

**Is s 2(3) of the Wills Act 7 of 1953
finally tailored?**

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John H Langbein, 'Substantial compliance with the Wills Act' 1975 *Harvard Law Review* 489 498:

'What is peculiar about the law of wills is not the prominence of formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.'

→ Formalities and formalism



Kidwell v The Master 1983 (1) SA 509 (E)

- Testator signed the second page of a two-page will 13 cm below the signature of the second witness thereto and 17 cm below the attestation clause
- Court: Will was not signed 'at the end thereof' as required by s 2(1)(a)(i) of the Wills Act
- Held: will invalid



Kidwell 514F:

‘The conclusion to which I have come is unfortunate for the applicant *and may frustrate the testator's intention.** This is the result of a failure to observe a statutory requirement for the validity of wills which is peremptory.’

*My emphasis



SA Law Commission Report Project 22
Review of the Law of Succession (1991)

Law of Succession Amendment Act 43 of
1992

S 3(g) of Act 43 of 1992 imported s 2(3) into
the Wills Act 7 of 1953



S 2(3):

‘If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).’



Certainties regarding the condonation provision

- Aim:
‘By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators.’

Van der Merwe v The Master 2010 (6) SA 544 (SCA) [14]

→ Therefore: not a move away from formalities, but a move away from formalism



Certainties regarding the condonation provision (cont)

- Three requirements:
 - a document must be presented to the court for condonation
 - this document must have been drafted or executed by the (now) deceased
 - the deceased must have intended this document as a will / amendment to a will



Certainties regarding the condonation provision (cont)

- If the subsection's requirements have been met, a court must issue the condonation order:

‘[O]nce a court is satisfied that the document concerned meets the requirements of the subsection, a court has no discretion whether or not to grant an order as envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.’

Van der Merwe v The Master 2010 (6) SA 544 (SCA) [14]



Noteworthy: definitions of 'document', 'drafted' and 'executed' with regard to s 2(3) not included in the amended Wills Act

→ Troublesome issues arose with regard to the interpretation and judicial application of s 2(3)



Troublesome issues regarding the condonation provision

- The 'document' requirement
 - Is a (hand)written document required?

‘What the Legislature had in mind in my view was the circumstance that the intention of a testator as demonstrated *in writing in his own hand** should not be frustrated because the writing does not comply in all respects with the requirements of s 2(1) of the Act.’

Webster v The Master 1996 (1) SA 34 (D) 41F

*My emphasis



Troublesome issues (cont)

But then (in respect of a document unexecuted by the deceased):

‘Volgens hierdie denkrigting moes die oorledene die dokument, wat hy of sy bedoel het om 'n testament te wees, self geskryf of getik het of op 'n ander wyse *persoonlik* tot stand gebring het.’

‘[I]n die konteks van die die Wet, van persoonlik opgestel, geskryf, getik of tot stand gebring het, soos bv deur dit te dikteer dra...’

Bekker v Naude 2003 (5) SA 173 (HHA) [8], [9]



Troublesome issues (cont)

- Electronic document or document as data message?
 - Electronic Communications and Transactions Act 25 of 2002, s 4(3) of Sch 1
- *MacDonald v The Master* 2002 (5) SA 64 (O) 711
 - ‘The deceased’s will was indeed a document that was stored in his computer in accordance with his instructions.’
- In both *MacDonald* (will stored on computer) and *Van der Merwe v The Master* (will emailed to recipient) print-outs of the documents were submitted to court for condonation



Troublesome issues (cont)

- The 'drafted' requirement
 - Can a document not executed by the deceased and drafted by another be condoned?

Webster v The Master 1996 (1) SA 34 (D) 41C:

'In my view, this provision requires that the document be drafted by such person personally.'



Troublesome issues (cont)

Ex parte Williams: In re Williams' Estate 2000 (4)
SA 168 (T) 176J-177A:

‘[O]n a correct reading of s 2(3) ... there is no warrant for holding that the Legislature intended ... the personal drafting of a document by the testator.’



Troublesome issues (cont)

– *Bekker v Naude* 2003 (5) SA 173 (HHA) [20]:

‘Daar is dus geen gronde waarop van die gewone letterlike betekenis van art 2(3) van die Wet afgewyk kan word nie. Die Hof het 'n “kondoneringsbevoegdheid” slegs indien die voorgenome testament deur die oorledene persoonlik tot stand gebring was.’

Is the matter now settled?



Troublesome issues (cont)

- Mohamed Paleker ‘*Bekker v Naude en Andere*: The Supreme Court of Appeal settles the meaning of drafted in s 2(3) of the Wills Act, but creates a potential constitutional problem’ 2004 *SALJ* 27



Troublesome issues (cont)

- The ‘executed’ requirement

- *Ex parte Williams: In re Williams’ Estate* 2000 (4) SA 168 (T) 175G:

‘I have already indicated that s 2(3) also deals with the “execution” of a document and that there is no reason to believe that the Legislature saw that as nothing else than the personal signing of the document by the would-be testator.’



Troublesome issues (cont)

- *Smith v Parsons* 2010 (4) SA 378 (SCA):

‘A formal signature is not required to meet the requirements of s 2(3) of the Wills Act. The section requires only that the document is drafted or executed with the intention of making or amending a will.’



Troublesome issues (cont)

- The 'intention' requirement
 - *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) [21]:
'...what was on the mind of the deceased at the time of making the contested will.'



Troublesome issues (cont)

– But: *Bekker v Naude* 2003 (5) SA 173 (SCA):

‘Die verhoor voor Marais R het uitsluitlik gewentel om die vraag of die konsep bedoel was om die oorledene se testament te wees, soos deur art 2(3) vereis. Marais R het nie hieroor 'n bevinding gemaak nie en dit is ook nie nodig vir hierdie Hof om oor dié feitelike vraag iets te sê nie. Die rede is dat daar 'n aanvanklike regspraak te berde gekom het...’



Conclusion

- Definitions and terminology
- Certainty regarding the deceased's intention
- Suicide cases
- Substantial compliance

