CONSTITUTIONAL COURT OF SOUTH AFRICA

David Louis Ayscough Wilkinson and Another v Georgina Elizabeth Crawford N.O. and Others

CCT 130/19

Date of hearing: 11 February 2020
Date of judgment: 16 April 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 16 April 2021, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal. The application concerned the proper interpretation of the words "children", "descendants", "issue", and "legal descendants" (impugned words) and whether these include adopted grandchildren. An adjunct issue was whether a court can interpret a private trust deed in a manner that is contrary to public policy and that has the effect of discriminating against adopted children in contravention of section 9 of the Constitution. Another question was whether the Trust Deed could be varied in terms of section 13 of the Trust Property Control Act so that the impugned words include the applicants.

On 28 January 1953, Mr Louis John Druiff (Mr Druiff) executed a notarial deed of trust (Trust Deed). The key clauses in the Trust Deed were clauses 4, 5 and 6. Clause 4 identified his children as the income beneficiaries of the Trust, and upon their death, their respective shares would devolve upon their children, *per stirpes*. Clause 5 regulated the duration of the trust. In terms of Clause 5, the Trust Deed would remain in force until a year after Mr Druiff's death if the trust capital had not been applied for the benefit of the beneficiaries. Clause 6 regulated the termination of the Trust Deed, which was to occur on the death of the last of Mr Druiff's four children. Clause 6 provided that the trust capital or balance thereof would be divided equally among Mr Druiff's children. In the event that they died before the expiry of the trust period then it would devolve upon their "legal descendants", *per stirpes*. Four months later, on 23 May 1953, Mr Druiff executed a will and amended clause 5. 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*.

At the time, Mr Druiff had four children. Three of them had biological children, the fourth one, Ms Dulcie Helena Harper (Ms Harper), had none. Ms Harper had difficulty carrying a baby to full term and considered adopting. She expressed these sentiments to Mr Druiff, who urged her not to act in haste as she "did not know what the future held". Mr Druiff died in 1953. Upon his death, the net revenue and income was paid to his children in equal shares. The remaining capital from the trust would, in terms of clause 5, devolve upon his grandchildren, as each of his children died. After Mr Druiff's death, Ms Harper adopted two children, the late Mr David Louis Ayscough Wilkinson and Ms Amanda Bridget Truter.

Ms Harper was concerned that her children may be excluded from inheriting. She thus approached the High Court and sought a declarator that the impugned words 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 to apply to her children (Mr Druiff's adopted grandchildren). The High Court considered the Children's Act 31 of 1937, which was in force when the Trust Deed was executed. 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. The High Court held that the donor failed to explicitly include the adopted children as required by the Act and therefore they could not inherit. Instead, only blood relations could inherit. The Court held that Mr Druiff had the benefit of a professional to draft the Trust Deed, and that he would have been advised of the need to explicitly provide for the inclusion of the adopted grandchildren. The application was therefore dismissed.

Ms Harper appealed to the Supreme Court of Appeal. Unfortunately, she passed away before the appeal was heard. She was substituted by the executor of her estate. That Court endorsed the reasoning of the High Court that in light of the proviso, without a clearly conveyed intention to include adopted children, the impugned words referred to blood relations only. The Supreme Court of Appeal also considered whether the exclusion of adopted children was contrary to public policy. It held that public trusts are judged more strictly than private ones, and this matter concerns what occurs in the private sphere of the donor and the exclusion was "not manifestly discriminatory". In the result, the appeal was dismissed.

Before this Court, the applicants, Mr Druiff's adopted grandchildren, made the following submissions: First, based on section 71(2) of the 1937 Children's Act, the court *a quo* misinterpreted the facts and Mr Druiff's intention regarding natural and adopted children. Second, the Supreme Court of Appeal neglected the developments in public policy. Third, this Court ought to develop the common law to give effect to the right to equality. Fourth, the current Children's Act should be applied retrospectively. Fifth, the differentiation based on birth infringed on section 9(1) and section 9(3) of the Constitution. While freedom of testation was a core principle, it was not absolute, and the right to equality should outweigh freedom of testation. Finally, the applicants submitted that the High Court

and Supreme Court of Appeal also erred in dismissing their argument in respect of section 13 of the Trust Property Control Act.

The respondents submitted that, in context, Mr Druiff did not intend to include adopted children. Since the Trust Deed was executed before the adoption, the adopted children were not entitled to inherit unless such intention was clearly conveyed. Moreover, only the laws applicable at the time of its execution could be used to discern his intention. Further, Mr Druiff would have been assisted by professionals to execute the Trust Deed and would have included adopted grandchildren expressly if he desired to. They also submitted that the applicants could not rely directly on the Bill of Rights, due to the non-retrospectivity rule, rendering the equality argument irrelevant. The respondents contended that freedom of testation did not rank lower than equality. Finally, the respondents submitted that the jurisdictional facts for section 13 of the Trust Property Control Act were absent.

The first judgment (majority) penned by Mhlantla J (Khampepe J, Madlanga J, Theron J, and Victor AJ concurring), held that the matter raised constitutional issues. And that leave to appeal should be granted as the determination of the extent to which freedom of testation in respect of private trusts impacted the right to freedom from unfair discrimination was a novel issue that required this Court's attention.

The majority judgment held that the intention of the testator was paramount when interpreting the terms of the Trust Deed. It held that Mr Druiff had not exhibited a clear intention to include the applicants, Ms Harper's adopted children, as required by the 1937 Children's Act. That Act required the testator to clearly convey an intention to include the adopted children for them to benefit under the testamentary instrument. In so far as the interpretation of the words "legal descendants" is concerned, the majority held that reading "legal descendants" to be inclusive of adopted children, as required by the proviso, would not accord with the meaning intended by Mr Druiff. Section 71(2) of the Act required the testator to do something that was substantially more for the adopted children to be included. In addition, there was no express reference to adopted grandchildren. The majority also held that due to the inconsistency between the use of the words "children" in clause 4, "descendants" in the amended clause 5 and "legal descendants" in clause 6, it could not be said that there was a clear intention to include adopted children.

Mhlantla J further held that vesting could not save the applicants' 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. Thus, Mr Druiff was still required to clearly convey an intention to include the adopted grandchildren in terms of section 71(2) of the Act. Therefore, all the impugned words exclude adopted children.

The majority then considered whether the exclusion constituted unfair discrimination against adopted children. After considering the relevant provisions of the Constitution, and pertinent case law, it answered the question in the affirmative, and held that the unfair discrimination against adopted children is contrary to public policy, and therefore, the

exclusion is unenforceable. The bequest should be given effect to as if the exclusion of adopted children did not exist. In the result, the Court issued an order in terms of which leave to appeal was granted and the appeal was upheld. The order of the Supreme Court of Appeal was set aside. This Court issued a declarator that the exclusion of the adopted children constituted unfair discrimination and was unenforceable. The applicants were declared capital beneficiaries of one quarter share of the trust capital.

The second judgment penned by Majiedt J (Mathopo AJ concurring) agreed with the majority judgment's finding and reasoning in respect of the applicability of the 1937 Children's Act; its interpretation of the term "legal descendants" as well as the date of *dies cedit*, but differed with the majority on the proposed outcome.

The second judgment's basis for the divergence is that there is a high premium placed on freedom of testation in private testamentary bequests and therefore courts should exercise judicial restraint in private testamentary bequests, such as in the present matter. It reasoned that the donor's freedom of testation derives protection from both common law and the fundamental rights of dignity, privacy and property and therefore overriding the donor's testamentary bequest constituted encroachment of the donor's fundamental rights to human dignity, privacy, and property.

Accordingly, the second judgment disagreed with the majority's development of the law to recognise that discrimination on the ground of birth includes adoption on the basis that such development was based on the misconstruction of "birth" as a prohibited ground in terms of section 9(3) and this Court's pronouncement in *Bhe*. Furthermore, the second judgment criticised this development on the basis that it did not properly consider the donor's fundamental rights; disregarded the difference between differentiation and unfair discrimination as expounded in *Harksen* and that the development was solely based on the differentiation brought about by section 71(2) and thus unnecessary. For those reasons, the second judgment would have dismissed the appeal.

The third judgment, penned by Jafta J (Mogoeng CJ concurring), agreed that relief should be granted in favour of the applicants, but for materially different reasons. It held that the question whether adopted children could benefit under the Trust Deed should be answered with reference to the language employed in the Trust Deed itself.

The third judgment held that, contrary to the findings of the majority, the proviso in section 71(2) of the 1937 Children's Act did not find application in this matter as the conditions set out in the proviso had not been met. Further, that section 71 had no bearing on the interpretation of the Trust Deed.

The third judgment considered the text of clauses 5 and 6 of the Trust Deed and held that although the clauses were not consistent with each other, clause 6 governed the termination of the Trust. In this regard, the use of the words "legal descendants" in clause 6 covered adopted children as beneficiaries of the capital divided equally between the donor's children.