THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 510/09

In the matter between:

THE CURATORS AD LITEM
TO CERTAIN POTENTIAL BENEFICIARIES OF
THE EMMA SMITH EDUCATIONAL FUND **Appellant**
and

THE UNIVERSITY OF KWAZULU-NATAL &
28 OTHER APPLICANTS **Respondents**

Neutral citation: **Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal (510/09) [2010] ZASCA 136 (1 October 2010)**

Coram: Navsa, Cloete and Shongwe JJA, Bertelsmann and Ebrahim AJJA

Heard: **23 AUGUST 2010**

Delivered: **1 OCTOBER 2010**

Summary: **Trust: Trust Property Control Act 57 of 1988 – amendment of trust deed;** educational fund administered by publicly funded university – benefits restricted to white bursars – racially restrictive clause in will in conflict with public policy as it offended against the equality clause in the Bill of Rights – high court deleting racially restrictive clause by applying section 13 of the Trust Property Control Act 57 of 1988 – appeal against that order dismissed.
Further clause that beneficiaries must have resided in 'Durban' also deleted by high court and substituted with 'the Ethikwini Municipality'. This order set aside because of absence of proof that geographical description hampered achievement of the objects of the fund.

ORDER

On appeal from: Kwazulu-Natal High Court, Durban (Nicholson J sitting as court of first instance).

1 The order of the court a quo substituting ‘the Ethikwini Municipality’ for ‘Durban’ in para 26(f)(2) of the will of Sir Charles George Smith is set aside

2 Save as set out in 1 the appeal is dismissed.

JUDGMENT

BERTELSMANN AJA (Navsa, Cloete, Shongwe JJA and Ebrahim AJA concurring):

[1] At the centre of this appeal, which is before us with the leave of the court below, are the provisions of a will creating a charitable trust, the Emma Smith Educational Fund (the Fund). It is administered by the first respondent, the University of Kwazulu-Natal. Its benefits are, in the original terms of the will, reserved solely for white South African women who need financial support for a tertiary education. Applicants for a bursary must have lived in ‘Durban’ for at least three years to qualify. The question is whether this bequest to be administered by the University can be allowed to stand in its racially exclusive form.

[2] The court below granted an order in favour of the respondents, the University and the members of its Council, who are the trustees of the Fund, deleting the racially restrictive provisions of the bequest and substituting ‘the Ethekwini Municipality’ for ‘Durban’. In doing so, Nicholson J relied upon the

provisions of s 13 of the Trust Property Control Act 57 of 1988 (the Act). I shall refer to the first respondent as the University.

[3] The appellants are the *curatores-ad-litem* for potential beneficiaries of the Fund.

[4] More than seven decades ago, on 21 July 1938, Sir Charles George Smith executed his last will and testament (the will) to dispose of his considerable estate. Sir Charles had arrived in South Africa in his youth and lived in Durban until his death in 1941. He was the founder of CG Smith and Company, a major member of the sugar industry, and the founder of a shipping line that later became part of Unicorn Shipping. He became a prominent industrialist and politician.

[5] Sir Charles was a great admirer and friend of General JC Smuts. He was a member of the latter's political party and served as a nominated senator for the then province of Natal for ten years. Sir Charles shared General Smuts' vision of a united white South African nation.

[6] Sir Charles was known as an exceptionally generous man who took a keen interest in education, which interest was stimulated by his mother, Emma Smith. She was his inspiration.

[7] In 1920, during his lifetime, Sir Charles instituted a scholarship in his mother's name, for the funding of overseas studies of intending painters, sculptors, architects or art teachers. In the will a similar scholarship was instituted at the Durban Technical College. In terms of a further provision of the will the Fund was bestowed upon the then Natal University College, a predecessor of the first respondent. The terms of the will in relation to the Fund are the focus of the present appeal.

[8] The relevant clauses of the bequest contained in clause 26(f) of the will read as follows:

'(f) As to three tenths thereof [of the residue of his estate] to the Council of the NATAL UNIVERSITY COLLEGE (hereinafter with their Successors in Office called the Council) to be taken and held by the Council in trust to the intent that the same shall be dedicated in perpetuity for the promotion and encouragement of education in manner hereinafter appearing, namely:-

1. The proceeds of this bequest shall form a fund to be called THE EMMA SMITH EDUCATIONAL FUND in memory of my Mother.

2. The Council shall stand possessed of the said Fund and the investments from time to time representing the same upon trust to apply the income thereof in and towards the higher education of *European girls born of British South African or Dutch South African parents,* who have been *resident in Durban* for a period of at least three years immediately preceding the grant, payment or allowance hereby authorised.

3. The income shall be applied at the discretion of the Council :-

(a) In the maintenance of Exhibitions for the benefit of *poor girls* who but for such assistance would be unable to pursue their studies of such value and for such period as the Council may determine in each case, tenable to any institution of higher education or of technical professional or industrial instruction approved by the Council;

(b) In payment at the discretion of the Council of an Allowance for the maintenance of such Exhibitioners for such period as the Council may determine in each case to their parents so long as the Exhibitioners reside with them or to some other person with whom the Exhibitioners may reside with the approval of the Council;

. . .

(f) In the event of the Council of the Natal University College being unable or unwilling to undertake the office conferred upon them hereunder I nominate, constitute and appoint the Town Council of the City of Durban, to be the Trustees of the said Fund with the same powers and authority as are hereby conferred upon the Council of the Natal University College.' (My emphasis.)

[9] The Council of the Natal University College accepted the bequest and it and its successors in title administered the Fund.

[10] The Natal University College later became a constituent college of the University of South Africa and thereafter became autonomous as the

University of Natal. The latter was amalgamated with the University of Durban-Westville in 2001 by a decision of the Minister of Education in terms of s 23 of the Higher Education Act 101 of 1997 to form the University.

[11] When Sir Charles passed away in 1941, the fund was established with an initial capital base of 42 000 pounds sterling, representing three-tenths of the residue of his estate. Today it is one of the largest administered by the University. At the time the proceedings were launched in the court below, its assets had increased in value to about R27 m, of which about R4 m was available for distribution to potential bursars.

[12] Because of the racially exclusive nature of the bequest, the Fund, instead of being depleted, has grown exponentially. Over the years the amount that has been paid out to successful applicants for funding has consistently been lower than what the Fund could afford. This was due not only to the racially exclusive nature of the bequest but also because of the difficulties attendant upon determining who qualified as ‘European girls born of British South African or Dutch South African parents’. This is due to dramatically changed circumstances from the time that the will was made. The parties are ad idem that '*European'* is an obsolete reference to white South Africans.

[13] The University’s Principal and Vice-Chancellor, Professor Malegapuru William Makgoba, was the principal deponent in support of its case. He recorded that the University has experienced considerable embarrassment in performing its function as trustee of the Fund because of the racially exclusive basis upon which bursaries have to be awarded. The University argued that such discrimination is self-evidently unfair. It is common cause that the first respondent is a public institution largely funded by government. The University is committed to non-racialism, yet the majority of its students do not qualify for an Emma Smith bursary.

[14] Over and above the embarrassment caused by administering a fund that is racially exclusive the University is concerned that it might be

challenged in the Equality Court under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 because it administers a fund exclusively reserved for Whites.

[15] Similarly, the reference to 'Durban' has given rise to possible challenges in the interpretation of the bequest. The city by that name that existed in 1938 has expanded to a large metropolitan municipality now known as the Ethekwini Municipality. It has incorporated formerly outlying boroughs and townships, with the result that uncertainty might exist in respect of the neighbourhood in which a potential beneficiary has to reside in order to qualify for a bursary.

[16] During 1999 the University launched an application in the Durban High Court to vary the provisions of the will creating the Fund in terms of s 13 of the Act, the provisions of which will be dealt with in due course. That application, intended to obtain the same result that is now sought to be brought about, was withdrawn when evidence showed that the availability of the bursaries had not been widely advertised and that the bursaries that were awarded had been restricted to studies at the University.

[17] The position has since improved, both in respect of the number of bursaries awarded and the range of institutions at which such bursaries may be taken up, but still the available funds are not fully applied to achieve the Fund's objects.

[18] The litigation culminating in the present appeal was launched in December 2005. As indicated above, the University was the first applicant in the court below and the individual members of its Council, led by Professor Malegapuru William Makgoba, were the second to twenty-ninth applicants.

[19] Adv Douglas Jamieson Shaw QC and adv Andrea Astrid Gabriel were appointed as curators for potential beneficiaries of the Fund to report to the court how the latter might be affected by the proposed changes. At the

direction of the court below, the Master was served with a copy of the papers. He abided the decision of the court.

[20] The curators filed two reports. They submitted that the application should be dismissed for the following reasons:

a. The Act does not apply to the Trust. The latter was transferred from the Natal University College to the present first respondent by way of statutory enactments, which resulted in the Trust effectively having been '. . . written into the statute. . . '. No amendment of its terms through the mechanism of s 13 of the Act is therefore possible;

b. Freedom of testation is not only a fundamental principle of the law of succession, but also an essential part of the right not to be deprived of property. Freedom of testation is therefore enshrined in s 25 of the Constitution. This fundamental right is as important as any other fundamental right in the absence of a hierarchy of fundamental rights. Nothing contained in the provisions of the Trust justifies an interference with this right against the factual background of this matter;

c. Interfering with the right to leave property to a person or class of the testator's choice might diminish the willingness of future testators to establish charitable trusts for educational purposes;

d. A decision to amend the provisions of the Trust may open the floodgates to have similar testamentary charitable trusts amended, with resultant prejudice to existing and potential beneficiaries;

e. If the present Trust were to be amended, private testamentary dispositions to a religious community, a club or a school might also fall foul of the law. This would clearly not be in the public interest;

f. A charitable trust that conformed to public policy when it came into effect might well be said to remain inoffensive in spite of the passage of time. The Trust instrument is therefore not in conflict with the present public interest or public policy;

g. In the alternative, and in the event of it being held that the Act does apply to the Trust, the curators submitted that there is no provision in the will that brings about consequences that the testator, a man of foresight and vision, did not foresee in broad and general terms. The provisions were lucid

when the Trust was created. The haze of imprecision surrounding some of them now was brought about by the passage of time, but they were not thereby rendered ambiguous or ineffective. Section 13 of the Act could thus not be invoked in this instance; and

h. The respondents' embarrassment in having to administer the Trust according to the terms of the will does not justify an amendment of the Trust. The trustee's function could be transferred to a private administrator.

[21] The curators recommended that, in the event that the Trust was held to fall under the Act, the following amendments should be made:

(i) The reference to British South African and Dutch South African parentage should be deleted;

(ii) The reference to residence in Durban should be deleted and replaced with a requirement that exhibitioners should have attended an educational institution in the Province of Kwazulu-Natal for a period of three years prior to the application for a bursary;

(iii) The reference to 'poor' should be deleted and substituted with the phrase that the intending exhibitioner would not be able to pursue a course of study without financial assistance;

(iv) The reference to 'European' (white) girls should be retained;

(v) The proper approach – if an amendment to the Trust was to be considered – should be to recognize that women as a class are still disadvantaged as they were in the testator's day, to preserve some distinction between the various sub-categories in this class and to divide the trust income on the basis that 30 per cent should be allocated to white women, any balance of the thirty percent plus a further 50 per cent of the income should be allocated for bursaries for women who are not white and the balance should be distributed in the trustees' discretion or be accumulated as capital; and

(vi) The University should not act as trustee of the Fund in order to avoid any conflict or embarrassment. This function should be transferred to a private trust administrator.

[22] It had been submitted on the University's behalf that the racial discrimination inherent in the application of the will's provisions is contrary to public policy and in conflict with the public interest. That submission found favour with the court below which ordered the deletion from clause 26(f)(2) of the will of the words 'European', 'British', or 'Dutch South African'; and substituted for 'Durban' the words 'the Ethekwini Municipality'.

[23] Prior to the hearing of the appeal, the curators requested that an *amicus curiae* should be appointed to investigate issues that fell outside their mandate. They suggested that the Trust might be potentially void because of the vagueness of its provisions, that its purpose might have fallen away or that subsequent circumstances might have led to its demise. Mr Pammenter SC was appointed as *amicus.* The court is indebted to him for his contribution.

Conclusions

[24] Section 13 of the Act reads as follows:

'**13 Power of court to vary trust provisions**

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.'

[25] Section 13 of the Act authorises a court to vary or delete the provisions of a trust instrument in the contemplated circumstances. The submission on behalf of the curators that the Act does not apply to the Fund because it is now written into statute and somehow is not a trust instrument that can be varied or otherwise dealt with in terms of the Act, is fallacious. This is best demonstrated by a consideration of the history of how the Fund came to be administered by the University.

[26] The Natal University College was established by the Natal University College Act 18 of 1909, s 3 of which entrusted its council with the administration of all grants of money to the College '. . . according to the objects and conditions of such grants.'

[27] The University of South Africa Act 12 of 1916 identified the College as a constituent college of the University of South Africa. Section 3(2) of this Act determined that the provisions of any law by which the constituent colleges had been established and governed until then would remain in force together with every rule or regulation made in terms thereof.

[28] The University of Natal (Private) Act 4 of 1948 created the University of Natal. All the assets and liabilities, rights, powers and privileges of the Council of the Natal University College were transferred to the new university. Section 14 of this Act deals, inter alia, with trusts and similar bequests, which are to be applied '. . . and exercised by the University in accordance with the conditions of such trust, donation or bequest.'

[29] The University of Natal (Private) Act of 1948 was replaced by the University of Natal (Private) Act 7 of 1960. It contains only one relevant provision, s 6, which reads: 'The Council shall administer all the property of the University and, except as otherwise provided in this Act, shall have the general control of the University and of all its affairs, purposes and functions'.

[30] The Higher Education Act 101 of 1997 transformed existing universities into public higher education institutions and created the legal framework for the merger of two or more such institutions. Section 22 (5) of this Act, dealing with an institution such as the first respondent, provides that all funds vested in the educational institution by virtue of a trust, donation or bequest must be applied in accordance with the terms upon which such trust, donation or bequest was created.

[31] The University of Natal (Private) Act of 1960 was repealed by the Higher Education Amendment Act 23 of 2001, which confirmed the continued

existence of the University of Natal and of its institutional statute in section 28(1) thereof. This institution was merged with the University of Durban-Westville as contemplated in the Higher Education Act 101 of 1997.

[32] These statutory provisions did not alter the terms and conditions of the original Trust, nor did they alter its essential nature. The University is the ultimate successor in title to the Natal University College. Although administered by the successive institutions set out above, the Trust has continued to exist. It must now be - and is in fact - administered by the University's Council. The Act therefore applies to the Trust.

[33] As stated above, a court is authorised in terms of s 13 to delete or vary a provision in the trust instrument which hampers the achievement of the objects of the founder, or which prejudices the interests of the beneficiaries or is in conflict with the public interest.

[34] The court below granted the relief sought by the University on the basis that the offending provisions were against the public interest. It relied, inter alia, on the decision in *Minister of Education & another v Syfrets Trust Ltd NO & another* 2006 (4) SA 205 (C). In considering public policy the court below took into account that equality was a foundational constitutional value. Furthermore, the court below thought it significant that the University, a public body maintained by public funds, was entrusted with the administration of the bequest.

[35] Equality is enshrined in s 9 of the Constitution in the Bill of Rights:

'9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[36] The legislation contemplated in subsection 4 is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It is only necessary to refer its preamble, section 7 and its Schedule :

'Preamble

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; . . . .'

'7 Prohibition of unfair discrimination on ground of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

. . . .

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

. . . . .

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.'

'*Schedule*

ILLUSTRATIVE LIST OF UNFAIR PRACTICES IN CERTAIN SECTORS

(Section 29)

1 . . . . .

. . . .

2 Education

(a) Unfairly excluding learners from educational institutions, including learners with special needs.

(b) Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.

(c) The failure to reasonably and practicably accommodate diversity in education. . . . .'

[37] The Bill of Rights applies to all law, including the law relating to charitable trusts: '. . .the objects of a trust will have to conform with the disavowal of unfair discrimination under the 1996 Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, which envisage equality even in person-to-person relations'. (Cameron et al *Honoré's South African Law of Trusts* 5th ed (2002) pp 171-172).[1]

[38] In the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster. Public policy 'is now rooted in our Constitution and the fundamental values it enshrines, thus establishing an objective normative value system. In considering questions of public policy for purposes of the present application, therefore, the Court must find guidance in "the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism".' (*Syfret's* case*, supra,* quoting *Napier v Barkhuizen* 2006 (4) SA 1 SCA para 7*).*[2] The Syfret's

[1] See further Corbett et al *The Law of Succession in South Africa,* 2nd ed (2001) p133; Du Toit 'The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law', (2001) *Stellenbosch LR* 222, in particular, p 236: 'It is submitted that the following rights included in the South African Bill of Rights will in all likelihood constitute the principal counterweight to freedom of testation: (a) The right to equality in section 9 . . . . The validity traditionally attributed to charitable testamentary bequests which limit benefits on the basis of race, nationality and religion will have to be . . . re-examined'.

[2] See further *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 54. 'In South Africa the highest test of

case concerned a public charitable educational fund administered by the University of Cape Town which excluded black persons, women and members of the Jewish faith as beneficiaries. In a comprehensive judgment with copious reference to authority Griesel J came to the conclusion that the discrimination against the excluded persons was in conflict with public policy because it transgressed the equality provision of the Bill of Rights. Applying the common law, he ruled that the offending provisions had to be deleted.

[39] The University is a higher education institution as defined in the Higher Education Act 101 of 1997, bound by s 37(3) of that Act to '*. . .* provide appropriate measures for the redress of past inequalities and . . . not (to) discriminate unfairly in any way' in its admission policy, and by section 4 of the National Education Policy Act 27 of 1996 to direct such policy to respect every person's right '. . . to basic education and equal access to educational institution.' The University is obliged to apply public policy.

[40] Section 13 (a) and (c) of the Act apply to the present issue, as the racially restrictive nature of the Fund prevents the realisation of the testator's intentions while it is, in addition, in conflict with the public interest (the term is a synonym of 'public policy': *Syfret's case, supra,* para 24). The court below correctly decided to remove the racially restrictive conditions of the will.

[41] The curators argued that the judicial amendment of a public charitable trust's provisions would have a chilling effect upon future private educational bequests. I cannot agree. We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for

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public policy is our Constitution', per Crouse AJ in *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 127. Before the advent of the Constitution Berman J said, in *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust* 1993 (2) SA 697 (C) in respect of children's homes restricted for white children that could not fill all their beds because of the restriction: ''It cannot seriously be contended that by continuing to restrict the intake of destitute children to the homes to those whose skins are white will better serve the interests of the public than to open their half-empty premises to children who are destitute but are excluded therefrom solely by reason of the fact that their skin is coloured brown or black or indeed any other colour but white. The contrary is unarguably the case – the interest of the public in this country, the inhabitants of which are mainly non-white in colour, cries out for the need to house and to care for destitute children, whatever their ethnological characteristics may be'.

members of his or her faith or a club member intending to benefit the children of fellow members. Testators who intend to benefit the underprivileged in the educational field will not be dissuaded, I think, from doing so by the implications of this judgment.

[42] The curators contended that the amendment of the will would interfere with freedom of testation which, they argued, is not only a fundamental principle of the law of succession but also part of the fundamental right not to be deprived of property in an unjustifiable fashion.[3] 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.

[43] The curators suggested that the University's qualms concerning the Fund's administration could be met by transferring the responsibility to a private institution. This submission overlooks the fact, as emphasised by Nicholson J in the court below, that the testator deliberately decided to entrust the University with the function of administering the Fund. It bears repetition that the University is a publicly funded institution that is obliged to serve all sections of society and cannot be seen to associate itself with racially discriminatory practices. In the English decision of *In re Lysaght, Hill v the Royal College of Surgeons* [1966] Ch 191 the court was faced with a bequest for scholarships to the College, made with the proviso that the recipients

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[3] s 25.(1) and (2) of the Constitution read: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application -
(a) for a public purpose or in the pubic interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
. . .

should be neither Jews nor Catholics. The College refused to administer the gift. Although the bequest as such might not have been regarded as being against public policy (*Blathwayt v Lord Cawley* [1975] 3 All ER 625 (HL)) the court struck down the offending provision to enable the College to administer the bursaries by the application of the *cy près* doctrine. There is good reason to follow this example

[44] The suggestion that the Fund might be void for vagueness will lose any validity if the offending provisions are deleted and it is clear that the Fund's proceeds may be applied to assist all South African women in need of financial support of a tertiary education. The same holds good for the argument that its object may have fallen away as 'British' and 'Dutch' South Africans have become united, or that new circumstances have caused the objects of the Fund to become unattainable.

[45] The curators' suggestion that, should the Trust be amended in respect of the group from which applicants for bursaries should be drawn, a racial quota should be introduced for future applicants was not supported by any evidence, statistics or precedent. It would, in the absence of compelling considerations to the contrary, constitute an unwarranted intrusion into the exercise of the Trustees' discretion and it would furthermore smack of a residual retention of race-based selection of potential bursars and is unacceptable for these reasons.

[46] The appeal against the order deleting the words 'European', 'British' and or 'Dutch South African' in clause 26(f)(2) of the will of Sir Charles Smith must be dismissed.

[47] The parties were *ad idem* in the court a quo that the reference to 'Durban' in clause 26(f)(2) had to be amended as it referred to the city as it existed at the time of the execution of the will. They made conflicting proposals to replace the existing reference to the city in which the testator lived.

[48] The court a quo substituted the name of the present municipality for the original appellation. With due respect, it appears to have been overlooked while debating the amendment of the existing geographical description that no evidence was placed before the court that the first respondent experienced any difficulty in attracting bursars because of the fact that the will refers to 'Durban', or would experience such after the removal of the racial limitations. The testator witnessed a continued expansion of his home city during his lifetime. He must have been fully aware of the certainty that it would continue to expand after his Trust was established. The provisions of s 13 of the Act can therefore not be invoked in the absence of any jurisdictional facts that would render any one of them operative. The appeal against this part of the order must succeed.

[49] The parties were *ad idem* that no costs order should issue.

[50] The following order is made:

1. The order of the court a quo substituting ‘the Ethekwini Municipality’ for ‘Durban’ in section 26(f)(2) of the will of Sir Charles George Smith, is set aside,
2. Save as set out in 1 the appeal is dismissed.

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E BERTELSMANN
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	D J Shaw QC A A Gabriel (Curator Ad Litem) Instructed by: Goodrickes Attorneys, Durban Symington & De Kok, Bloemfontein
For respondent:	A M Stewart SC S Mahabeer C J Pammenter SC (Amicus Curiae) Instructed by: Shepstone & Wylie, Durban Matsepes Incorporated, Bloemfontein