

The Role of Public Policy in *King v De Jager* (CCT 315/18) [2021] ZACC 4 (19 February 2021)

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Abstract

In *King v De Jager* (CCT 315/18) [2021] ZACC 4 (19 February 2021), the Constitutional Court considered whether a discriminatory out-and-out disinheritance clause in a private will could be declared unenforceable in terms of public policy. This opened private wills with disinheritance clauses to the scrutinising evaluation of public values despite freedom of testation. Although public policy has always been an elusive concept, South African public policy is infused with constitutional values to give more clarity on the content of public policy. In *King* a conflation emerged between constitutional rights, legislative violations and public policy values, however. The court grappled with the question of whether to apply the *Constitution* directly based on a violation in terms of section 9(4) or whether the section 8 of the *Equality Act* should be applied directly through the subsidiarity principle, or whether the discriminatory clause should be evaluated through the public policy lens. Where the conflicting values were weighed up there seem to be hints of subjective views to tip the scales in favour of one value over another. This is a concern when public policy is used to advance a subjective view of what the community values more, especially when it involves the disruption of the devolvement of a deceased's estate. This underlines the difficult application of public policy values, even in a constitutional democracy, when competing values are at play.

Keywords

Public policy; conflicting constitutional values; value of equality; law of succession; constitutional subsidiarity.

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1 Introduction

Courts have already explored discriminatory clauses in charitable trusts that have a public character.¹ In *King v De Jager*² the Constitutional Court grappled with a novel issue that involved a discriminatory disinheritance clause in a private will that excluded female descendants from inheriting, that was accused of violating the public policy considerations of equality, freedom and dignity in court for the first time. Previously our courts had applied public policy considerations only to testamentary forfeiture clauses and public charitable trusts.³ The *King* judgment ultimately ruled the discriminatory clause as unenforceable.⁴ Before *King* it had been argued that disinheritance clauses should never be open to contest and constitutionally-founded public policy criteria should be precluded in such cases.⁵ These criteria were widened in *King* to disinheritance clauses in private wills, however, and the minority judgment⁶ specifically focussed its arguments on the question of discriminatory disinheritance through the "lens of public policy against the backdrop of our constitutional democracy".⁷ It had to be evaluated whether the discriminatory terms in the wills were to be allowed in terms of the freedom of testation or were to be barred in terms of their violation of the value of equality.⁸

Whilst the majority judgment⁹ focussed on the question of the direct or indirect application of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) and the separate judgment advocated the direct use of the *Promotion of Equality and Prevention of Unfair Discrimination Act*¹⁰ through the principle of constitutional subsidiarity, the focus of this note will

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¹ *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) (hereafter *Min of Education v Syfrets* (C)); *Curators, Emma Smith Educational Fund v University of KZN* 2010 6 SA 518 (SCA) (hereafter *Emma Smith* (SCA)); *In re Heydenrych Testamentary Trust* 2012 4 SA 103 (WCC); *Ex parte Boe Trust Ltd* 2013 JOL 30123 (SCA).

² *King v De Jager* (CCT 315/18) [2021] ZACC 4 (19 February 2021) (hereafter *King* CC).

³ *King* CC para 33.

⁴ *King* CC para 163.

⁵ Du Toit 2001 *Stell LR* 245. Also see Sonnekus 2019 *TSAR* 679; De Waal "Law of Succession and the Bill of Rights" 3G9.

⁶ Led by Mhlantla J with Khampepe J, Madlanga J and Theron J concurring.

⁷ *King* CC para 1.

⁸ This decision was also echoed in the judgment that followed *King* that also amended a private testamentary trust to remove a discriminatory provision, albeit given by the same bench of constitutional judges: *Wilkinson v Crawford* 2021 4 SA 323 (CC).

⁹ Led by Jafta J with Mogoeng CJ, Majiedt J, Mathopo AJ and Victor AJ concurring. Victor AJ included a separate judgment.

¹⁰ The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter the *Equality Act*).

be on the arguments raised that focussed on the impact and role that public policy played in the case.

The note will show the elusive nature of public policy (a synonym for the *boni mores*, public interest, and the general sense of justice of the community)¹¹ generally and how the South African *Constitution* had given more clarity to some of these values when they were reflected in section 1 of the *Constitution*. It will also show, however, how this infusion of the *Constitution* with the public policy values caused a conflation issue in *King* and has caused other questions regarding certain constitutional values being viewed as more important than others based on our constitutional dispensation. The consideration of these issues in *King* seems to have diminished the pertinent role of public policy in our constitutional democracy and raised concerns when it is used only to advance a subjective view under the banner of public policy.

2 *King v De Jager* background

The case concerned a clause (7) in the joint will of the late Mr Carel Johannes Cornelius De Jager and the late Mrs Catherine Dorothea de Jager, who bequeathed fixed property to their six children (four sons and two daughters) subject to a *fideicommissum*.¹² The substitutions of the *fideicommissum* limited the first and second substitutions to only the male heirs of the six children.¹³ If no male descendants of a son existed, his share would go to his brothers and their sons.

The first substitution of fiduciaries occurred and was devolved upon the three sons, one being Mr Cornelius De Jager. He left three sons, Corrie, John and Kalvyn. The substitution hereafter would have been the last as required by the terms of the will, and the heirs would inherit the property free of the *fideicommissum*.

Corrie died without leaving any children, John died leaving three sons who inherited John's share of the properties in question, free of any *fideicommissum*. Kalvyn died, leaving only five daughters and no sons.¹⁴ In terms of his *fideicommissum* his daughters would receive nothing from the

¹¹ *Min of Education v Syfrets* (C) para 24; *Emma Smith* (SCA) para 40.

¹² A *fideicommissum* is "a legal institution in terms of which a person (the *fideicommittens*) transfers a benefit to a particular beneficiary (the *fiduciary* or *fiduciaries*) subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit goes over to a further beneficiary (the *fideicommissary* or *fideicommissarius*)". De Waal and Schoeman-Malan *Law of Succession* 147-148.

¹³ *King* CC para 5.

¹⁴ *King* CC para 6.

property bound to the *fideicommissum*, and their share would go to their male cousins.

After Kalvyn's death, although the property bound by the *fideicommissum* was bequeathed in Kalvyn's will to his daughters, the cousins laid claim to the property as heirs in the last substitution that would inherit the property free of the *fideicommissary* burden. As the attorney, executor and main applicant, King expressed the view that the terms of the *fideicommissum* clause were discriminatory against the female descendants (daughters) that were excluded from inheriting, and that this was against public policy.¹⁵ He asked the court for a declaratory order stating to whom he and his fellow executors should transfer the *fideicommissary* property¹⁶ and to amend the clause to read in "children" instead of "sons".¹⁷

The High Court accepted that the terms of the *fideicommissum* were discriminatory against the female descendants of the testators. However, after doing extensive evaluations on public charitable testamentary trusts and the right to equality in the new constitutional era and the prohibition of gender discrimination in section 8 of the *Equality Act*, it held that "the will did not have a public character or an indefinite life and its provisions did not discriminate against one or more sectors of society but rather, against certain descendants".¹⁸

The High Court concluded that it would produce an "arbitrary result"¹⁹ to allow the right to equality to trump the right to freedom of testation, and thus the discrimination was "reasonable and justifiable given the importance accorded to freedom of testation"²⁰ and not so unreasonable or offensive as to be contrary to public policy.

The daughters challenged the outcome as applicants in the Constitutional Court, asking for leave to appeal to be granted. The substantive issues that had to be addressed were the interpretation of clause 7. Did the clause unfairly discriminate against women and should it therefore be declared as unenforceable?²¹ These issues raised the question of whether a discriminatory out-and-out disinheritance provision in a private will could be declared unenforceable based on public policy as underpinned by our constitutional values.²²

¹⁵ *King v De Jager* (21972/2015) [2017] ZAWCHC 79 (10 August 2017) para 13 (hereafter *King* HC).

¹⁶ *King* HC para 17.

¹⁷ *King* HC para 20.

¹⁸ *King* CC para 10.

¹⁹ *King* CC para 11.

²⁰ *King* CC para 11.

²¹ *King* CC para 14.

²² *King* CC para 19.

In the minority (first) judgment delivered by Mhlantla J, the majority (second) judgment delivered by Jafta J and a separate judgment by Victor AJ (concurring with the second judgment), the judges were unanimous that the *fideicommissary* clause was unenforceable, but they were divided in their approach.²³ The majority judgment focussed on a direct application of the *Constitution's* section 9(4) to declare the clause invalid²⁴ and did not see the need to develop the common law.²⁵ Although the judgment regarded the *Constitution* as the driving force to declare the clause unenforceable, the judgment recognised the *Equality Act* and public policy as additional supportive authority for the clause to be unenforceable.²⁶ Public considerations were recognised to indicate that the terms in the will were regarded as unlawful even before the *Constitution*.²⁷

In her separate judgment Victor AJ argued that the clause was unenforceable not because of a direct violation of the *Constitution* but, based on the principle of constitutional subsidiarity, because it directly violated the *Equality Act*. Authority²⁸ given in *King* confirmed that:

in cases concerning the horizontality of the right to equality, that is cases of unfair discrimination committed by private parties, it is the Equality Act, and not section 9(4) which must be invoked.²⁹

Constitutional subsidiarity entails that issues should be determined by indirect constitutional norms, rather than more general, direct constitutional norms.³⁰ The majority did briefly acknowledge the principle of constitutional subsidiarity that obliged the applicants to base their arguments of unfair discrimination on the *Equality Act*³¹ but it was Victor AJ's judgment that relied on this principle to declare the clause to be unfairly discriminatory.³²

She also stressed that the transformative constitutional commitment asks that "common law principles such as the freedom of testation should be recalibrated towards more egalitarian and *ubuntu* based ends".³³

It was the first judgment (the minority) that focussed the discussion on public policy as the basis for why the clause should be declared unenforceable.³⁴ The judgments will be unpacked to indicate two issues that have an impact

²³ *King* CC paras 85, 88, 158.

²⁴ *King* CC para 128.

²⁵ *King* CC para 40.

²⁶ *King* CC para 137.

²⁷ *King* CC para 127.

²⁸ *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 40.

²⁹ *King* CC para 187.

³⁰ Murcott and Van der Westhuizen 2015 CCR 46.

³¹ *King* CC para 142.

³² *King* CC para 193.

³³ *King* CC para 202.

³⁴ *King* CC paras 19, 40.

on our understanding of the role of public policy in a constitutional democracy, but it is important first to understand the intricacies of how public policy operates generally before it can be evaluated in terms of *King*.

3 The elusive public policy concept

Public policy has always been an enigma³⁵ and has eluded a proper definition in many jurisdictions. Smalberger JA reflected that public policy is "an expression of vague import"³⁶ and often a complex and contentious matter or "an imprecise and elusive concept".³⁷ It has frequently been described as an "unruly horse".³⁸ This metaphor is used to indicate the volatile nature of public policy that is not static and changes over time, and from one context to another.³⁹ It can vary in different societies and at different times in accordance with social beliefs on the one hand and what justice demands on the other hand.⁴⁰ This would mean that one would evaluate the relevant public policy when the issue in the will was brought forward, not when the will was executed.⁴¹

There is also the concern that that public policy changes from person (judge) to person (judge)⁴² and therefore "is sufficiently spacious and flexible to cover what the Courts choose to encompass".⁴³ A warning, therefore, comes with this metaphorical description of public policy. That one should not argue too strongly on public policy⁴⁴ as this might result in legal uncertainty,⁴⁵ and that it should be used only in clear cases "in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds".⁴⁶

³⁵ Begleiter 2012 *Quinnipiac Prob LJ* 125.

³⁶ *Law Union and Rock Insurance Company Limited v Carmichael Executor* 1917 AD 593 598; *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A) 350.

³⁷ *Min of Education v Syfrets (C)* para 24; *Longman Distillers Ltd v Drop Inn Group* 1990 2 SA 906 (A) 913G.

³⁸ *Richardson v Mellish* (1824) 2 Bing 229 252; *Canada Trust Co v Ontario (Human Rights Commission)* 1990 CarswellOnt 486, [1990] OJ No 615 para 34; Shand 1972 CLJ 144-167; Begleiter 2012 *Quinnipiac Prob LJ* 135; *Driefontein Consolidated Mines Ltd v Jansen* 1901 17 TLR 604 605; *Ex parte BOE Trust Ltd* 2009 6 SA 470 (WCC) para 13.

³⁹ Du Toit, Smith and Van der Linde *Fundamentals of South African Trust Law* 36; Hahlo 1950 SALJ 240; Botha 2004 SAJHR 271; *Min of Education v Syfrets (C)* para 24; Van Niekerk 2000 THRHR 405; *King CC* para 72.

⁴⁰ Van Niekerk 2000 THRHR 405; *King CC* para 72.

⁴¹ *Min of Education v Syfrets (C)* para 26; *King HC* para 30; Du Toit 2012 *Tul Eur & Civil LF* 117.

⁴² Kruger 2011 SALJ 712; *Canada Trust Co v Ontario (Human Rights Commission)* 1990 CarswellOnt 486, [1990] OJ No 615 para 34.

⁴³ Gould 1955 ABAJ 60.

⁴⁴ *Driefontein Consolidated Mines Ltd v Jansen* 1901 17 TLR 604 605.

⁴⁵ Grattan and Conway 2005 McGill LJ 522.

⁴⁶ *Canada Trust Co v Ontario (Human Rights Commission)* 1990 CarswellOnt 486, [1990] OJ No 615 para 34.

The interest of the community is at the heart of the public policy concept.⁴⁷ It is used as the substantive reason for judgments reflecting the values accepted by society.⁴⁸

In South Africa public policy considerations are used in the public and private sphere of the law. Specifically in private law, in the law of delict, public policy plays a significant role in defining injuries.⁴⁹ It has played a role in the law of contract on the limitation of freedom of contract, specifically on the conditions in a contract, and also in family law on elements of the family structure, specifically the freedom of marriage or of divorce.⁵⁰ Even in the law of succession it has since Roman times been the framework in which testamentary clauses were held to be valid.⁵¹ Considerations of public policy were used to set certain restrictions on conditions in a will, to protect the sanctity of marriage⁵² but they were also used to develop restrictions that applied on racial, gender and religious grounds.⁵³ They were also used to alter charitable trusts that had discriminatory provisions.⁵⁴ These wills (with their charitable trusts) were amended post mortem, as provisions in the wills had consequences for the public sphere and were therefore viewed as being in the public domain. Hence the justification for amending these wills.⁵⁵

Applying public policy to a will generally does not have a defined process and there is "no check-list to be marked off by judges or bright line to mark in advance what will be contrary to public policy"⁵⁶ but it is important instead to take the context surrounding the consideration into account.

The introduction of the *Constitution* post-1994 has influenced public policy a great deal in South Africa by providing a set of values that impact on the conceptual and substantive nature of public policy.⁵⁷ Public policy is now deeply rooted in the *Constitution* and its underlying fundamental values,

⁴⁷ *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A) 350.

⁴⁸ Van Aswegen 1993 *THRHR* 174; *King CC* para 168.

⁴⁹ Sharp *Critical Analysis of the role of the Boni Mores* 9; Mayer-Maly 1987 *THRHR* 64.

⁵⁰ *Kuhn v Karp* 1948 4 SA 825 (T); Mayer-Maly 1987 *THRHR* 64.

⁵¹ *Min of Education v Syfrets (C)* para 23; *Levy v Schwartz* 1948 4 SA 930 (W) 937; Du Toit 2012 *Tul Eur & Civil LF* 111.

⁵² *Levy v Schwartz* 1948 4 SA 930 (W); *Kuhn v Karp* 1948 4 SA 825 (T); *Aronson v Estate Hart* 1950 1 SA 539 (A); Du Toit 2012 *Tul Eur & Civil LF* 111.

⁵³ Du Toit 2012 *Tul Eur & Civil LF Form* 115; *Osman and Effendi* 2022 *PELJ* 10; *Min of Education v Syfrets (C)*; *Emma Smith (SCA)*; *In re Heydenrych Testamentary Trust* 2012 4 SA 103 (WCC); *Ex parte Boe Trust Ltd* 2013 JOL 30123 (SCA).

⁵⁴ *Levy v Schwartz* 1948 4 SA 930 (W); *Kuhn v Karp* 1948 4 SA 825 (T); *Aronson v Estate Hart* 1950 1 SA 539 (A); Corbett, Hofmeyer and Kahn *Law of Succession* 129; Du Toit, Smith and Van der Linde *Fundamentals of South African Trust Law* 39.

⁵⁵ *Min of Education v Syfrets (C)*; *Emma Smith (SCA)*; *In re Heydenrych Testamentary Trust* 2012 4 SA 103 (WCC); *Ex parte Boe Trust Ltd* 2013 JOL 30123 (SCA).

⁵⁶ Kruger 2011 *SALJ* 714.

⁵⁷ Kruger 2011 *SALJ* 713.

such as human dignity, equality and freedom.⁵⁸ Section 1 of the *Constitution* states:

[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.

This has established an objective, normative value system against which public policy matters must be resolved.⁵⁹ In *Barkhuizen v Napier*⁶⁰ the South African Constitutional Court acknowledged that:

[p]ublic policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.⁶¹

To illustrate how public policy is now infused by the constitutional values, the value of dignity and freedom is embodied in the principle of self-autonomy.⁶² Self-autonomy in the law of contract is embodied by the common law's *pacta sunt servanda* (contractual terms must be carried out), much as self-autonomy in the law of succession is embodied by the common law's *voluntas testatoris servanda est* (a testator's wishes must be carried out). Ngcobo J (as he then was) confirmed in *Barkhuizen*: "self-autonomy, or the ability to regulate one's own affairs, even to one's detriment, is the very essence of freedom and a vital part of dignity".⁶³ This value is not reflected by the constitutional value of freedom and dignity.

Equality, on the other hand, is also seen as a foundational value of public policy. It is also seen as "a standard which must inform all law and against which all law must be tested for constitutional consonance".⁶⁴ The equality value will be violated in cases of unfair discrimination (as listed in the *Constitution* in section 9(3)). Harding concludes that "it seems highly

⁵⁸ *Min of Education v Syfrets* (C) para 24; *Emma Smith* (SCA) para 38; *King CC* para 168.

⁵⁹ *Min of Education v Syfrets* (C) para 24; Du Toit 2012 *Tul Eur & Civil LF* 117.

⁶⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter *Barkhuizen*), a case concerning the application of public policy on a time limitation clause in terms of contract law. In *Min of Education v Syfrets* (C) para 24 it is acknowledged that the relation to the freedom of testation and the freedom of contract is analogous and that identical considerations apply to both fields.

⁶¹ *Barkhuizen* para 28.

⁶² Du Toit, Smith and Van der Linde *Fundamentals of South African Trust Law* 34.

⁶³ *Barkhuizen* para 57.

⁶⁴ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 22. Also see Du Toit, Harding and Humm 2022 *Stell LR* 506.

implausible that any part of South Africa's legal order, including its private law, would operate free from the demands of equality, whether through the public policy doctrine or in other ways".⁶⁵

But these are not the only public policy considerations that could be relevant to a certain case. In the law of contract, established public policy considerations of fairness, justice, reasonableness and ubuntu were acknowledged in *Barkhuizen*.⁶⁶

Kruger then aptly describes the understanding of public policy as a "basket" of several potentially relevant public policy considerations a judge must evaluate in a particular case.⁶⁷ The challenge then is the balancing of competing relevant considerations that steer the judgment in favour of one party's value instead in favour of the other's conflicting value. In *Holomisa v Argus Newspapers Ltd*⁶⁸ it was stated that "[t]he value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process".

Where the value of equality was a consideration in earlier cases that involved charitable trusts, it seemed that unfair discrimination (seen as a violation of the equality value) was to receive more protection than other values. In *Min of Education v Syfrets*⁶⁹ it was argued that the right to equality outweighs the right to property and privacy. Griesel J also alluded to the opinion that state action would have to succumb to the "heavier" rights of equality.⁷⁰ This led to the outcome in the case that a charitable trust (which was seen as a public agency) which contained unfair discriminatory clauses that allowed only for European applicants that were not Jewish or female would not reflect the foundational constitutional values of non-racialism, non-sexism and equality and that the clauses would therefore be against public policy.⁷¹

In *Emma Smith* the court trusted the balance used in *Min of Education v Syfrets* and affirmed that "[i]n the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster".⁷² The prohibition against unfair discrimination in the public sphere (motivated by the constitutional imperative to move away from our racially divided past) would therefore take precedence over the freedom of testation⁷³ and the values that it protects (dignity and property) as part of

⁶⁵ Du Toit, Harding and Humm 2022 *Stell LR* 507.

⁶⁶ *Barkhuizen* para 51.

⁶⁷ Kruger 2011 *SALJ* 716.

⁶⁸ *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 607D.

⁶⁹ *Min of Education v Syfrets* (C) para 44.

⁷⁰ *Min of Education v Syfrets* (C) para 45.

⁷¹ *Min of Education v Syfrets* (C) para 47.

⁷² *Emma Smith* (SCA) para 38.

⁷³ *Emma Smith* (SCA) para 42.

public policy. Consequently, the racially discriminatory provisions were also removed in this charitable trust to enable the University to award bursaries to students free of being forced to administer a racially exclusive fund.⁷⁴

It could be deduced from these cases that equality has been seen as a principal value as part of South African public policy for cases in the public sphere that had prohibited discriminatory terms. In *King* this view was taken even further, beyond the public divide. This will be unpacked below after evaluating what insights foreign jurisdictions could give on the application of public policy in private wills with disinheritance clauses.

4 Comparative public policy

The *Constitution*⁷⁵ makes provision for the consideration of foreign law when interpreting the Bill of Rights and its values. Mhlanthla J used Canada, Germany and the *Dutch Civil Code* as points of comparison in *King*.⁷⁶

The civil law jurisdiction of Germany provides for a strict freedom of testation, but the role of good morals is also applied there – a testamentary provision could be against public policy if it offends the legal convictions of all "reasonable and right-minded people".⁷⁷ The *Dutch Civil Code* also restricts a provision in a will that is contrary to the public order or good morals.⁷⁸

The freedom of testation is also a deeply entrenched common law principle in Canada, which makes Canadian cases are useful points of comparison for South Africa in evaluating how public policy is applied in wills.

In *Canada Trust Co v Ontario (Human Rights Commission)*,⁷⁹ a case having to do with a charitable trust that contained discriminatory provisions based on race, religion and gender, the court argued that there is a "clear public aspect to its purpose and administration"⁸⁰ and decided that the discriminatory clauses should be deleted.

In response Grattan and Conway⁸¹ argue that public policy can override clauses in private dispositions, which do not need to be framed as being in

⁷⁴ Similar facts and decisions were also reached in *In re Heydenrych Testamentary Trust* 2012 4 SA 103 (WCC) and *Ex parte Boe Trust Ltd* 2013 JOL 30123 (SCA), although the testatrix included an alternative clause that was to be followed if her wishes were found to be contrary to public policy.

⁷⁵ *Constitution of the Republic of South Africa, 1996 (the Constitution)*, s 39(1)(b).

⁷⁶ *King* CC paras 56-62.

⁷⁷ *German Civil Code* para 138(1).

⁷⁸ *Dutch Civil Code* s 4:44.

⁷⁹ *Canada Trust Co v Ontario (Human Rights Commission)* 1990 CarswellOnt 486, [1990] OJ No 615.

⁸⁰ *Canada Trust Co v Ontario (Human Rights Commission)* 1990 CarswellOnt 486, [1990] OJ No 615 para 21.

⁸¹ Grattan and Conway 2005 *McGill LJ* 534.

the "public domain" in order for public policy to be applied successfully. They argue that "[t]he doctrine acts as a vessel for channelling constitutional protections into private law".⁸²

The case of *Spence v BMO Trust Co*⁸³ was different. It did not involve a public charitable trust. Instead, a father had expressly excluded his daughter from benefitting from his private will as he stated that she had apparently had no communication with him for several years.⁸⁴ The background to this was not described in the will, but it was apparent from evidence that the daughter gave that it was because of strife between her and her father based on the fact that she had had a relationship with a white man, and that her father (a black man) was against this.⁸⁵

The Ontario Superior Court of Justice was persuaded that the disinheritance was based upon a racist principle that violated public policy, and set aside the entire will.⁸⁶ On appeal, the court decided that the courts cannot interfere in a will that is unambiguous and that contains no expressed discriminatory conditions⁸⁷ just because a potential beneficiary is not satisfied with the outcome, as this was not a violation of public policy.⁸⁸ The court stated that even if the will were expressly discriminatory, the will was of a "private, rather than a public or quasi-public nature".⁸⁹ It further did not require any discriminatory conduct by the estate trustee as in the cases where trustees of charitable trusts had to provide scholarships only to members of a specific, select group.⁹⁰ The bequest would be valid as "reflecting a testator's intentional, private disposition of his property – the core aspect of testamentary freedom".⁹¹

In Canada a person can refuse to benefit a person for express, discriminatory reasons as long as the beneficiary is not required to violate public policy as a condition of receiving the benefit or to use the benefit in a

⁸² Grattan and Conway 2005 *McGill LJ* 534. Also note the Canadian case of *Re the Ester G Castanera Scholarship Fund* 2015 MBQB 28 [2015] 7 WWR 191, where a similar view was taken, although the clause was in the end found not to be discriminatory. Du Toit 2017 *Man LJ* 160 opined that the South African court would most likely have concurred with the reasoning and ruling in the *Castanera* case.

⁸³ *Spence v BMO Trust Co* 2016 ONCA 196 (Ont CA) (hereafter *Spence v BMO* 2016).

⁸⁴ *Spence v BMO* 2016 para 10.

⁸⁵ *Spence v BMO* 2016 para 15.

⁸⁶ *Spence v BMO* 2016 para 20.

⁸⁷ *Spence v BMO* 2016 para 55.

⁸⁸ *Spence v BMO* 2016 para 57.

⁸⁹ *Spence v BMO* 2016 para 73.

⁹⁰ *Spence v BMO* 2016 para 71.

⁹¹ *Spence v BMO* 2016 para 73.

manner contrary to public policy, and the executor likewise is not required to violate public policy in carrying out the terms of the will.⁹²

Johnson strongly criticises the Canadian court for disbarring the application of public policy to private wills as this might lead to the perpetuation of discrimination in Canadian provinces.⁹³ She advances that:

[b]y stating that such clauses can never be subject to a public policy application, no matter how discriminatory in nature they may be, intentionally or not, the Court of Appeal for Ontario has sanctioned the use of the private law as a tool of discrimination.⁹⁴

The Canadian cases closely resemble the facts heard in the South African courts, even with the reasoning of the charitable trust cases. De Waal, however, warns against comparing foreign law in the context of freedom of testation as the limits of freedom of testation are closely linked to the jurisdiction's interpretation of public policy, and believes that it may be counterproductive to assess what public policy is in South Africa by comparing it with what it is in other jurisdictions.⁹⁵

However, if we were to get a perspective from Canada, the facts in the *King* case may be similar to the facts in *Spence*, but the reasoning is where the *King* case deviates at its core from the reasoning in the Canadian case. In *King*, Jafta J reasoned that freedom of testation should not be taken as a licence to discriminate unfairly.⁹⁶

South Africa has therefore introduced the application of a public policy analysis of private wills, despite their having no clear public implications, in contradiction to Canadian cases based on the same grounds of discrimination in private wills. The view of the South African Constitutional Court is that public policy may motivate the use of a pre-emptive restrictive measure against the testator, inducing the testator not to discriminate unfairly (on one of the constitutional grounds) in his/her will (taking into account any additional conflicting values).⁹⁷ The clear restrictive measure against unfair discrimination in all areas of the law, even in private wills, has become ambiguous in *King*, however, when the competing constitutional values and public policy analysis were added to the arguments to declare an unfairly discriminatory clause unenforceable.

⁹² Esposito 2018 *Estates, Trusts and Pensions Journal* 157; Johnson 2019 *Windsor Yrbk Acc Jus* 159.

⁹³ Johnson 2019 *Windsor Yrbk Acc Jus* 162.

⁹⁴ Johnson 2019 *Windsor Yrbk Acc Jus* 158.

⁹⁵ De Waal "Law of Succession and the Bill of Rights" 3G3.

⁹⁶ *King* CC para 93.

⁹⁷ *King* CC para 94.

5 The question of the role of public policy in *King*

Two issues will be raised where the judgment fumbled in the handling of the concept of public policy in this case. The one is the conflation that is evident between public policy and the constitutional values and the second issue is how certain values were seen as more important than others.

This will ultimately show the concerns where public policy becomes infused by constitutional values but results in obscuring the public policy considerations to the effect that it is used only to advance subjective views of what should be enforced and what not.

5.1 *The conflation issue*

Based on the difficulty involved in pinning down public policy, as was seen in the discussion above, it is not a novel for the constitution or legislation to be used as a yardstick for what constitutes public policy.⁹⁸ Although the *Constitution* may provide clarity on what values are dear to the South African community, the clear role that public policy should play is difficult to establish from the *King* case. It appears, in some of the discussion of the judges, that the connection between public policy and the *Constitution* blurred the boundaries of what the role of public policy still is. The description of the values of public policy has become so intertwined with the *Constitution* (and legislation) that it is difficult to clearly understand the distinct role of public policy, as separate from that of the *Constitution*.

If one reads all three different judgments together, it becomes apparent that some terms regarding public policy are used almost interchangeably with constitutional norms, as if these concepts were one and the same. Jafta J states:

It is this unlawfulness [based on the violation of section 8 of the Equality Act] which render clause 7 unenforceable, regardless of whether the unlawfulness stems from the inconsistency with section 9(4) of the Constitution or from a violation of section 8 of the Act. From time immemorial, our courts have declined to enforce clauses of wills or wills that are unlawful or contrary to public policy. It appears to me that public policy requires no development in this regard.⁹⁹

Unlawfulness is therefore the outcome regardless of whether section 8 of the *Equality Act*, section 9(4) of the *Constitution* or public policy is used to evaluate the clause. Adding to this conflation, he suggests that unfair discrimination (a violation of the *Constitution* or the *Equality Act*) should be "added to the list" of terms contrary to public policy.¹⁰⁰ What is then

⁹⁸ *Girard Trust Co v Schmitz et al* 20 A2d (Court of Chancery of New Jersey, 1941) 29.

⁹⁹ *King* CC para 137.

¹⁰⁰ *King* CC para 147.

considered unfair discrimination would be contra the *Constitution*,¹⁰¹ contra the *Equality Act* and contra public policy.¹⁰²

Another aspect that adds to the conflation is the fact that, although equality and freedom can be seen as among public policy values, they are also protected as rights in the *Constitution*. The freedom of testation constitutes a right that is protected by the *Constitution* in section 25(1)¹⁰³ through the right to property, in section 14 through the right to privacy and in section 10 through the right to dignity.¹⁰⁴ The equality value is also protected as a right against discrimination in terms of section 9(4) of the *Constitution*. Jafta J accuses the High Court judgment of this conflation.¹⁰⁵ The difference would lie in the defence given. If the right to equality is claimed, a section 36 limitation can be used as justification for the discrimination. If the equality value is claimed, section 36 cannot be used to limit the right.¹⁰⁶

Regarding this conflation, Woolman had a similar observation on the *Barkhuizen* case, where he observed that the court "relies upon a rather baffling conflation of rights analysis, value analysis and public-policy analysis".¹⁰⁷

This mix of constitutional rights¹⁰⁸ and legislative violations¹⁰⁹ with public policy values¹¹⁰ that would all have the same outcome of unlawfulness makes it challenging to draw clear lines on the applicability of or need for public policy in a constitutional democracy.

Even in the debate on whether the *Constitution* should be applied directly against the discriminatory clause, Jafta J adds to the uncertainty. In one paragraph he argues that the unfair discrimination in the will is in violation of the *Constitution*.¹¹¹ In the next paragraph¹¹² he states that the clause is in violation of the *Equality Act*. And then in the same paragraph he adds to the confusion by bringing in public policy as a ground for the unlawfulness of the clause. He then concludes by saying "in the present matter the position is that clause 7 which contains the *fideicommissary* condition is invalid for being contrary to public policy".¹¹³

¹⁰¹ *King* CC para 133.

¹⁰² *King* CC para 160.

¹⁰³ *King* CC para 203.

¹⁰⁴ *King* CC para 67.

¹⁰⁵ *King* CC para 98.

¹⁰⁶ *King* CC para 98.

¹⁰⁷ Woolman 2007 *SALJ* 772.

¹⁰⁸ *King* CC para 98.

¹⁰⁹ *King* CC para 137.

¹¹⁰ *King* CC para 147.

¹¹¹ *King* CC para 155.

¹¹² *King* CC para 156.

¹¹³ *King* CC para 158.

Furthermore, it seems from his judgment¹¹⁴ that a balancing between different applicable values is unnecessary. Unfair discrimination is unlawful because it is a violation of the *Constitution* and the *Equality Act* as well as public policy and that is all that is necessary to conclude that the clause should be unenforceable.

The debate on the direct or indirect application of the *Constitution* is also raised in the other two judgments of *King*. In the minority judgment the question was whether the clause amounted to unfair discrimination in terms of section 9 of the *Constitution* or through the lens of public policy.¹¹⁵ Mhlantla J chose to use the public policy lens rather than to apply the *Constitution* directly or to address whether the *Equality Act* should be applied.¹¹⁶

It is only Victor AJ that gave attention to the principle of constitutional subsidiarity in her analysis on the question of the direct or indirect application.¹¹⁷ The subsidiarity theory can be viewed negatively to the effect that the *Constitution* plays only a supportive role, or positively in that the *Constitution* creates the context and circumstances for the *Equality Act* to operate.¹¹⁸

Regardless of how one views the subsidiarity theory, Victor made it clear that constitutional subsidiarity should apply where the legislature has adequately provided for the constitutional obligation in section 9(4). Parliament therefore has "fulfilled this obligation through the enactment of the *Equality Act* and no suggestion has been made to the contrary".¹¹⁹ She concludes therefore that the Bill of Rights should be directly applied but reliance must be placed on the *Equality Act* as the benchmark against which the freedom of testation must be measured.¹²⁰ She was clearly alone in her view on this, however, as the other judgments did not agree that reliance should be made on the *Equality Act*.

It should be a concern that the Constitutional Court could not be clear on whether the *Constitution* could be applied directly to a private will, that the matter still had to be debated to this extent, and that the different judgments could not reach a conclusion on the matter. Woolman states:

As a matter of logic, one must know when direct application is or is not required in order to know when indirect application is or is not required. Direct

¹¹⁴ *King* CC paras 137-161.

¹¹⁵ *King* CC para 37.

¹¹⁶ *King* CC para 40.

¹¹⁷ *King* CC paras 182-194.

¹¹⁸ Murcott and Van der Westhuizen 2015 *CCR* 46.

¹¹⁹ *King* CC para 185.

¹²⁰ *King* CC paras 191, 193.

application means that the prescriptive content of the substantive rights found in ss9–35 of the Constitution engages the law or the conduct at issue.¹²¹

The outcomes of taking the various routes to reaching a decision, however, all seem to be the same. They would all lead to declaring the clause as unenforceable.

Clearly this "collapsing of the distinction between value analysis, rights analysis and public policy analysis"¹²² has resulted in fluidity in the concept of public policy analysis. It may be possible to question the role public policy consideration, if courts treat constitutional values as codified "versions" of public policy values where the outcome can now be achieved by applying the *Constitution* or the *Equality Act* directly.¹²³ *King* brings no clarity to this issue, and the confusion deepens with the consideration of the second issue raised here, which is what values would be seen as more important in a case when conflicting values must be evaluated.

5.2 *The most important value*

Although it may sometime seem that courts assume that public policy is codified by the *Constitution* or legislation, it is not.¹²⁴ Public policy can be said to extend beyond the normal parameters of written law. It makes room for a community's specific core values.¹²⁵ This is where there is a weighing up between competing constitutional values. In the *King* case the most prominent competing values were the freedom of testation and equality. Victor J refers to *United Democratic Movement v President of the Republic of South Africa*,¹²⁶ that states:

[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.

She states that the *Constitution* is to be read in "harmony" and if competing values exist they must be evaluated against public policy.¹²⁷ Public policy is used in this way to give weight to the value that the particular community at the specific time values more.

¹²¹ Woolman 2007 SALJ 776.

¹²² Woolman 2007 SALJ 779.

¹²³ *Barkhuizen* para 30.

¹²⁴ *King* CC para 41.

¹²⁵ *Girard Trust Co v Schmitz et al* 20 A2d (Court of Chancery of New Jersey, 1941) 29.

¹²⁶ *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC) para 83.

¹²⁷ *King* CC para 203. See below the argument that this is not how the judges have applied this balancing act. They did not evaluate the conflicting values against public policy, but rather on the aim of the *Constitution*.

However, two thoughts are raised while considering the three different judgments in *King*. The first is the danger that judges can use the term public policy to advance their subjective views and to tip the scale in a certain direction when competing values are at play. Secondly, public policy is relied on only briefly and it is obscured by the drive of the *Constitution* that effectively gives the authoritative blow of the hammer. The emphasis is therefore not on what the community values more, but on what the values of the *Constitution* have set out to be important. It may be that the values as stated in section 1 of the *Constitution* were originally based on what South Africa's public policy values were, but this was not argued in *King*. Instead there is a reliance on the *Constitution* because of its supremacy. As public policy values can change from time to time, it would be important to contemplate what values are important to the community.

For instance, Victor AJ's judgment stresses the plight of women as against male privilege¹²⁸ more than do the other judgments, and this may be seen as her advancing her subjective desire to rule in favour of the equality of women rather than in favour of the freedom of testation. She states:

It is important for this Court to acknowledge that there is indeed a clash of competing principles in this case: freedom of testation on the one hand versus substantive equality on the other. In my view ... there can simply be no contest between the *raison d'etre* (reason for being) of the Constitution, namely the abolition of patriarchy and sexism, and the "right" to freedom of testation.

Notice that she also advances the *Constitution* as the decisive authority to rule against sexism.

Despite Mhlantla J's arguments also against the discrimination against women (to a lesser extent than Victor AJ) that has "gone on long enough and must be stopped",¹²⁹ her focus generally was on evaluating the discriminatory clause against public policy, but she also relies on the argument of the supremacy of the *Constitution*:

Our Constitution also envisages and promises a democratic State based on '... the supremacy of the Constitution.' Furthermore, it protects all persons from direct or indirect unfair discrimination, both in the public and private sphere.¹³⁰

It almost seems as if she views the freedom of testation on the lighter side of the scale of importance and the constitutional values of equality and non-sexism on the heavier side, as this side "underpins our constitutional dispensation".¹³¹ It would then be easy to argue that the values of equality and non-sexism are more important than the freedom of testation, if she

¹²⁸ See *King* CC paras 207, 208, 211, 214, 216-219, 234, 236.

¹²⁹ *King* CC para 85.

¹³⁰ *King* CC para 70.

¹³¹ *King* CC para 52.

sees equality as "the lodestar of our transformative constitutional project", or "at the very heart of the Constitution" and that it "permeates and defines the very ethos upon which the Constitution is premised".¹³² This suggests that she does not treat all values as equally¹³³ and raises the question whether the different treatment is based on the judge's subjective view or is truly at the heart of the community's values. The judge does not convincingly say why the freedom of testation is not regarded as the more important value.

Although Jafta J's judgment states that the clause is invalid for being contrary to public policy,¹³⁴ the overwhelming argument of the judgement is aimed at unfair discrimination that is a direct violation of the *Constitution*,¹³⁵ which would mean that the discrimination would be unfair and therefore unenforceable.

It is clear from *King* that although the public policy values of dignity and freedom (of testation) and equality were all relevant to the case, the judges viewed the value of equality as the more essential or core value of the *Constitution* and consequently allowed it to tip the scale toward the equality value rather than the freedom of testation value.¹³⁶

To illustrate that equality is not generally seen as the "core" value of the *Constitution*, judges in the law of contract have regarded fairness,¹³⁷ justice¹³⁸ and good faith¹³⁹ as core values of the *Constitution* in the field of contracts.

It is clear that unfair discrimination was not tolerated in previous case law involving charitable trusts. The reasons for this are uncertain. In *King* the equality value was advanced to declare the clause to be unenforceable.

If the public policy analysis is used as the basis for declaring the clause unenforceable, the public policy considerations must be evaluated to see what the community would regard as the most important value, especially

¹³² *King* CC para 78, she quotes here from *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 20.

¹³³ According to Sutherland 2008 *Stell LR* 408, all public policy principles ought not to be treated equally.

¹³⁴ *King* CC para 158.

¹³⁵ See *King* CC paras 127-143, 150-156.

¹³⁶ *King* CC paras 77, 78, 84, 211.

¹³⁷ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 27.

¹³⁸ *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC) para 210.

¹³⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

where there are conflicting constitutional values.¹⁴⁰ It seems, however, that it was done the other way around in *King*. What happened in *King* is that conflicting public policy values were identified and then the aim of the *Constitution* was evaluated to see what value was more at the core of the *Constitution*. In this regard the *Constitution* gave more power to their decisions and the ultimate outcome of ruling the clause unenforceable.

This ultimately sheds doubt on the role of public policy in jurisprudence if it is overshadowed by the subjective views of judges and the *Constitution* rather than public policy is ultimately used to declare a clause invalid.

6 Conclusion

King opened the floodgates for disappointed potential heirs to apply public policy as authority to contest being left out of a private will based on the equality value.

Public policy has, however, always been an elusive concept, however, and has suffered from the lack of a clear framework, and *King* seems to see a claim of a violation of public policy alone as being insufficient and as needing to be nuanced with the prohibition on unfair discrimination, and the underlying value of equality in the *Constitution*. Through reference to the subsidiary principle the *Equality Act* was used to ultimately declare the discriminatory clause unlawful. This has, however, resulted in a conflation of a rights analysis, a value analysis and a public policy analysis.

The different judgments in *King* are a good illustration of the problem with public policy, which is that its nature can change from judge to judge and that it should therefore not be relied on too strongly as this may lead to legal uncertainty. The judgments in *King* allude to personal subjective views that are advanced under the banner of public policy and should be avoided. However, as has been seen, the constitutional values that are relied on suffer from the same concerns as the public policy analysis.

It remains difficult, therefore, to use values, whether under a public policy analysis or a constitutional value analysis, as the basis for declaring a discriminatory clause in a private will unenforceable. One should tread lightly when applying one's own opinions to what one thinks is the more important norm when this interferes with the private disposition of a person who has already passed on and who cannot be called on to amend the provision in such a way as still to give effect to his wishes.

¹⁴⁰ Victor AJ's arguments in *King* CC paras 207-210 moves in this direction before depending on the constitutional order again. Mhlantla J also argues in this direction (para 84).

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List of Abbreviations

ABAJ	American Bar Association Journal
CCR	Constitutional Court Review
CLJ	Cambridge Law Journal
Man LJ	Manitoba Law Journal
McGill LJ	McGill Law Journal
PELJ	Potchefstroom Electronic Law Journal
Quinnipiac Prob LJ	Quinnipiac Probate Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal

Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tul Eur & Civ LF	Tulane European and Civil Law Forum
Windsor Yrbk Acc Jus	Windsor Yearbook of Access to Justice