

Legal update 5 of 2021: Estate planning- Provisions of a will must not be inconsistent with the Constitution

Introduction

This update deals with a recent case decided by the Constitutional Court relating to inheritance.

Below is a summary of the case and insight into how we deal with these issues on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We also included more detail on the case.

Summary

Case: King N.O. & Others vs De Jager & Others (Case no. CCT315/18) [2021] ZACC 4 (19 February 2021)

Can a person creating a fideicommissum (a type of bequest in terms of which a beneficiary is allowed to inherit on condition that the property inherited will pass on to one or more other person, or class of persons such as children of the beneficiary, nominated by the testator) through a will, exclude certain heirs from inheriting from his estate based on their sex or gender?

- **The finding:** It would be against public policy and contrary to the Constitution for certain heirs who are fideicommissary to be excluded or disqualified from inheriting if eligibility is only based on the grounds of sex or gender. Even though the Courts are reluctant to interfere with the freedom of testation, any provision in a will that is inconsistent with the Constitution will be set aside by a Court. The declaration of invalidity in respect of the clause in the will does not pertain to the execution of the will back in 1902 but applies from the date of the order of the Constitutional Court (CC).
- **How we deal with this:** When distributing a death

benefit in terms of section 37C of the Pension Funds Act, the Trustees are required to consider what each potential beneficiary stands to receive from other sources outside of the Fund, such as an inheritance from the deceased member's estate.

When it is brought to our attention that a member of our Fund has a will in terms of which certain descendants are excluded on the grounds of sex or gender, the Fund will not enter the legal proceedings if the beneficiaries are involved in litigation. The Trustees of the Fund will consider how the deceased member's estate is distributed in making an equitable distribution of the death benefit payable in terms of section 37C of the Pension Funds Act. The Trustees of the Fund will accept the deceased's member's liquidation and distribution account that has been approved by the Master of the High Court or if a will is challenged in Court, the Trustees will accept the order of the Court concerned as an indication of what each potential beneficiary has received from the estate.

More detail of the case

Case: King N.O & Others vs De Jager & Others (Case no. CCT315/18) [2021] ZACC 4 (19 February 2021)

Can a person creating a fideicommissum through a will, exclude certain heirs from inheriting from his estate based on their sex or gender?

This matter was heard in the Western Cape High Court (High Court) and then went on appeal to the Supreme Court of Appeal (SCA), and subsequently the Constitutional Court (CC).

Background

On 28 November 1902, Mr Karel Johannes Cornelius De Jager and Mrs Catherine Dorothea De Jager (the deceased's grandparents) executed a joint will in terms of which they bequeathed various properties, including farming properties, to their six children – four sons and two daughters, subject to a fideicommissum. A fideicommissum is an inheritance bequeathed to a person without passing ownership of the property to the heir as they are required to later pass the property onto another person in the manner stipulated in the will. Clause 7 of the will stipulated that beyond the first generation, the fideicommissary property would, as far as the second and third generations were concerned, not be inherited by their female descendants. The deceased was the last grandson of Mr and Mrs De Jager in respect of whose estate the property could still be dealt with in terms of the will executed in 1902. One of their sons Cornelius, had three sons: Corrie, John and Kalvyn (the deceased). The first to third respondents are John's sons. Mr Kalvyn de Jager died having a will on 5 May 2015. He had no sons but left five daughters (the second to sixth applicants). His daughters had four sons – the fourth to eighth respondents (deceased's grandsons).

The executor of the deceased's estate received the following three claims against the estate:

- A claim by the deceased's daughters that the terms of the clause were discriminatory because female descendants were excluded from inheriting;
- A second claim by the first to third respondents, who relied on the terms of clause 7 and contended that since the deceased had no sons, the fideicommissum devolved on them, and
- A third claim by the deceased's grandsons, who contended that if their mother's claim of unfair discrimination did not succeed, clause 7 of the will

should be interpreted in such a way that the property devolves on them, as the deceased's male descendants (his grandsons).

One of the co-executors of the deceased's estate applied to the High Court for a declaratory order, in terms of which the court had to confirm how the law should be applied, as there were conflicting claims made to the deceased's property.

The High Court

The High Court did not declare clause 7 of the will invalid by reason of being inconsistent with the Constitution and neither did the SCA. This led to the application to the CC.

The Constitutional Court

The applicants submitted that clause 7 of the will unfairly discriminates against women. The CC made the following findings:

- Before the commencement of the Constitution, courts had the power to develop the common law in light of public policy and adjust it to the ever-changing needs of society.
- Now, however, we have instructive guidance since public policy is deeply rooted in our Constitution and its ingrained values. Therefore, applying the public policy of today does not raise the question of the retrospective application of the Constitution. Rather, it is consistent with the role of courts to develop the common law to bring it in line with the Constitution. The enforcement of the testamentary provisions, which occurred in 2015 on the death of Mr Kalvyn de Jager, and not the drafting of the provisions of the will which dates back to the early 1900s, were the issue to be determined by the court. Therefore, the CC held that there is no need to worry about whether its order should have retrospective effect as the order would take effect from the date that it is made by the Court.

The CC held that the provisions of clause 7 of the will were invalid as they were inconsistent with the Constitution, which means that the deceased's daughters were allowed to inherit from their father even though they are not male heirs.

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