IS SECTION 2(3) OF THE WILLS ACT 7 OF 1953 FINALLY TAILORED? (CONTINUED)

MR JAMES FABER

FISA CONFERENCE

SEPTEMBER 2012

UNIVERSITY OF THE
FREE STATE
UNIVERSITEIT VAN DIE
VRYSTAAT
YUNIVESITHI YA
FREISTATA
UFS
UV

AN ANALYSIS OF RECENT JUDGMENTS:

- Smith v Parsons 2010 (4) SA 378 (SCA)
- Ex Parte Porter 2010 (5) SA 546 (WCC)
- Van der Merwe v The Master 2010 (6) SA 544 (SCA)
- Abrahams v Haggard [Case no: 5890/2009 (Judgment: 10 November 2010)
- Taylor v Taylor 2012 (3) SA 219 (ECP)

UFS UV

SMITH V PARSONS 2010 (4) SA 378 (SCA)

Facts (brief summary):

The deceased wrote a suicide note containing testamentary provisions. He left the note under a crucifix in the kitchen before committing suicide. The only question before the SCA was to determine whether the deceased intended the handwritten suicide note signed with his name (‘Wally’) to be an amendment of his will as contemplated by section 2(3)?

UFS UV

- The intention requirement entails an examination of the document itself and the surrounding circumstances (Van Wetten v Bosch):

- The document ("the suicide note"/ "an essentially personal letter"): The deceased gave clear instructions on what should happen to his estate;

  - "… you can have the house …"
  - "… I authorise … to give you … which will not leave you battling … . There are also …"
  - "I leave everything else to …"

UFS UV

- The surrounding circumstances:

  - The deceased knew he had a will. (“My will is in the Brown envelope in the safe.”)
  - He knew the content of the will. He knew that the will does not make provision for the appellant. His intention with the note was to amend this. “I leave everything else to Jeremy as stated therein” (in the will).
  - He knew he was about to commit suicide.
  - He left the document where it could be found.

- The Master of the High Court was directed to accept the document as an amendment to the will of the deceased.

- Important considerations:

  - Document - “a suicide note”/ “an essentially personal letter”.
  - Execution - ‘[a] formal signature is not required to meet the requirements of s 2(3) of the Wills Act’ (par [18]).
  - Intention - ‘no ambiguity’ (par [15]), ‘clearly demonstrates’ (par [16]), ‘telling indication’ (par [17]), ‘clear and unequivocal’ (par [17]), and concludes with ‘[i]t can thus reasonably be inferred that … the deceased intended that his instructions would be implemented…’ (par [17]), and the deceased ‘was expressing his clear instruction’ (par [20]).
  - The court applied section 2(3) without considering the testamentary capacity of the deceased. It may technically be right, but it can result in a situation where a document of a person without testamentary capacity can be condoned as a will, and if not challenged (after the 2(3)-application), then sections 2(3) can in fact condone *more* than non-compliance with the formalities.

UFS UV

EX PARTE PORTER 2010 (5) SA 546 (WCC)

Facts (brief summary):

The testator instructed his attorney to draft a codicil for him The attorney drafted the codicil and emailed it to him. A print-out of the emailed draft codicil was made and validly executed. The codicil was sent back to the attorney for safekeeping, but went missing at the attorney's offices. Application was made in terms of section 2(3) for the condonation of the "print-out-email-attachment" ("a replica of the document that was duly executed …"). The question was whether relief could be granted in terms of section 2(3)?

- The Law

“The lost codicil” remains in force after execution. Revocation is the only way to deprive a once valid will of its legal force. If a will is missing, a copy of the will can be used to reconstruct the missing will and the court can authorise the “reconstructed copy” of the will to be accepted by the Master.

UFS UV

The court found that section 2(3) was not applicable:

- The document which the testator executed was the document the testator intended to be his codicil.
- The document the applicants wanted to condone was “not that document, but only a template of the one that was executed.”
- The interpretation of document must be limited ‘to the narrower concept of the actual piece of paper in issue, which, in my view, is what the statutory provision has in contemplation’ (par [11]).

Important considerations:

- The *Porter* case highlights the problem that there is no clear understanding of important concepts in the law of testate succession in South Africa (“document”, “drafted”, “executed”, “section 2(3)-document”, “will”, “copy of a will”, “duplicate original will” and “invalid will”). Will statutory definitions bring about legal certainty or will it further limits the application of section 2(3)?
- *Porter* services as authority that the *document itself* must have been intended by the testator to be his will (not intention in terms of the *content of the document*). What would the effect of this limitation be on documents of an exclusive electronic nature?
- ‘Drafted’ does not include where a third party has drafted the document and the deceased “had adopted the resultant text” ([par 9-10]).

UFS UV

VAN DER MERWE V THE MASTER 2010 (6) SA 544 (SCA)

Facts (brief summary):

The deceased and his friend (the appellant) had decided to each execute a will and nominate each other as sole beneficiaries. Following this agreement the deceased sent the appellant an e-mail of which the content was testamentary in nature and contained the heading, “TESTAMENT”. They discussed this telephonically and the appellant reciprocated by executing a valid will. However, the deceased died without having executed the document sent by e-mail to the appellant.

In applying section 2(3), the court pointed out that the first question should be whether the document in question was drafted or executed by the deceased. Following on this question, the court referred to *Letsekga v The Master*:

> "…the testator must have intended the particular document to constitute his final instructions with regard to the disposal of his estate."

The court found that the document was drafted by the deceased (It was sent to the appellant via e-mail from the deceased and it still existed on the computer of the deceased).

UFS UV

- The court *a quo* insisted on a formal signature by the deceased and did not condone the document.

- The SCA found that “A lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3).” and “The very object of s 2(3)…is to ameliorate the situation where formalities have not been complied with…”, but unfortunately concludes with “On the other hand, it must be emphasised that the greater the non-compliance with the prescribed formalities the more it would take to satisfy a court that the document in question was intended to be the deceased’s will.”

UFS UV

- With regard to whether the deceased intended the document to be his will:

  - The document is boldly entitled ‘TESTAMENT’.
  - Appellant is sole beneficiary of pension fund proceeds. “This is an important and objective fact that is consonant with an intention that the appellant to be the sole beneficiary in respect of the remainder of his estate.”
  - No immediate family, and previous will also had no intention to benefit remote family members.
  - The mutual agreement is uncontested and is supported by the fact that the appellant also executed a will in accordance with their agreement (“another objective fact”).

  “All of this leads to the *inexorable* conclusion that the document was intended by the deceased to be his will.”

- Important considerations:

- Is the agreement to benefit each other an invalid *pactum successorium*?
- Can the invalid agreement (or *any* factor) be used in determining the intention of the deceased?
- The court referred to the document as the document that ‘still exists on the deceased’s computer’, but condoned the printed-out copy thereof. The court also referred to the document as the “document executed by the deceased during 2007” (the document was not executed).

ABRAHAMS V HAGGARD [CASE NO: 5890/2009 (JUDGMENT: 10 NOVEMBER 2010)

Facts (brief summary):

The deceased died of natural causes, however it is uncertain whether he died of a heart attack or the accident he was involved in while he was riding his bicycle. Prior to his death the deceased was unstable and suffered from depression, he abused alcohol which rendered his stormy on-off relationship abusive. The unstable relationship contributed to the anxiety and mental instability which the deceased was suffering of. All this contributed to the deceased contemplating suicide. He wrote a personal letter (an original handwritten unsigned and undated document) to his family and friends dealing with the contemplated suicide; the letter also contained testamentary provisions. The deceased also made a number of statements, which involved promises relating to the dissolvement of his estate prior to death.

UFS UV

The question was whether the deceased intended the document to be his will. The court relied on Van Wetten v Bosch to determine this (it was not disputed that the document was drafted by the deceased).

- The respondents contented (most notably) that because of the various statements made by the deceased in the period before his death, he did not intend the document to be his will.

The court followed a very logical approach in its judgement, the court examined the:

- wording of section 2(3);
- the requirements for the application of section 2(3);
- the purpose of section 2(3);
- similar cases.

The court firstly dealt with the *contents of the document* and came to the conclusion that there were “very clear indications that the deceased intended it to be his will:

- he listed the main assets;
- he nominated a beneficiary;
- he appointed an executor;
- he stated “I herewith declare that this writing replace all previous in respect of my estate devide (sic) or last wishes expressed.”

The court dealt with various grounds advanced by the respondents:

- the document was found amongst surplus notepaper (next to his study notes), and not “in a place where one would expect to find … important documents;
- they relied on the contradictory remarks made by the deceased;
- they relied on the “form” of the letter (“emotional letter”), its incomplete nature and the fact that the deceased was under emotional stress and concerned about his health;

UFS UV

The court concluded:

"Taking a broad view of the surrounding circumstances, I do not consider that any of the various assurances made by the deceased plays a decisive role in the determination of whether he intended the document to be his will. *What must carry much greater weigh* are the terms of the contested will which unequivocally point towards the deceased's intention that it would constitute his will. A further weighty factor is that although the deceased destroyed another document relating to his view on his family members shortly before his death, he did not destroy the contested will but kept it in a place of sufficient prominence for it to be found without any difficulty after his death. Taking all these factors into account … I am satisfied that …"

UFS UV

Important considerations:

- Regarding the question that the deceased had appeared to change his mind concerning the disposition of his property (after concluding the document). "The Court held that those factors were not relevant in the determination what the deceased's intention was at the time of writing the contested will. "Evidence as to subsequent conduct is relevant only insofar as it throws light on what was on the mind of the deceased at the time of making the contested will…" The approach adopted by the Supreme Court of Appeal in Van Wetten's case was recently endorsed by that Court in the matter of **Smith v Parsons N.O. and Others** 2010 (4) SA 378 (SCA)."

UFS UV

The deceased was contemplating suicide when he drafted the contested will. The court found: “This prompts two observations;

- firstly the fact that the deceased was contemplating suicide does not of itself render the document something less than his will, if that is indeed what it is.
- Secondly, the fact that the deceased changed his mind about committing suicide also does not exclude the document being declared his will. The contested will must be judged on its own terms (which are unconditional), and the surrounding circumstances. Any later change of mind on the part of the deceased, unless given effect thereto by an act of revocation …, is irrelevant.

UFS UV

TAYLOR V TAYLOR 2012 (3) SA 219 (ECP)

Facts (brief summary):

The deceased became aware of the fact that he was terminally ill, and because of this knowledge executed a will. Shortly before his death he drafted and signed another document, a “wish list” (it was dated and signed at the end only by the deceased). The question before the court was whether the deceased intended the “wish list” (when he drafted it) to be an amendment of his existing will, or not.

UFS UV

In answering the question, the court found:

> "…we must attempt to divine what the deceased had in mind when he drafted the wish list. When analyzing the document itself, the relevant surrounding and background circumstances of which we are aware should be taken into account."

The court did not condone the document. The court held that the document had as its aim the unity of the family.

The court found:

- The document: contained discretionary language, “it is my wish”, “can be”, it is suggested”

- The circumstances: when the deceased realised that he was terminally ill, he acted on this knowledge by executing a will.

- No evidence that “the circumstances in his life changed to such an extent to have persuaded him to changes his will in any way”, during the period after he made his will and before he drafted the wish list.

- The court found that because he executed a will, he therefore should have known that formalities are required “there is simply no explanation as to why he did not do this if he in fact intended to amend his will.” This reason, coupled with the language employed in the wish list “leads inescapably to the conclusion that he did not intend …”

UFS UV

- The court found that this case differs materially from Smith, in that the deceased had the intention of committing suicide when he drafted the document and that was a compelling factor in favour of his intention…

- Is there a “suicide-exception” in the application of section 2(3)?
- Shouldn't the courts be more cautious in suicide cases?

Important considerations:

- “A key element in intention is a person’s wishes or desires.” De Waal 2008: 221.
- The two headings, “**My wishes regarding**…”.
- “It is my wish that in the event of my death, my wife, Mrs Hildegard Taylor be allowed to remain living in the main house.” *Then* suggestions…
- Also, he bequeathed the personal effects and residue to the wife “for the sake of simplicity”. It is my wish… and then detail….
- “The attached list are items in the house which belongs to my wife and as such do not form part of these wishes.”
- The court found: “When the document is measured against the surrounding circumstances enumerated above, it seems to me that the matter is put *beyond doubt*.”
- Can the court rely on the fact that he drafted a will a few months earlier and therefore must have been aware that formalities will be required to such a large extend (in light of the purpose of section 2(3))?

UFS UV

General discussion:

- Definitions and terminology
- Relevant time to determine the intention of the deceased
- Uncertainty regarding the intention requirement
- Is there a “suicide-exception”?
- Substantial compliance?