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Cover: Artwork: Jaco Sieberhagen, ‘Judge’ 1999, carved wood, 824 x 227 x 230 mm. Donated by the artist to the CCAC. Cover image courtesy of the Constitutional Court Trust, as part of the Constitutional Court Art Collection (CCAC). For more information, visit ccac.concourtrust.org.za or follow @concourt_art on Instagram and Twitter.

Photograph by Ernest Bellingan Scott.

Constitutional Court Art Collection / cover

“Judge”



THE CONSTITUTIONAL COURT TRUST

Artist Jaco Sieberhagen found a piece of driftwood in a river running through the mountains around Worcester, which he sculpted into “Judge” in 1999.

Sieberhagen aimed to leave the original weathered wood as untouched as possible. According to him, he developed the theme for this specific piece of wood from its expressive texture, “I wanted to contribute to the ‘story’ of the sculpture instead of completely imposing my will on the wood. While carving the face, I felt that although the wood was weathered, the face should have an inner strength and portray wisdom – the wisdom that only comes with time and experience. From there, the idea developed that I could carve the lines of the scales of justice into the sculpture”.

The artwork embodies the core theme of the Constitutional Court Art Collection: the intersection of art and justice. ♦



Law of succession

Limitations on the right to freedom of testation

MUNEER ABDURAOUF

Part 2

In the previous article, I discussed two case studies involving discriminatory testamentary provisions. We now move on to the third example; the matter of *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) (*Emma Smith Educational Fund*). The judgment was handed down by the Supreme Court of Appeal (SCA). It dealt with discriminatory testamentary provisions in a public charitable trust. Eligibility for the bursary was limited to European girls who were born of British South African or Dutch South African parents. It was further required that they must have been resident in Durban for a period of at least three years immediately preceding the grant.

An order was sought for the deletion of the discriminatory provisions from the trust deed based on s13 of the TPCA that allows the court to vary provisions in a trust instrument. The court held that the constitutional obligation to remove provisions that are in conflict with public policy takes precedence over freedom of testation. The court did not answer the question as to whether the Constitution can be applied directly to the law of succession (*King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC)). It must be noted that the court placed considerable emphasis on the fact that the trust was a public charitable one which operated in the public sphere. It held that there can be no question that racially discriminatory testamentary dispositions in the public sphere will not pass constitutional muster. The court stated that testamentary dispositions in the private sphere would require a totally different approach.

The fourth case to look at is *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC). Judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a number of public charitable trusts. It was argued that the trusts