *THE SOUTH AFRICAN BLIND WORKERS ORGANISATION.*
>
> *Should any of these institutions no longer exist at such time, I direct that my trustee shall choose institutions with similar aims and objectives. I direct that all such donations be sent directly to the organisation concerned and not to organisations collecting on their behalf.'*

[25] In relation to this provision, the trustees express the opinion that '*it would be prudent and preferable rather to fulfil the primary purpose behind the creation of the trust*' by effecting the amendment sought by them. This notwithstanding that the charitable organisations named in the will were not consulted by them or joined in these proceedings.

[26] In my opinion, this is quite impermissible. The court is not at large to rewrite testamentary dispositions (or other trust instruments) simply because

the trustees (or, for that matter, the beneficiaries) wish this to be done. Recognition of the right to freedom of testation must imply that effect must be given to the expressed wishes of the testator, except in the circumstances set out in the Trust Property Control Act, if it is possible to establish the jurisdictional fact to which I referred in paragraph 19 above.

[27] In the absence of such jurisdictional fact, the court may declare a provision in a trust instrument void as being contrary to public policy. This might result in a failure of the trust *in toto*, or the excision of the offending provision to the extent that it is severable from the remaining provisions of the trust instrument.

[28] In particular, neither the Act nor the common law permits the court to authorise the trustees to refrain from implementing any instructions given by the founder for the disposition of the trust assets upon failure of a particular provision (or the trust as a whole)[13].

[29] The trustees may take comfort from the fact that, as far as I am aware, all of the institutions listed as substitute beneficiaries are run on non-racial lines and accordingly that public policy will not be offended by the distribution of the trust income to these beneficiaries.

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[13] *Ex parte De Niewe Kerk* 1936 CPD 236; *In re Estate Lewis* 1944 CPD 360; *Ex parte Gandhi* 1949 (1) SA 421 (N) at 426-7.

[30] It follows that the application is dismissed. Despite this conclusion, it is apparent that the applicants have acted in what they considered to be the best interest of the trust. I therefore direct, insofar as this is necessary, that their costs as between attorney and own client be paid out of the funds of the trust.

MITCHELL, A.J.