Acta Universitatis Danubius

JURIDICA

The Evolution of Freedom of Testation in Post-Constitutional South Africa

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Abstract: In South Africa, freedom of testation has been an enjoyed practice since ancient times. It gave testators comfort in knowing that when they departed, their legacies and property would be looked after by those they had chosen to survive their estates. Before the advent of the Constitution, testators used to abuse this freedom. There existed a tendency to exercise this freedom without limitations. However, the Constitutional epoch brought about changes in the manner the testators exercised their freedom of testation. Amongst other things, was the limitation to freedom of testation. Legislation and Common Law also contributed to restricting or limiting this freedom. Against this backdrop, this article investigates the impact of the Constitution on freedom of testation in South Africa under the current constitutional dispensation. The paper is predicated on the assumption that freedom of testation gave testators leeway to promote discrimination and unfairness. Therefore, this paper will show that freedom of testation has evolved and is no longer absolute in South Africa, with the Courts playing an important role in the process.

Keywords: Discrimination; equality; unfairness; public policy; constitutionalism

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1. Introduction

For the longest time, people who were legally able enjoyed the freedom to dispose of their property by Will (Johnson, 2011, p. 105). This freedom gave testators the assurance that when they depart, their property and assets would be cared for by the survivors of their estate and those who they elected to continue their legacy. Today this form of disposition is known as a freedom of testation. In South Africa, freedom of testation is considered a foundational principle of testate succession (Matsemela, 2015, p. 93). It provides testators with the freedom or the prerogative to decide on how they elect to dissolve their estate when they pass on (de Waal & Schoeman-Melan, 2015, p. 2). However, this does not mean that this freedom is unlimited. Freedom of testation can be limited in South Africa in terms of common law and legislation (Matsemela, 2015, p. 95). Common law holds that a testator's wishes can only be carried out if they are not vague, unlawful, impossible or against public policy (de Waal & Schoeman-Melan, 2015, p. 4). On the other hand, legislation such as the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, the Trust Property Control Act 57 of 1988 or the Maintenance of Surviving Spouses Act 27 of 1990, amongst others, can also limit this freedom (de Waal & Schoeman-Melan, 2015, p. 4). Apart from common law and legislation, the Republic of South Africa's 1996 Constitution (hereinafter the Constitution) has also played a significant role in limiting this freedom. For the purposes of this paper, emphasis is placed on the Constitution because it has exposed how freedom of testation has been abused by testators over the years. This abuse is identified as a problem and cause for concern in this paper. Therefore, this paper seeks to answer the questions whether before the advent of the Constitution, testators have been perpetrating unfair discrimination on their heirs and beneficiaries? And how the Constitution and the Courts Post-Constitutionalism have been instrumental in protecting beneficiaries from unfair discrimination? In answering these questions, this paper shall adopt a non-empirical and qualitative research approach using primary and secondary sources, as data derived from written texts such as, but are not limited to, the Constitution, legislation, conventions, dissertations, journals, and other legal publications.

2. Conceptualization: The Problem and Background

To give context to the argument advanced in this paper, it is necessary to look back at history and the jurisprudence of freedom of testation in South Africa before the Constitution. Borrowing from Professor du Toit's narration, Freedom of testation is not a concept of South African creation, but rather a Roman legal system invention that was adopted as such into Roman-Dutch law (du Toit, 2012, p. 110). The Roman legal system recognised *contra bonos mores*, or what is often known today as public policy, as a reason for limiting freedom of testation. In South Africa, this limitation has been recognised as such since 1910, when South Africa was still a Union (Matsemela, 2015, p. 95). Despite this constraint, South African courts opted to enforce testators' wishes despite their testaments carrying discriminatory provisions (du Toit, 2012, p. 114), or despite their unfairness on the survivors or the beneficiaries. For example, it was common and acceptable for a testator to stipulate in their testament that their beneficiary must do a certain thing to benefit from the bequest, failing which they would forfeit the benefit. These would include, for example, requiring the beneficiary to marry someone who adheres to a specific faith or to profess a specific religion, failing which they would be penalized for being disobedient and losing the inheritance (Joubert, 1968, p. 403). The benefit would then be transferred to a beneficiary willing to conform to the testator's stipulations (Joubert, 1968, p. 402).

Earlier decisions indicate that courts addressed these types of provisions, but solely from an interpretation standpoint, rather than from their validity or unfairness (see *Ex parte Mark's Executors* 1921 TPD 289; *Ex parte Administrators Estate* Lesser 1940 TPD 11). It was only until 1944, in the case of *Wasserzug v Administrators of Estate Nathanson* 1944 TPD 369, that the court provided clarity on testaments that contained stipulations compelling beneficiaries to profess certain faiths. In that matter, the testator had provided in their testament that it is their wish that "none of the aforesaid children or grandchildren shall marry anyone out of the Jewish faith and in case of any child or grandchild contracting such a marriage then he or she shall forfeit his or her inheritance for the benefit of our remaining residuary heir."

The applicant had married a Christian faith partner and contested this provision on the basis that it was invalid. Murray and Schreiner J ruled that the clause was void for uncertainty. In other words, the clause could not be ascertained on what the testator intended. This precedent, however, was short-lived because the Appellant Division in *Aronson v Estate Hart* 1950 (1) SA 539 (A) overturned this view. In *Aronson,* the Appellant court had to decide whether a condition in the testator's

testament stated that a beneficiary would forfeit all the benefits under the Will if they did not "marry a person not born in the Jewish faith or forsake the Jewish faith" was valid or not. Greenberg JA observed, "in my view, the testatrix in the present case was not concerned with "the more subtle… conceptions of theologians. It can safely be assumed that she regarded herself as a person of the Jewish faith or as a Jewess and that she wished to discourage her beneficiaries from entering marriage with persons who ordinarily would be regarded as not being of the Jewish faith or Jews or Jewesses as the case may be." In the end, the court ruled that the Will was not void for uncertainty and dismissed the appeal.

The implication of this decision indicates that it is acceptable for testators to tell their beneficiaries whom they should marry or not marry, as well as what kind of religion their beneficiary should marry into, a stance which was criticised by scholars. For example, Hahlo emphasised that testators should not be permitted to dictate to their beneficiaries what religion to practice nor pick the spouses they should wed (Hahlo, 1950, p. 242). Sherman, likewise, made an interesting remark. He states that testation is odd; the logic is that dead people do not vote, why then do we allow them to dictate what survivors do with the material resources they have left behind? (Sherman, 1999, p. 1281). According to Sherman, testaments that impose restrictions on the beneficiary's personal behaviour should not be upheld. Similar to this, Browder contends that restrictions on marriage have negative effects that lead to "immorality, depopulation, the weakening of the family and other consequent evils" (Browder, 1941, p. 1327). This is contrary to the Roman legal system, which sought to advance society by removing obstacles to marriage (Sherman, 1999, p. 1281).

Equally, in matters where the courts had to rule on testamentary charity trusts, the courts retained a similar attitude. Testators enjoyed ample freedom to limit beneficiaries from inheriting on discriminating grounds (du Toit, 2012). See cases like *Ex parte Robinson* 1953 (2) SA 430 (C), *Marks v Estate Gluckman* 1946 AD 289 and *Ex parte Estate Impey* 1963 1SA 740 (C) amongst others. Testators would require that a beneficiary be exclusively of a certain religion before they benefit (*Ex parte Robin* above) or be jew or Jewess and not converted (*Marks v Estate Glucksman*) or be of a specific nation or native (*Ex parte Marriot* 1960 1 SA 814 (D)). As stated in *Marks v Estate* the Appellant Division court made it clear that charitable trusts are entitled to favourable treatment and should be upheld as far as legitimately possible.

The pre-constitutional jurisprudence indicates that courts were reluctant to protect beneficiaries or survivors even when it was clear that a provision interfered with the

beneficiary's personal life, choices, and the freedom to live beyond the limitation imposed by testators. The court's reluctance to halt this problem made it easy for testators to abuse this freedom as they would make whatever stipulations in their testament and courts would uphold them.

3. The Constitution and Freedom of Testation

South Africa's constitutional regime was formally established with the adoption of the interim Constitution in 1993, which was succeeded by the current or 'final' Constitution of 1996. The adoption of these constitutions signified a break with the past and formed a 'new' South Africa in which the principles of the rule of law, equality, human rights, non-racialism, and non-sexism served as core ideals. The final Constitution's ultimate purpose was to unite South Africa and to ensure that equal opportunities and rights are afforded to all people regardless of race, gender, or religion. Furthermore, the final Constitution provided for supremacy of the Constitution (see section 2 of the Constitution). This clause is significant because it fulfilled a long-held aspiration for many people in pre-constitutional South Africa. In the pre-constitutional dispensation, the legislature held jurisdiction over the affairs of the state (Van der Vywer, 1982, p. 570). We will not dwell too much on how South Africa's legislature abused this power by promulgating unjust laws, but it is worth mentioning two factors that are important in the context of freedom of testation.

Two noteworthy, albeit negative, events occurred during the pre-constitutional period. First, because no supreme constitution existed, the concept of parliamentary sovereignty was embraced (Malapane & Nyane, 2022, p. 714). The problem with parliamentary sovereignty was that the laws passed by parliament were deemed valid, and courts were unable to rule on their validity or invalidity. This was made clear through section 34(3) of the South African Constitution Act 110 of 1983 which stipulated that "no court of law shall be competent to enquire into or pronounce upon the validity of an Act of parliament". As a result, courts were constrained in their ability to protect human rights (Kibet & Fombad, 2017, p. 346). Secondly, as a result of this, human rights would be violated, even within the context of testation and courts would be powerless to act. We submit that without a proper institution like the courts to protect human rights, inequality and discrimination will worsen. It is for this reason that the adoption of the final Constitution was a celebrated endeavor because, for the first time in decades, the people of South Africa were afforded

human rights and protection as a result of the replacement of parliamentary sovereignty with constitutional supremacy.

Post-constitutional dispensation seeks transformation. This is made clear through the preamble which makes a promise that the constitutional dispensation has to "heal divisions of the past" and "establish a society based on democratic values, social justice and fundamental human rights." The objective and vision of the Constitution is one that is built on inclusivity, human rights, and making sure that the previous racial system is halted, as is evident from this constitutional commitment. The significance of this constitutional guarantee and the aspirations has been emphasised by the courts. The Constitutional Court stated in *City of Tshwane Metropolitan Municipality v Afriforum and Another* (2016) ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) that "the effects of the system of racial, ethnic, and tribal stratification of the past must thus be destroyed and buried permanently."

As previously stated, freedom of testation is an important concept of testate succession in South Africa. It is also protected by the Constitution. In *Minister of Education and another v Syfrets Trust Ltd NO and another* (2006) ZAWCHC 65; 2006 (4) SA 205 (C); (2006) 3 All SA 373 (C); 2006 (10) BCLR 1214 (C) Griesel J accepted that freedom of testation is an integral part of section 25 of the Constitution, a right that recognises and protects property. Given South Africa's post-constitutional objectives and, on the other hand, freedom of testation, which is a constitutional right itself, these rights may be said to be in opposition to one another. On the one hand, the Constitution mandates that testators' rights be protected under Section 25, and on the other hand, the promises, ideals, and human rights enshrined in the Constitution must be upheld too. It is suggested that the Constitution is explicit on this point; anything that fosters inequality will not be accepted in the new South Africa. This extends to freedom of testation.

Mogoeng Mogoeng CJ once stated, "Our Constitution was never meant to be a selectively recognised weapon, conveniently produced and used by some of us only when it could help advance illegitimate sectarian interests through legal stratagems. It was designed to facilitate justice and equity for all" (*City of Tshwane Metropolitan Municipality v Afriforum* above). It follows that in the new South Africa, such conducts have no place. This sums up the extent to which post-constitutional freedom of testation must be considered in South Africa. Notwithstanding this position, however, this does not imply that the freedom of testation is any less important or that it should be abolished. The only requirement the Constitution requires is that there be a balance where there are competing rights. The question

then becomes, what are the rights that conflict with freedom of testation in the context of discriminatory provisions?

Du Toit submits that among these constitutional rights are the rights to equality, dignity, privacy, and freedom of religion, belief, and opinion (du Toit, 2001, p. 236-237). Likewise, we submit that indeed these rights need to be considered when applying freedom of testation particularly where testators make discriminatory provisions in their testaments, and this is for the following reasons;

a) The right to equality is protected under section 9 of the Constitution. Section 9 expresses that everyone in South Africa is equal before the law and has the right to equal protection and benefit of the law. Subsection 4 further states that no person may directly or indirectly unfairly discriminate against another on the grounds such as race, gender, sex, ethnic, colour, religion, birth, sexual orientation, or culture amongst others. To further give effect to this provision, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) was enacted. The Act prohibits discrimination. Section (viii) of the Act deems discrimination as "any act or omission including a policy, law, rule, practice, condition, or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds the benefits, opportunities or advantages from any person on one or more grounds of the prohibited grounds." These prohibited grounds include but are not limited to race, gender, and religion (see section 1 (xxii)). Given the nature of South Africa's history, equality is central to the new constitutional order (Kamga, 2021, p. 356). The writers of the Constitution not only saw it fit to include this right in the Constitution but also saw it fit to also place an obligation on the state to take meaningful steps to protect it. Ackermann J in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998) ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 matter had this to say about this right "Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely." This section thus mandates that any provisions in a testator's Will that promotes discrimination or unfairness to beneficiaries be reconsidered (Van Zyl, 2024, p. 8).

b) The right to human dignity is a protected right under section 10 of the Constitution. This section provides that everyone has a right to have their dignity respected and protected. Juma points out that this right is perhaps a starting point in the assertion of rights in the Constitution (Juma, 2012, p. 5). This right is important in South

Africa's post-constitutional era because, like equality, it is corrective in nature, aiming to transform South African society. Ahmed provides that bequests that are discriminatory infringe on this right (Ahmed, 2023, p. 210). We cannot make a good transition if we continue to adhere to historical tendencies in which regard for human rights and dignity was nonexistent. Similarly, freedom of testation must be evaluated, particularly where its use threatens people's right to human dignity.

c) The right to privacy is a protected right under section 14 of the Constitution. It prohibits home and property search and seizure of a person's possession. Du Toit explains that the link between this right and freedom of testation is that this right is not only limited to the aforementioned but extends to include the right to be left alone or a right to personal growth (du Toit, 2001). This right protects a beneficiary's right to self or personal development without interference. Therefore, when a testator makes provisions in their testaments that alter the beneficiary's freedom of choice and freedom to make his or her own decisions, this right is impacted (du Toit, 2001).

d) The right to freedom of religion, belief, and opinion is yet another right that will impact freedom of testation (Samaai & May, 2022, p. 65-66). Section 15 of the Constitution protects this right. The section expressly points out that everyone has a right to freedom of conscience, religion, thought, belief, and opinion. This right thus protects beneficiaries who would in circumstances where the testator makes provisions like the ones mentioned above on religion or religious beliefs invalid because that would be violating this right. As stated in *S v Lawrence, S v Negal; S v Solberg* (1997) ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 "the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

Thinking about the aforementioned points reveals that, even though freedom of testation is a constitutionally protected right, testators should not be permitted to violate the beneficiaries' other constitutionally protected rights. Therefore, the courts must strike a balance between these rights and ensure that when there is a breach, the Constitution and the aspirations that follow it are maintained.

4. Judicial intervention on freedom of testation in post-constitutional South Africa

The coming into effect of the final Constitution of South Africa meant that courts now had a role to play in the protection of human rights. This was made clear by constitutional provisions such as section 165, which declares that the judicial authority of South Africa is vested in the courts (see section 165(1)). They must uphold the law and the Constitution without fear, favour, or prejudice (section 162(2), and Section 39 which stipulates that when interpreting the Bill of Rights, "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; apply international law, and take foreign law into consideration".

Given the transformative nature of South Africa's Constitution, Langa argued that judges must uphold the transformative ideal of the Constitution by changing the law to conform it to the rights and values espoused in the Constitution (Langa, 2006, p. 358). In essence, the transformative ideals require courts to address and overcome systemic deficiencies by interpreting and applying constitutional provisions to foster the transformation sought (Von Bogdandy & Spieker, 2023, 67). We acknowledge that within the context of this paper, one may ask what role have the Courts played in this regard. This is, however, made apparent immediately hereunder as follows:

(a) The first case involving freedom of testation in the post-constitutional dispensation can be traced as far as 2006, in the matter of *Minister of Education and Others v Syfrets Trust Ltd NO and Others* (2006) ZAWCHC 65; 2006 (4) SA 205 (C); 2006 (3 All SA 373) (C); and 2006 (10) BCLR 1214 (C). According to the facts of the case, the testator established a charitable trust, the Scarbrow Bursary Fund Testamentary Trust to provide for the awarding of bursaries. Of concern here was that the bursaries were only limited to people of "European descent," and not Jews or women. The testator made it clear in the codicil added to their Will that "by virtue of the power reserved by me so to do under my last Will and testament, I now alter my possible bequest to the University of Cape Town, being the portion of clause "4" in section "d", so far as it affects persons of Jewish descent (sic), and females of all nationalities, none of whom are to be eligible to compete for any Scholarships founded by the University of Cape Town in connection with my bequest."

The applicant in this matter, the Minister of Education, approached this court in accordance with Section 7(2) of the Constitution, which requires him to respect, protect, promote, and fulfill the Bill of Rights. The Minister argued that this

provision violated section 9 of the Constitution and common law because of its discriminatory nature. The Minister pleaded that this discriminatory provision be deleted in accordance with Section 13 of the Trust Property Control Act. This section states that "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 (a) hampers the achievement of the objects of the founder; or (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".

After considering public policy and the equality clause in terms of the Constitution, as well as applying section 13 of the Trust Property Control Act, the court ruled that the provision was discriminatory and constituted unfair discrimination and was against public policy which the court emphasised is now rooted in the Constitution and the value entrenched in it. The court further stated that public policy establishes an objective normative value system and now having been rooted in the Constitution means that the courts must be guided by constitutional values like human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism, and non-sexism in protecting it (paragraph 2).

As a result, the court struck out the words "European descent only" as well as the entire codicil. Notwithstanding this ruling, the court clarified however that this decision should not suggest that freedom of testation is being disregarded; rather, that the court is simply protecting the Constitution by limiting the testator's freedom because the provision unfairly discriminates against others based on gender and religion (paragraph 44).

(b) *In Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal and Others* (2010) ZASCA 136; 2010 (6) SA 518 (SCA) ; 2011 (1) BCLR 40 (SCA) ; (2011) 2 All SA 1 (SCA), a judgment of the Supreme Court of Appeal, where the court had to adjudicate whether the testators Will which provided for an establishment of a fund called Emma Smith Educational Fund, established to assist "towards the higher education of European girls born of British South African or Dutch South African parents" was racially exclusive?

The university was the administrator of this fund. The university, as the fund's administrators, claimed that the restrictions were racially exclusive and that it was embarrassing for it to run such a fund. The curators, on the other hand, argued that freedom of testation is a fundamental principle of succession law and that there was no justification for interfering with it; further, that amending the Will was against public policy and interest; and that the provision was not against public policy and interest.

The court ruled that racially discriminatory testamentary dispositions would not pass constitutional muster after taking the arguments into account and applying section 9 of the Constitution, the Equality Act, and the Higher Education Act 101 of 1997 (paragraph 38). The testator's provisions as far as they are racially limiting, the court said, rendered the testator's wishes unrealisable and in conflict with the public interest (paragraph 40). The court stated that the objectives of the testators had fallen given that South Africa's unification; there is no longer British South African or Dutch South African. As such, this had rendered the objects of the fund unattainable (paragraph 44).

(c) In *Board of Executors v Benjamin Godlieb Heydenrych Testamentary Trust and Others* (2011) ZAWCHC 466; 2012 (4) SA 103 (WCC) likewise, testamentary instruments of three testators were questioned for being discriminatory. In this matter, three testators established their respective testaments. The first testament involved a charitable testamentary trust of Benjamin Godlieb Heydenrych who had stipulated in his testament that after his death the residue of his estate be held in a trust and after the death of his wife two-thirds be invested for purposes of "providing for the education of European boys of good character of the Protestant faith to enable them to qualify for the civil sen/ice (sic) of the Union or as Pharmaceutical Chemist." Further, he said, "I do specially stipulate that at least one-half of the boys so assisted shall be of British descent." The second charitable trust was that of Dorothy Helen Houghton, who established a bursary trust called the Cyril Houghton Bursary Trust. The only recipients of the bursary would be "members of the white population." The last Charitable trust belonged to George King which established a bursary trust, the George King Bursary. The bursary was for members of the 'white group of protestant faith.'

In argument, the applicant contended that these testamentary provisions were discriminatory on the basis of sex and gender, as well as indirectly on the grounds of race. The amicus curiae (Women Legal Centre) also stated that these provisions have a harmful impact because they exclude girls and women from receiving scholarships.

The court ruled that Heydenrych's testament was discriminatory insofar as it states 'British descent' on the basis of ethnic origin, culture, and birth, as well as indirectly discriminating on the basis of race and color. As a result, the court ruled that this constituted unfair discrimination. The court went on to say that testamentary instruments of this type, which provide for particular persons in society, such as whites, Europeans, and British, to be the exclusive recipients of such benefits, has a negative impact since they disqualify Black South Africans. This is against the law and constitutes discrimination. When applying the equality clause in terms of section 9 of the Constitution, the Equality Act, and the Higher Education Act, the court found that these provisions were contrary to the purposes of these legislations. As a result, the court ruled that the discriminatory provisions in the testaments be struck out. The court further ordered that the word 'boys' be substituted with 'persons,' and that the reference to gender in Dorothy Helen Houghton's testament be understood to include the female gender.

These judgments indicate that South Africa is on the right track and the Courts have played an important role in limiting freedom of testation and promoting constitutional values and ethos. Furthermore, this is in the context of the constitutional framework, which requires transformation to be at the forefront in the adjudication of matters of this nature so that the constitutional promises can be fulfilled. In the same vein, systems of objective normative values necessitate the fulfillment of constitutional imperatives to transform South African society and address past challenges (Rosa, 2011, p. 543). According to Modiri, the new South Africa is meant to deal with and rectify such oppressive practices. Therefore, the courts would be failing in their duties if they allowed testators to dictate from the grave how their heirs should exercise their freedom (Modiri, 2013, p. 593). Similarly, courts would be failing in their duties if they did not strike down racially discriminatory provisions in testaments because that would mean that inequality, racism, and discrimination are permitted to persist. The post-constitutional dispensation's aspiration is opposed to this. As stated by the Supreme Court of Appeal in *Emma Smith* "the constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need, administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past. Given the rationale set out above it does not amount to unlawful deprivation of property" (paragraph 42).

5. Conclusion

The intention of this paper was to demonstrate the paradigm shift that occurred in South Africa's post-constitutional era as a result of the adoption and enforcement of the 1996 Constitution. This paradigm shift has resulted in further restrictions on freedom of testation with the objective of aligning it with constitutional principles and values that guide South Africa's new order. This is a crucial objective that the Constitution seeks to achieve. As submitted, this is understandable given the history of South Africa, in which human rights were either nonexistent or not applied, perpetuating divisions based on, among other things, gender, race, and religion. Furthermore, this study revealed that freedom of testation in the pre-constitutional dispensation enabled and aided discrimination. As demonstrated, testators would abuse their power to freely dissolve their property by including discriminatory and other unfair provisions in their testament that would significantly exclude potential beneficiaries or have a significant impact on the beneficiaries' lives, particularly on how they live or choose to live their lives. All of this had to be changed and stopped in the post-constitutional era, and it is for this reason that an emphasis was placed on the significant role played by the Constitution and the Courts.

The courts as shown have also been helpful in this regard. They have ensured that there is a balance between freedom of testation and constitutional rights while carrying out their judicial duties of adjudicating in a transformative manner.

In closing, a recommendation is submitted. The recommendation is that non-governmental organisations, and state institutions, particularly those that work in protecting the Constitution, human rights, and succession should frequently run projects that are aimed at educating society about constitutional aspirations and human rights. This will be useful for people who are yet to make/draft their Wills and may also encourage those who already have Wills to consider amending them if necessary.

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