



The intention requirement of section 2(3) of
the *Wills Act 7* of 1953 after *Van Wetten v*
Bosch 2004 1 SA 348 (SCA)

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ABSTRACT

A will is a document regulated by the *Wills Act* 7 of 1953 (hereafter *Wills Act*) that dictates how a person's assets are distributed after death. Situations often occur in which testators fail to comply with the formal requirements for executing or altering wills as provided in section 2(1), even though they genuinely intend the document to serve as their final will or as an amendment to it. Section 2(3) of the *Wills Act* empowers the court to order the Master of the High Court to accept such a non-compliant document if the court is satisfied that the deceased intended the document to be their will. This section faced significant challenges related to its interpretation and application, particularly concerning the intention requirement.

The Supreme Court of Appeal (SCA) addressed this uncertainty in the case of *Van Wetten v Bosch* 2004 1 SA 348 (SCA) (hereafter the *Van Wetten* judgment/case), establishing principles for determining the deceased's intention in condonation applications. These principles mandate an examination of both the document itself and its context, allowing documents that do not formally appear as a will (such as a letter) to be accepted if evidence confirms that the deceased intended it to serve as their will.

The purpose of this doctrinal study is to analyse court cases adjudicated subsequent to the *Van Wetten* judgment to examine the developments, inconsistencies, challenges, and criticisms in the interpretation of the intention requirement.

The inquiry reveals that interpretive challenges pertaining to the intention requirement still prevail, particularly within the context of informal, irregular, and electronic documents. Crucially, divergent outcomes often arise from the highly subjective assessment of the surrounding circumstances and the difficulty in judicially establishing the finality of the document. To enhance the effectiveness of the condonation provision in fulfilling genuine testamentary intentions, it is crucial to apply the principles established in the *Van Wetten* case consistently, and to adopt a flexible approach when determining whether a person intended to make a will.

Keywords: testator's intention; condonation; testamentary formalities; wills; *stare decisis*

LIST OF ABBREVIATIONS

APLJ- Australian Property Law Journal

JJS-Journal of Juridical Science

LitNet – LitNet Akademies

OUCLJ- Oxford University Commonwealth Law Journal

PER-Potchefstroom Elektroniese Regsblad

PELJ-Potchefstroom Electronic Law Journal

SAMLJ- South African Mercantile Law Journal

SALC- South African Law Commission

SALJ- South African Law Journal

SCA- Supreme Court of Appeal

THRHR- Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TSAR- Tydskrif vir die Suid-Afrikaanse Reg

1 Introduction

1.1 Background

A will is drafted to give effect to the testator's wishes after his death. The testator's wishes may include, among others, the disposal of assets and any other matters under the control of the testator. When drafting or amending a will, the requirements as set out in respective section 2(1)(a) and (b) of the *Wills Act*¹ must be met for the will or amendment to be valid.

Section 2(1)(a) of the *Wills Act* stipulates that the will must be in writing, signed at the end by the testator [and if the will consists of more than one page, anywhere on the other page(s)], and attested to by two competent witnesses.² Section 2(1)(a) is strictly interpreted and applied by the courts. A breach of these requirements would leave the purported will invalid and unenforceable, leaving potential heirs disappointed, as no benefits may accrue under the purported will.

Section 2(1)(b) of the *Wills Act* stipulates that any amendment made by the testator must be signed by the testator and attested to by two competent witnesses.³ As with section 2(1)(a), the prescribed formalities for the amendment of a will in terms of section 2(1)(b) are also strictly interpreted and applied by the courts.

If the will or its amendment does not comply with one or more of the aforementioned requirements, then the Master of the High Court may not accept the will or its amendment for the purpose of administering the deceased estate. If the intended will is not accepted, and the person does not have a previous will, the deceased person is deemed to have died intestate. Consequently, the administration of the deceased's estate shall devolve in terms of the *Intestate Succession Act*,⁴ often contrary to his wishes. In a case of non-compliance with the formalities for the amendment of a will, such amendment shall not

¹ 7 of 1953 (hereafter the *Wills Act*). Also see Hofmeyr and Paleker *The Law of Succession in South Africa* 88-89.

² Section 2(1)(a)(v) of the *Wills Act* also makes provision for using an amanuensis or signing by the testator by means of a mark, in which case further formalities are required.

³ Section 2(1)(b)(iv) of the *Wills Act* also makes provision for the situation where the amendment was signed by the testator by means of a mark or an amanuensis was used, in which case further formalities are required.

⁴ 81 of 1987.

find application; therefore, the existing will would be enforceable without any recognition of the amendment. The execution acts (complying with the formalities) are distinguished from testation acts, where a testator disposes of his assets.⁵ As previously stated, a document containing a testamentary disposition must be executed in order to be legally enforceable.

Before 1992, there were no remedies to allow for deviations from non-compliance with the requirements set in section 2(1).⁶ The frustrations caused by the strict requirements of section 2(1) were one of the reasons for a study requested by the (then) South African Law Commission (hereafter the SALC) to recommend legislative amendments to the *Wills Act*.⁷ The study reaffirmed the compliance with the formalities prescribed in section 2(1) of the *Wills Act*. As a result of the SALC's recommendations, the *Law of Succession Amendment Act*⁸ was enacted to give effect to the SALC's recommendations. The *Amendment Act* introduced *inter alia* section 2(3) in the *Wills Act* to allow for the condonation of non-compliant wills and amendments of wills. Section 2(3) of the *Wills Act* provides that:

if a court is satisfied that a document or the amendment of a document was drafted or executed by a person who has since died and the testator intended the document 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, as a will or amendment of a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection(1).

This section empowers the courts to order the Master of High Court to allow condonation of the documents purporting to be a will or amendment to a will, even if it does not comply with all the formalities of section 2(1)(a) and (b).⁹

Soon after the enactment of section 2(3) into the *Wills Act*, the courts were confronted with interpreting and applying this provision. The *Wills Act* (as amended) does not give a clear definition of the word "document", the meanings of the phrases "drafted" or "executed", or the details that should be considered as to the intention of the deceased to a document purporting to be his will or amendment. Accordingly, the courts were faced

⁵ Faber 2022 *PELJ* 3-4.

⁶ Jacobs and Lambrechts 2013 *De Rebus* 31.

⁷ SALC Project 22: Report on Review of the Law of Succession (1991) (hereafter *Report Paper*).

⁸ 43 of 1992 (hereafter the *Amendment Act*).

⁹ Wood-Bodley 1997 *SALJ* 1-2.

with the interpretation of the aforementioned terms and provisions of section 2(3), which often led to conflicting interpretations.

The first reported case in which section 2(3) was successfully applied was *Longue v The Master*¹⁰ (hereafter *Longue*), where the deceased left a three-page handwritten document reinstating his son, who was disinherited in his existing will, as an heir. The aforesaid document did not comply with the section 2(1) requirements in that the testator did not sign the first page. Furthermore, it was not attested to by two witnesses, as required.¹¹ As mentioned, a successful application was brought before the court to order the Master of High Court to regard the document as an amendment to his will.¹² However, in *Letsekga v The Master*¹³ (hereafter *Letsekga*), a similar application to condone a handwritten document that was neither signed nor witnessed, appearing to make changes to the deceased's will, was unsuccessful. The application of the section 2(3) requirements by the courts continued to result in conflicting interpretations over the years.

In *Ex Parte Maurice*,¹⁴ (hereafter *Maurice*) the court summarised the three requirements of section 2(3) as follows: the document has been drafted or executed by a person who has since died and who intended that the document should be his will. Furthermore, the courts applied divergent interpretations regarding the extent of non-compliance with the formalities prescribed in section 2(1), concerning section 2(3)'s reference to "although it does not comply with *all* the formalities for the execution or amendment of wills..."¹⁵ Nonetheless, the courts in *Macdonald v The Master*¹⁶ (hereafter *Macdonald*), *Van der Merwe v The Master*¹⁷ (hereafter *Van der Merwe*), and *Bekker v Naude*¹⁸ (hereafter *Bekker*) clarified the challenges regarding the first requirement concerning the term "document" and the meaning of the words "drafted or executed" by the deceased.

¹⁰ 1995 1 SA 199 (N).

¹¹ *Longue* 202C-D.

¹² *Longue* 202C-D.

¹³ 1995 4 ALL SA 226 (W) 231.

¹⁴ 1995 2 SA 713 (C) 715G.

¹⁵ Own emphasis.

¹⁶ 2002 5 SA 64 (O).

¹⁷ 2010 6 SA 544 (SCA).

¹⁸ 2003 5 SA 173 (SCA).

In the *Macdonald* case,¹⁹ the deceased left four handwritten notes, in one of which he declared that his last will could be found on his personal computer at his workplace under a specific directory. Furthermore, he left passwords and instructions on how to find his will. The file contents, purported to be his last will, were printed onto paper. The Master of High Court refused to accept the purported will as it did not comply with the requirements set out in section 2(1)(a) of the *Wills Act*. During the proceedings in the section 2(3) condonation application, the court decided in favour of the liberal approach by ordering that an electronically stored document, which could be reproduced in hard copy format in order to serve before the court, could be condoned in terms of section 2(3).²⁰ Similarly, in the *Van der Merwe* case²¹ the deceased emailed the non-compliant purported will to the appellant. The appellant applied to the court to have the printout of the document that was emailed to be condoned in terms of section 2(3), thereby declaring the same to be the deceased's last will. The Appeal Court considered whether the deceased drafted or executed the document. If the answer were affirmative, then whether the deceased intended the document to be his last will. After considering several objective factors that led to evidence of the deceased's intention in making the document his last will, the Appeal Court directed the Master of High Court to accept the document as the deceased's will, albeit being printed after the testator's death.²²

In the *Bekker* case, the Supreme Court of Appeal resolved the dispute over documents not signed by the "testator" (in other words, not executed by the person since deceased). In such a case, the document had to be "drafted by" the person since deceased.²³ The Supreme Court of Appeal held that the document had to be personally drafted by the deceased, in the sense that the deceased was the author of the document.²⁴ The *Macdonald*, *Van der Merwe*, and *Bekker* judgments established the approach to be applied by the courts in subsequent cases concerning similar facts relating to the document's authorship.²⁵

¹⁹ *Macdonald* 67F-H.

²⁰ *Macdonald* 72C.

²¹ *Macdonald* 15.

²² *Macdonald* 71J.

²³ De Waal 2004 *SALJ* 534-534.

²⁴ Schulze 2004 *Juta Business Law* 34-35.

²⁵ Papadopoulos 2012 *SAMLJ* 98-99.

Conversely, the scope of the “intention” requirement remained uncertain as the courts have been inconsistent in the interpretation thereof.²⁶ Initially, the courts used a strict and literal approach to interpreting the “intention” requirement. In *Ex Parte Maurice*, the court could not condone a document, “which simply expressed the testator’s wishes for the distribution of his estate” contending that the document must have been intended by the deceased to be his will.²⁷ A similar approach was followed in *Anderson and Wager NNO v The Master*²⁸ (hereafter *Anderson*) and *Longfellow v BOE Trust Ltd*²⁹ (hereafter *Longfellow*). In *Webster v The Master*³⁰ (hereafter *Webster*), the court concluded that the document correctly reflected the deceased’s intention in some aspects but not in others, and it could also not be rescued from invalidity. The order in terms of section 2(3) of the *Wills Act* was also refused under circumstances where the deceased gave third-party instructions to draft the will. In *Bennett v Master of Supreme Court*,³¹ the court held that the detailed instructions for drafting the proposed will were not clearly intended by the deceased to be a will itself.

However, in the *Van Wetten* case, the Supreme Court of Appeal (SCA) formulated a test to ascertain the deceased’s intention, for purposes of a condonation application under section 2(3) of the *Wills Act*, in relation to a document that the testator intended to serve as his final will. The SCA had to determine whether the deceased intended a document to be his final will or merely instructed his attorney to draft a will. The SCA advanced the broad and flexible approach by looking into the entire document in the context of its surrounding circumstances when the testator made the purported will.³² Similarly, in *Smith v Parsons*³³ (hereafter *Smith*), the court was satisfied with instructions contained in a suicide note, to having set out the deceased’s intention to amend his existing will.

However, the contradicting outcome to the interpretation of the intention requirement was distinguished in the subsequent case of *Taylor v Taylor*³⁴ (hereafter *Taylor*) where a

²⁶ Schoeman-Malan 2017 *JJS* 95-96.

²⁷ *Ex Parte Maurice* 716G-717C.

²⁸ 1996 3 SA 779 (C) 784G-H.

²⁹ Unreported. Case number 13591/08 (ZAWCHC) of 28 April 2010 para 28-29.

³⁰ 1996 1 SA 34 (D) 40G-H.

³¹ 1995 ZASCA 100 paras 2-3.

³² *Van Wetten* para 16.

³³ 2010 4 SA 378 SCA para 14-16.

³⁴ 2012 (3) SA 219 (ECP).

document referred to as the “wish list” was not condoned as an amendment to the last will. The question before the court was whether or not the deceased intended the “wish list” to be an amendment to his will when drafting it. The court looked at the facts, background, and surrounding circumstances, which led to the drafting of the “wish list”.³⁵ The court examined the document's language and concluded that it does not demonstrate the intention on the part of the deceased to amend his will.³⁶

Similarly, in *Dryden V Harrison*,³⁷ (hereafter *Dryden*) the deceased's testamentary disposition contained in an email failed condonation for lack of the deceased's intention. Du Toit³⁸ averred that the honourable Judge could have acknowledged the factual similarity between this case and that of *Van der Merwe*. Therefore, an analysis of how the courts have been interpreting the intention requirement of section 2(3) to date is necessary.

1.2 Motivation

The provisions of section 2(3) of the *Wills Act* (as amended) have been considered in a number of court decisions since it came into force on 1 October 1992. As mentioned, a successful application for condonation in terms of section 2(3) of the *Wills Act* compels the Master to accept a document that does not comply with all the execution/amendment requirements as if it were a valid will or amendment to a will. The *Wills Act* does not determine the scope of the deceased's intention. The intention requirement of section 2(3) is the focus of the proposed study and has been commented upon in many cases and academic contributions. The motivation of this research study is brought about by divergent outcomes when the court interprets the intention requirement of section 2(3).

Since the insertion of section 2(3) in the *Wills Act*, the courts have been using different approaches to interpreting the intention requirement of the deceased, creating uncertainty regarding the correct interpretation thereof. In the courts' judgments prior to the *Van Wetten* (such as the *Anderson* and *De Reszke v Maras*³⁹), the respective courts

³⁵ *Taylor* para 12.

³⁶ *Taylor* para 13-16 .

³⁷ Unreported. Case number 11912/17 (WCC) of 20 May 2019 para 17.

³⁸ Du Toit 2020 *OUCLJ* 159-160.

³⁹ 2003 6 SA 676 (C) 683C-D.

refused condonation of documents based on similar facts concerning instructions made by the deceased to his attorney to draft a will. Similarly, in *Henwick v The Master*,⁴⁰ a relaxed approach was refused to establish the deceased's intention. These aforementioned approaches used by the courts to interpret the intention requirement, as they have crystallised through case law, warrant an analysis.

Following the SCA decision in the *Van Wetten* case, there have been quite a few instances where courts are inconsistent in their application of the intention requirement. This has been seen in many cases where the interpretation of the testator's intention for purposes of a section 2(3) application is controversial. In subsequent cases such as *Smith, Mabika v Mabika*,⁴¹ and *Dikgale v Master*⁴² the courts followed the broad and flexible principles laid down by the SCA in the *Van Wetten* case. However, this approach did not seem to have set a precedent in the last two decades. This was distinguished in a contradictory outcome in *De Reszke v Maras*⁴³ (hereafter *De Reszke*) where the Supreme Court of Appeal refused the order in terms of section 2(3), in that the letter was intended merely to be an instruction to draft a will. A similar outcome was followed in the *Taylor* case.⁴⁴ Consequently, the court in the *Taylor* case refused to condone an email, even after the Supreme Court of Appeal in the *Van Wetten* case condoned the same. A similar approach was further encountered in the *Dryden* case where the court reasoned on the informal way in which the email will was created.⁴⁵

The lack of formal guidance as to the interpretation of the intention requirement suggests that there should be an intervention to resolve the uncertainty relating to the interpretation of the intention requirement of section 2(3).

⁴⁰ 1996 4 ALL SA 440 (C) 448.

⁴¹ Unreported. Case number 10308/11(GPJHC) of 8 September 2011 para15.

⁴² Unreported. Case number 21381/11 (ZAGPPHC) of 26 March 2013 para 26-28.

⁴³ 2006 2 SA 277 (SCA) para 17.

⁴⁴ *Taylor* para 48.

⁴⁵ *Dryden* para 17.

1.3 Research question

How have the courts interpreted and applied the principles established concerning the intention requirement of section 2(3) of the *Wills Act* 7 of 1953, subsequent to the Supreme Court of Appeal's judgment in *Van Wetten v Bosch* 2004 1 SA 348 (SCA)?

1.4 Aims and objectives of the study

The primary purpose of the study is to address the abovementioned research question. The following research aims and objectives are identified, namely, to

- i. Examine the purpose and requirements of section 2(3) of the *Wills Act*, with a particular focus on the intention requirement;
- ii. Analyse relevant judgments to understand how the courts have applied the intention requirement in specific cases;
- iii. Identify and evaluate the development of the interpretation of section 2(3) relating to the intention requirement through a case-by-case analysis, considering the facts, circumstances, and reasoning presented in the different judgments; and
- iv. Assess the consistency and evolution of the judicial application of the intention requirement over time, highlighting key legal trends and challenges.

1.5 Research methodology

The research is conducted through a doctrinal desktop method, wherein relevant literature sources are reviewed. Reference and analysis will be made to primary sources, including legislation and case law, and secondary sources, such as books, journal articles and other academic literature and official reports.

1.6 Framework of the study

An overview of section 2(3) will be provided in Chapter 2 with reference to the history behind the adoption of the *Wills Act* and the relevant discussions in the SALC's Working Paper 14 (Project 22), Review of the Law of Succession: Formalities of a Will 1986 (hereafter *Working Paper*), and recommendations, which constituted the subsequent

report. The chapter will outline the draft bill, which was incorporated in the *Law of Succession Amendment Act* 43 of 1992.

The interpretation of the intention requirement of section 2(3) of the *Wills Act*, prior to the *Van Wetten* case, will be outlined in Chapter 3. This will outline the various earlier courts' approaches to the interpretation of the intention requirement.

The *Van Wetten* case, as far as it relates to the intention requirement of section 2(3) of the *Wills Act*, will be discussed in Chapter 4. This will outline the court's approach to interpreting the deceased's intention and the principles set by the SCA.

An analysis of case law subsequent to the *Van Wetten* case regarding the intention requirement will be provided in Chapter 5. This examines how courts have interpreted the intention requirement after *Van Wetten* case and whether its principles have been applied or influenced later rulings.

The study will conclude in Chapter 6 with a conclusion of the main findings of the study and the recommendations to be made.

2 Background and overview of section 2(3) of the Wills Act

2.1 Introduction

In Chapter 1, the context and background of the study were outlined. The current chapter provides background and an overview of section 2(3) of the *Wills Act*, which include among others: the testamentary requirements for the execution and amendment of a will, as prescribed in respectively section 2(1)(a) and (b) of the *Wills Act*; and the requirements for the condonation of a document in non-compliance with these formalities, as prescribed by section 2(3). Due regard is accorded to an overview of section 2(3)'s legislative journey, as initiated by SALC, evidenced through its published discussion paper (*Working Paper*) and final report (*Report Paper*), and subsequent embodiment in the promulgation of the *Amendment Act*.

The purpose of this chapter is to examine the history of section 2(3), with reference to the pre-1992 legal framework, motivations behind its enactment, and its intended function within the law of succession. It further provides judicial interpretation and practical application thereof, highlighting key cases that have shaped its scope and limitations. Particular attention is given to resolved issues pertaining to how the judiciary has shaped and refined the scope and limitations of section 2(3) requirements as it pertains to (a) "documents"; and (b) the meaning of the words "drafted" or "executed". The chapter also briefly deals with the meaning of the intention requirement, the evidentiary burden of proof, and the debate over whether substantial compliance with formalities is a prerequisite for condonation.

Having explored the foundational purpose of section 2(3) and its historical development in the current chapter, Chapter 3 will specifically focus on the establishment of the testator's intention in condonation application proceedings.

2.2 The formalities for the execution and amendment of a will

South African rules pertaining to the execution and amendment of wills have varied from province to province for many years, and only in 1954 were uniform rules applied throughout the country, as enacted in the *Wills Act*.⁴⁶ The *Wills Act's* provisions relating

⁴⁶ Schoeman-Malan *et al* 2014 *Acta Juridica* 80-81.

to the execution and amendment of wills are influenced by both Roman-Dutch and English law.⁴⁷ The formalities for a will were adopted from the aforesaid foreign statutory prescripts to form part of the South African *Wills Act* after abolishing the civil laws that were in use.⁴⁸ Accordingly, any will or amendment to a will that is executed after 1 January 1954 must comply with the provisions of section 2(1)(a) (for execution) and (b) (for amendment) of the *Wills Act*.⁴⁹ Any document that contains testamentary dispositions must meet all the requirements outlined in the aforesaid sections. The will-making formalities became uniform throughout South Africa.

The will-making formalities are intended to ensure the authenticity of the testamentary document and provide evidence of the testator's intention.⁵⁰ The purpose of the formalities is to limit the opportunities for fraud and unjust influence, avoid uncertainty and speculation, and ensure that the testator's final deposition is secured.⁵¹ Fraud prevention was the primary objective for formalising wills and amendments to wills.⁵² Testamentary fraud is an action where the deceased is defrauded as to the contents of the will.⁵³ When testamentary fraud is alleged, the validity of the will becomes questionable, usually resulting in lengthy civil disputes over the validity of a will.⁵⁴ If an application regarding the validity of a will, based on fraud, is brought before the court, the process of winding up the deceased's estate is suspended until the authenticity of the will is clarified.⁵⁵ However, the forgery of a will or amendment of a will transcends the scope of this study.

When a testamentary writing is assessed against the prescribed requirements of section 2(1), the testator's depository intentions of making the document as his will are

⁴⁷ Corbett *et al* *The Law of Succession in South Africa* 85-86. Also see, Reid *et al* *Exploring the Law of Succession* 67-69.

⁴⁸ Du Toit 2014 *APLJ* 57-58.

⁴⁹ Section 2(1) of the *Wills Act*.

⁵⁰ *Henriques v Giles* 2010 6 SA 51 (SCA) para 19.

⁵¹ Du Toit 2014 *APLJ* 57-58. Also see Schoeman-Malan *et al* 2014 *Acta Juridica* 81-82.

⁵² *Working Paper* para 3.3.

⁵³ Schoeman-Malan 2015 *TSAR* 127-128, 138-139.

⁵⁴ Criminal charges may also materialise, which the State has to prosecute. Non-compliance with the proscribed formalities would still render the will invalid even when fraud is not suspected

⁵⁵ Schoeman-Malan 2015 *TSAR* 136-137. The intention of the testator was clear, but for some formalities, such intention was disregarded.

undermined because the will did not comply with formalities.⁵⁶ Non-compliance with section 2(1) will *ex facie* render the will or amendment invalid and unenforceable.⁵⁷ In terms of the execution requirement [namely section 2(1)(a)], it is required that:

- (i) The testator must sign at the end of his will or instruct another person (the amanuensis) in his presence to sign on his behalf;⁵⁸
- (ii) The testator or amanuensis must sign the will in the presence of two competent witnesses;⁵⁹
- (iii) The witnesses must sign in the presence of the testator (and if applicable, the amanuensis), all present at the same time;⁶⁰ and
- (iv) If the will consists of more than two pages, the testator must sign anywhere on the other pages.⁶¹

Similarly, an amendment to a will that has already been validly executed (post-execution amendment) is made in terms of section 2(1)(b) of the *Wills Act*.⁶² Failure to comply with the aforesaid requirement will render the amendment ineffective. According to section 1 of the *Wills Act*, "amendment" is defined as a deletion, addition, alteration, or interlineation of the words of the previously executed will.⁶³ "Deletion" means any deletion, cancellation, or obliteration, by any method, other than one intended to revoke the entire will.⁶⁴ Same as section 2(1)(a), the section essentially requires that the amendment be signed by the testator and the witnesses.⁶⁵ The same concerns regarding

⁵⁶ *Maimane v Shole-Mashao* (ZAGPJHC) unreported case number 19945/2022 of 23 October 2023. Also see Schoeman-Malan 2015 *TSAR* 130-131.

⁵⁷ Section 2(1)(a) states that "no will...shall be valid unless" the formalities are complied with.

⁵⁸ Section 2(1)(a)(i) of the *Wills Act*. If an amanuensis is used, or the testator signs by means of a mark, then the formalities pertaining to the Commissioner of Oaths are also applicable.

⁵⁹ Section 2(1)(a)(ii) of the *Wills Act*. When an amanuensis is used, the testator must also be present.

⁶⁰ Section 2(1)(a)(iii) of the *Wills Act*.

⁶¹ Section 2(1)(a)(iv) of the *Wills Act*. Witnesses need not sign all the pages, but only the last page of the will. However, in *Karani v Karani* 2018 1 SA 156 (G), it was held that witnesses must sign all the pages of the will.

⁶² Section 2(2) of the *Wills Act* provides that an amendment made to a will, will be presumed to have been made after execution thereof.

⁶³ Section 1 of the *Wills Act*.

⁶⁴ Section 1 of the *Wills Act*. See also Hofmeyr and Paleker *The Law of Succession in South Africa* 104-105.

⁶⁵ Section 2(1)(b) of the *Wills Act*. The provisions for the use of mark and amanuensis also apply to amendments.

fraud in the execution of a will (as previously outlined) are also applicable to the amendment of a will.

As pointed out above, the primary purpose of strict formalities was to prevent fraudulent acts related to the execution of a will or an amendment to a will.

2.3 Non-compliance with the execution and amendment formalities of the wills before the enactment of section 2(3)

For centuries, the formalities for the execution or amendment of a will had been peremptory, and there was no recourse allowing for any deviation.⁶⁶ The Master of the High Court dealt casuistically with wills brought before him. Non-compliance with any of the requirements set in section 2(1)(a) and (b) of the *Wills Act* would inevitably void the will or amendment to a will, even when the testator's intentions were clear.⁶⁷ Some examples of these non-compliances included the absence of the witnesses' signatures or the testator's failure to sign the will. Section 8(1) and (4) of the *Administration of Estates Act*⁶⁸ empower the Master of the High Court to refuse a will or an amendment to a will that does not comply with the prescribed requirements for the execution or amendment during the administration of the estate until the validity of such document has been confirmed by a court. In *Leprosy Mission v The Master*⁶⁹ (hereafter *Leprosy*), the testator made a two-page will, with each page containing the disposition of property. The first page of the document was neither signed nor witnessed; however, the testator later signed the first page in the presence of other witnesses.⁷⁰ The testator signed the will in the presence of the witnesses; however, not at the same time.⁷¹ The Master of the High Court rejected the will for failing to comply with prescribed formalities.⁷² Accordingly, if one page does not comply with the formalities, the same fate befalls the entire will.⁷³ Section 2(1)(a)(iv) requires the testator's signature on every page. The court remarked

⁶⁶ Du Toit 2014 *APLJ* 58.

⁶⁷ Some invalidity may also arise under section 4 (b) to (f) of the *Wills Act*, for example, where the testator or witness does not have the capacity to testate or witness a will; duress, fraud or undue influence.

⁶⁸ 66 of 1965.

⁶⁹ 1972 4 SA 173 (C).

⁷⁰ *Leprosy* 175.

⁷¹ *Leprosy* 175.

⁷² *Leprosy* 176.

⁷³ *Leprosy* 185.

that there is no doubt that the document represented the testator's intended will; however, it concluded that the legislation and legal principles override the moral or ethical aspects of a voided will.⁷⁴ As previously stated, if the invalid part of the will contains the testator's disposition, the entire will was regarded as invalid. The court dismissed the application.⁷⁵ The *Leprosy* case showed how the court prioritises formal compliance over testamentary intent.

In *Kidwell v The Master*,⁷⁶ the testator signed the last page of the will at the bottom but not "at the end thereof" as prescribed by the *Wills Act*. The court referred to "at the end" in section 2(1)(a)(i) to mean that the testator must sign as close as reasonably possible to the final words of the will.⁷⁷ The court found that the will was not signed "at the end thereof" as required in section 2(1)(a)(i), and it was declared invalid.⁷⁸ The court's reasoning suggested that the testator does not enjoy freedom regarding where his signature is placed on the last page of the will, to prevent insertion of text before the testator's signature.

Also, in *Jeffrey v The Master*⁷⁹ the testator's lawyers enclosed the necessary certificate and stamp on the will, indicating that he signed the Commissioner of Oaths' certificate as a practising attorney rather than as a Commissioner of Oaths.⁸⁰ The Master refused to accept the will because the attorney did not describe himself as a Commissioner of Oaths.⁸¹ The court declared the will invalid as the certificate did not comply with the requirement of section 2(1)(a)(v) of the *Wills Act*.⁸²

The cases discussed above demonstrated a problem faced by the courts when strictly adhering to technicality in interpreting and applying the legislation. If a will or amendment fails to comply with the prescript of section 2(1), it will be rejected merely for such a technical defect during its execution or amendment. Compliance with the formalities apparent on the face of the document plays an important role in the Master's decision

⁷⁴ *Leprosy* 184.

⁷⁵ *Leprosy* 185.

⁷⁶ 1983 1 SA 509 (E) (hereafter *Kidwell*) 510. Schoeman-Malan *et al* 2014 *Acta Juridica* 81.

⁷⁷ *Kidwell* 513.

⁷⁸ *Kidwell* 514.

⁷⁹ 1990 2 ALL SA 481 (N) (hereafter *Jeffrey*).

⁸⁰ *Jeffrey* 481.

⁸¹ *Jeffrey* 481.

⁸² *Jeffrey* 484.

regarding its acceptance and validity within the scope of the legislative framework. The Master of the High Court has no power to decide on the facts of the matter before him, such as the authenticity of the signatures, or whether the testator or witness was competent to sign. The Master's acceptance of the will or amendment to the will is merely an administrative act. The validity of the document or amendment is determined on face value. If there is a question of fact regarding the will or amendment, it would be heard by the High Court when pursued by a person with an interest in the matter. The resulting annulment of the will or amendment, as discussed above, had a negative impact on the testator's intentions to devolve his estate as he pleased or make modifications to his existing will.⁸³ The adherence to the *Wills Act's* formalities on execution, together with the resultant void wills, caused frustrations between the 1970s and early 1980s.

2.4 Review of the formalities for the execution and amendment of wills

The frustration arose from instances in which courts, by rigidly enforcing the formalities, have invalidated wills or amendments to wills. The strict compliance with the prescribed requirements for the execution and amendment of a will prompted a study by the SALC to remedy the tension between the strict formalities and giving effect to the testator's last wishes.⁸⁴ Between 1986 and 1987, the SALC was called to investigate the strict formalities of wills as part of the review of the law of succession. The purpose of the investigation was to achieve a balance between the testamentary formalities' burdensome nature, and the role that such formalities play to ensure the authenticity of wills.⁸⁵ A discussion paper (*Working Paper*) was published in the Government Gazette for comments, suggestions, improvements, modernisations, or reform of the law of succession.⁸⁶ Various persons and interested parties received the *Working Paper* on the subject of the formalities for a valid will and other related matters.⁸⁷

⁸³ *Kidwell* 514. Schoeman-Malan *et al* 2014 *Acta Juridica* 82-83.

⁸⁴ Schoeman-Malan *et al* 2014 *Acta Juridica* 81-82.

⁸⁵ Schoeman-Malan *et al* 2014 *Acta Juridica* 82-83

⁸⁶ The SALC also investigated subjects, such as alteration or revocation of wills; disqualification from inheriting; succession rights of adopted children, etc. See also *Working Paper* para 1.1. The *Working Paper* as compiled from its extensive research into the shortcomings and practical problems of succession law, contained a discussion of the formalities of wills and a provisional proposal for the reform of the law of succession.

⁸⁷ *Working Paper* para 1.3.

The SALC considered different approaches to solve the problems with non-compliance with the formalities of a will, including, among other things, the relaxation of the *Wills Act's* formal requirements or reduction of formalities; and that the High Courts should be empowered to accept a will that does not comply with formalities (dispensing powers).⁸⁸ In the instance of courts' dispensing powers, the laws in Israel, South Australia, Queensland, Tasmania, the Manitoba Law Reform Commission, the Northern Territory of Australia Wills Amendment Act, *etc*, were explored as similar powers were conferred.⁸⁹ The arguments against the condonation power were, among others, that: (a) the power will open a flood of litigation;⁹⁰ (b) it will cause a delay in the winding up of deceased estates and attract further administration costs⁹¹; (c) people may be encouraged to try to make their own will in any form that they deem appropriate;⁹² (d) uncertainty as to whether the court will accept the will;⁹³ (e) it will create more problems than solve them;⁹⁴ and (f) that there may be a better solution available to the problem.⁹⁵

The SALC found objections to the power to condone unfounded and preferred retaining this power over relaxing the strict formalities of wills.⁹⁶ The remaining question was whether the authority should be entrusted to the Master or the High Court.⁹⁷ The SALC recommended that the power should be limited to the (then) Supreme Court.⁹⁸ The SALC further recommended that the power to condone should be broad and not hindered by substantial compliance with the formalities of the wills.⁹⁹ As a result, the court can tolerate any non-compliance with any of the formalities, but the written document should be the only requirement if it adequately proves that the document reflects the testator's wishes.¹⁰⁰ As far as the standard of proof is concerned, courts should apply the standard of proof used in civil cases (namely, on a balance of probability) when considering a will

⁸⁸ *Working Paper* paras 7.8-7.9.

⁸⁹ *Working Paper* paras 7.10-7.15.

⁹⁰ *Working Paper* paras 7.18-7.22.

⁹¹ *Working Paper* para 7.23.

⁹² *Working Paper* para 7.25.

⁹³ *Working Paper* para 7.26.

⁹⁴ *Working Paper* para 7.28.

⁹⁵ *Working Paper* para 7.30.

⁹⁶ *Working Paper* para 34.

⁹⁷ *Working Paper* para 35.

⁹⁸ *Working Paper* para 7.39.

⁹⁹ *Working Paper* para 7.50.

¹⁰⁰ *Working Paper* para 51.

that has not been properly complied with.¹⁰¹ It was then agreed that the proposed amendments would not apply to the documents executed before the *Amendment Act*.¹⁰² The SALC proposed the wording of a draft amendment bill to read:¹⁰³

If a court is satisfied that a document was intended to be his will by a person who has since died, notwithstanding that it does not comply with the formalities of a will, the court shall declare such document to be the valid will of the deceased.

On 16 April 1985, the SALC presented its final report (*Report Paper*) on the law of succession to the Minister of Justice. The purpose of the report was to clearly outline the commission's preliminary recommendations as outlined in the *Working Paper*. The relevant SALC recommendations in the *Report Paper*, to address the difficulties occasioned by testamentary formalities, are summarised as follows:

- i. that the High Courts be granted authority to condone wills, or amendments to wills, that fail to meet the required formalities.¹⁰⁴
- ii. a document expressing a testator's wishes must meet the basic requirement of being in writing.¹⁰⁵
- iii. the court should not apply the strict standard of proof of beyond a reasonable doubt when assessing the condonation application.¹⁰⁶
- iv. a condonation provision be introduced to the *Wills Act*, which would grant the court the power to condone irregularity in the execution of a will and an amendment to a will.

In the *Report Paper*, a draft bill was prepared wherein the following words were to be added under subsection 2 of the *Wills Act*. Accordingly, the draft bill provided that:¹⁰⁷

if the court is satisfied that the document or an alternation thereto by a person who has died since the drafting or execution thereof was intended to be his will or an alternation to his will, the court shall order the Master to accept that document or that document as amended for the purposes of Administration of Estates Act, 1965

¹⁰¹ *Working Paper* para 7.58.

¹⁰² *Working Paper* para 7.59.

¹⁰³ *Working Paper* para 7.63.

¹⁰⁴ *Report Paper* paras 2.18-2.19 (wills). Also see paras 2.121-2.125 (alterations).

¹⁰⁵ *Report Paper* para 2.20.

¹⁰⁶ *Report Paper* paras 2.23-2.27.

¹⁰⁷ *Report Paper* para 134.

(Act No. 66 of 1965), as a will notwithstanding the fact that it does not comply with the formalities of a will or the alteration of a will as prescribed in this section.

The recommendation shaped the draft bill's condonation provision, which was then tabled and discussed in parliament.

2.5 Adoption of section 2(3) into the Wills Act

The SALC's recommendations incorporated into the draft bill were ultimately included in the subsequent *Amendment Act* (which was enacted on 1 October 1992). The *Amendment Act* introduced several changes to the *Wills Act* concerning the execution and amendment of wills. The most important and relevant to this study is providing the court with the power to condone non-compliance with the statutory requirements for the execution or amendment of a will in terms of the added section 2(3).¹⁰⁸ The provision aims to rescue a will or amendment to a will executed on or after 1 January 1954 by the testator who was alive on or after 1 October 1992 from invalidity as it did not conform to the requirements set out in section 2(1) of the *Wills Act*.¹⁰⁹ Corbett¹¹⁰ stated that the legislature's intention in introducing the section is to give the court the power to make an order to formally accept a non-compliant will or amendment to a will to avoid the invalidity thereof and further consequences of frustration of the testator's intention. It is apparent from case law that the formalities prescribed in section 2(1) have certainly not been rendered superfluous and are still required to guarantee the authenticity of a will and to minimise the risk of fraud.¹¹¹

The legislature rejected the proposed wording of the draft bill in the SALC *Report Paper* and reformulated it in the *Amendment Act*. Section 2(3) currently reads (also quoted in Chapter 1 of this study) as:

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 amendment of his will, the court shall order the Master to accept that document, or that amendment as his will, for the purposes of the

¹⁰⁸ Section 2(3) of the *Wills Act* was added by section 3(g) of the *Amendment Act*.

¹⁰⁹ The laws before the coming into operation of the *Wills Act* remain relevant in respect of wills executed prior to the *Wills Act*. Also, section 2(3) does not abolish the testamentary formalities prescribed in section 2(1) of the *Wills Act*.

¹¹⁰ Corbet *et al The Law of Succession in South Africa* 59-60. See also *Longue* 203F-G.

¹¹¹ This was evident from cases decided shortly after the amendment of the *Wills Act*. Examples of cases include *Horn*, *Longue*, *Ex Parte Maurice*, discussed in a later chapter.

Administration of Estates Act, 1965 (Act No. 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).

The differences between the draft bill and section 3(g) of the *Amendment Act* (section 2(3) of the *Wills Act*) are that¹¹²

- i. in the Amendment Act, the phrase “drafted or executed” is added as a qualifier to the word “document” where it first appears in the provision; however, this qualifier is absent from the draft bill contained in the Report Paper; and
- ii. In the Amendment Act, the term “all” was added as a qualifier before the word “formalities” in the provision, which was not included in the draft bill.

With reference to the peremptory nature of section 2(3), the court does not have discretion if the requirements in the section have been met.¹¹³ Once the court is so satisfied, it is obliged to issue the condonation order to the Master of the High Court and may not, in its discretion, decline to condone the document or amendment in question.¹¹⁴ Likewise, if the requirements of section 2(3) have not been met to the satisfaction of the court, it must reject such a document and must refuse the condonation application accordingly. In *Horn v Horn*¹¹⁵ the court held that where the document complies with the section, the court has no discretion but is obligated to make such an order, emphasising the mandatory nature of the relief once the statutory threshold is met.¹¹⁶

The purpose of section 2(3) is expressed by Navsa JA, as follows:¹¹⁷

by enacting s 2(3) of the Act, the Legislature was intent on ensuring that the failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. It has rightly and repeatedly been said that once 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 section 2(3) are peremptory once the jurisdictional requirements have been satisfied.

¹¹² Schoeman-Malan *et al* 2014 *Acta Juridica* 83-84.

¹¹³ Schoeman-Malan *et al* 2014 *Acta Juridica* 84-85.

¹¹⁴ *Van der Merwe* para 14.

¹¹⁵ 1995 3 ALL SA 467 (W) (hereafter *Horn*).

¹¹⁶ *Back* 169C and *Anderson* 785E-F.

¹¹⁷ *Van der Merwe* para 14.

Apparent from Nasva JA's reasoning is that the section confers no discretion to the court once the jurisdictional requirement has been satisfied. Conversely, the section prescribes that the court must direct the Master of the High Court to unquestionably accept the will, having satisfied itself that the contents thereof are in truth so intended by the deceased. With the adoption of section 2(3), a will or amendment to a will that would otherwise be invalid due to formal defects in its execution would be saved. The court in *Olivier v Die Meester*¹¹⁸ held that the legislature had clearly, by insertion of section 2(3), not done away with the formalities for the execution of wills, the formal requirements still have to be observed. Therefore, section 2(3) aims to overcome the problem that the testator's intention would have been defeated by some technical irregularities, rather than to elevate the deficiency of a will or amendment to a valid status without proof that the deceased intended to make the document his will or amendment.

As previously stated in Chapter 1 of this study, in order to succeed in a section 2(3) condonation application, the applicant(s) must convince the High Court (on a balance of probabilities) regarding the following three elements (jurisdictional facts), namely (a) the existence of a document; (b) that this document was drafted or executed by the person who has since died; and (c) that the deceased intended it to be his will or an amendment of his will. If the court is satisfied that the requirements are met, it shall order the Master of the High Court to accept the document, or the amended document, for administering the deceased's estate.

Although section 2(3) of the *Wills Act* states the requirements and the framework that it applies to, it does, however, not elaborate on the meanings of the word "document", the phrases "drafted" or "executed", or the details of the intention requirement. As a general principle of interpretation of statutes, the courts must give effect to the ordinary, grammatical meaning of the words used by the legislation unless it results in an absurd, inconsistent, excessively harsh, or anomalous outcome.¹¹⁹ If not, the court would consider the enactment as a whole and be satisfied with what could have been the intention of

¹¹⁸ 1997 1 SA 836 (T) 842E-F.

¹¹⁹ *Poswa v MEC for the Economic Affairs, Environment and Tourism* 2001 3 SA 582 (SCA) 587.

the legislature.¹²⁰ Our courts have applied section 2(3) inconsistently, giving different interpretations to its words and phrases.

2.6 The requirements of section 2(3) of the Wills Act

As outlined in the preceding subsection on the requirements of section 2(3), Schoeman-Malan¹²¹ holds that these requirements revolve around the “document” intended by the testator to be a will. If the requirements have been met, a court should grant a condonation order, instructing the Master of High Court to accept such a document as a will or amendment to a will for the purposes of administering the deceased (testator) estate.¹²² Thus, the section does not refer to the document under condonation as a will, or is deemed to be a will, but merely empowers the court to order the Master of High Court to accept it as a will for the purposes of the *Administration of Estates Act*.¹²³ The *Ex Parte Maurice* is one of the first reported cases where the requirements of section 2(3) were grouped.¹²⁴ The scope of each requirement of section 2(3) is discussed below.

2.6.1 The “document” requirement of section 2(3)

Neither the *Wills Act* nor the *Interpretation Act*¹²⁵ contains a definition of “document” for the purposes of clarification to the term. Schoeman-Malan¹²⁶ noted Binns-Ward J’s view in *Ex Parte Porter*¹²⁷ that the word “document” in section 2(3) is to be given its ordinary meaning, having regard to the context in which it is used. Faber¹²⁸ distinguished between non-compliant wills and informal documents for the purpose of condonation. According to his distinction, formally non-compliant wills resemble wills in both appearance and structure but are executed improperly, whereas informal documents do not conform to the usual appearance and format associated with wills.¹²⁹ In earlier case law, the

¹²⁰ *Poswa v MEC for the Economic Affairs, Environment and Tourism* 2001 3 SA 582 (SCA) 587.

¹²¹ Schoeman-Malan 2017 *JJS* 79-80.

¹²² Wood-Bodley 2018 *SALJ* 428-429.

¹²³ Section 2(3) of the *Wills Act*.

¹²⁴ *Ex Parte Maurice* 716G-H. Gildenhuys 2020 *LitNet* 516-517. Also see chapter 1.1 for the grouping of the requirements of section 2(3).

¹²⁵ 33 of 1957. The Act was enacted to consolidate the laws relating to the interpretation and shortening of the languages of statutes.

¹²⁶ Schoeman-Malan *et al* 2014 *Acta Juridica* 86-87.

¹²⁷ 2010 5 SA 546 (WCC).

¹²⁸ Faber 2022 *PELJ* 6-7.

¹²⁹ Faber 2022 *PELJ* 6-7.

provisions of section 2(3) were restricted to irregularly executed wills, and documents that were informal by nature could not be condoned.¹³⁰

According to South African legal requirements, testamentary dispositions must be documented either in handwritten or typed form.¹³¹ Whether documents stored electronically on a computer are capable of being condoned under section 2(3) was, however, settled in the *Macdonald* case.¹³² The court satisfied that the security precautions relating to the computer file had not been compromised and, as a result, the unexecuted printed document represented the deceased's genuine testamentary intentions.¹³³ The court stated that retention of section 2(1)'s formal requirements and section 2(3)'s peremptory nature does not justify a strict interpretation of section 2(3).¹³⁴ Moreover, this approach not only aligns with the fundamental objective of the section, namely, to ensure that a testator's final wishes are not invalidated merely because of a failure to comply with technical formalities, but it also recognises the practical realities of the technological age in which we live.¹³⁵ The court declared the printed format of the document as the deceased's will.¹³⁶

A similar approach of accepting electronically stored formal documents was followed in the *Van der Merwe* case. The deceased emailed an unsigned will to his friend, who was the sole beneficiary.¹³⁷ The SCA conceded that the emailed document still existed on the deceased's computer and ordered the Master of High Court to accept the hardcopy printout of the will as the deceased's will.¹³⁸ A distinction was drawn between the unexecuted will sent through an email and the informal document sent in the *Dryden* case.¹³⁹ This distinction had scholars calling for the delineation of the document requirement.¹⁴⁰ Accordingly, this distinction should be implemented through the

¹³⁰ See *Webster* 42B-G; *Dryden* para 12- 21; and Faber 2022 *PELJ* 6-7.

¹³¹ Du Toit 2014 *APLJ* 62-62.

¹³² See para 1.1 of this study for the facts of the *Macdonald's case*. Section 4(3) read with Schedule 1 and section 4(4) read with Schedule 2 of the *Electronic Communications and Transactions Act* 25 of 2002 expressly exclude wills from being executed electronically.

¹³³ Du Toit 2014 *APLJ* 61-62.

¹³⁴ Du Toit 2014 *APLJ* 61-62.

¹³⁵ *Macdonald* 71A-B. See also Faber and Ratotobala 2025 *JJS* 29-30.

¹³⁶ *Macdonald* 73B-C.

¹³⁷ *Van der Merwe* para 3.

¹³⁸ *Van der Merwe* para 17.

¹³⁹ Faber 2022 *PELJ* 6-7. *Dryden* para 18.

¹⁴⁰ Schoeman Malan *et al* 2014 *Acta Juridica* 85-86.

introduction of a new statutory definition of the term "document" specifically for the purposes of the condonation provision, which definition can be modelled on the definitions found in corresponding Australian statutes dealing with judicial dispensing powers.¹⁴¹

The two cases discussed above created a legal position that the courts are prepared to accept printed formats of documents containing testamentary dispositions, which are generated and stored electronically when presented for judicial rescue. Faber and Rabie¹⁴² held that the court could have used the cases as an opportunity to define the term "document" for the purposes of section 2(3). Whether the courts could also condone some other form of documents, such as diary entries, or suicide notes, whether handwritten, dictated, or electronically stored, is discussed in chapters 3 to 5 of this study.

2.6.2 The meaning of "drafted" or "executed"

The further requirement in section 2(3) is that the document had to be drafted or executed by the person since deceased. The question as to what exactly is meant by the phrases "drafted" or "executed" caused a contentious debate, as there was no consensus among various courts' outcomes. The courts took different approaches to interpret the two phrases, which led to divergent outcomes.¹⁴³

Regarding the interpretation of the phrase "drafted" for the purposes of section 2(3), De Waal¹⁴⁴ noted that the courts were caught up between four different interpretations, namely: (i) the strict or literal approach; (ii) the restricted or narrow interpretation; (iii) the flexible or liberal approach; and (iv) a hybrid view.

In summary, in terms of the strict approach, a document was regarded as having been "drafted" only if the testator drafted or created the document by writing it out in his own hand.¹⁴⁵ The second interpretation entails that the deceased must have drafted the document himself or dictated to another person to write down the words exactly as he

¹⁴¹ Schoeman-Malan *et al* 2014 *Acta Juridica* 85-87.

¹⁴² Faber and Rabie 2005 *TSAR* 778-779.

¹⁴³ *Bekker* case para 20; *Webster* 41B-D; *Longue* 201I-J; *Ndebele v The Master* 2000 1 SA 475 (C) 480-481.

¹⁴⁴ De Waal 2004 *SALJ* 532-533.

¹⁴⁵ De Waal 2004 *SALJ* 532-533; Jamneck *et al The law of Succession*; *Webster* 41B-C.

said.¹⁴⁶ The difference between the first and second approaches is that in the first approach, the deceased writes the words of the will himself on paper, while the second approach extends to the handwriting or electronic document, and further to dictation to a third party for writing or typing.¹⁴⁷ In terms of the third approach, the deceased instructs another person to draft the document, and thereafter the drafter thereof presents it to the testator for approval.¹⁴⁸ A flexible approach was followed in the *Back v The Master*¹⁴⁹ (hereafter *Back*) in which the court held that the requirement of a document “drafted” by the deceased should be interpreted flexibly in light of the purpose of section 2(3), which was to ensure that the testator’s wishes are not defeated by failure to comply with technical formalities. The court decided that nothing in section 2(3) suggests the testator must personally prepare the document, and noted that very few people still write out a will by hand. Lastly, in the hybrid approach, the court supports the flexible approach when interpreted with the requirement of “intention”.¹⁵⁰

The divergence of views about the correct approach to adopt was ultimately resolved by the SCA in the *Bekker* matter, where the court endorsed the narrow interpretation. In the *Bekker* case, Mr Bekker (the deceased) had a joint will with his ex-wife, Mildred.¹⁵¹ Soon after his divorce, he met and married Mrs Bekker (the appellant).¹⁵² The deceased and the appellant instructed a bank official to draft a joint will. The couple explained to the bank official what they required in their envisioned joint will, while the bank official took notes.¹⁵³ The bank official drew up a will as instructed and posted it to the couple to sign before witnesses. Before the parties could sign the drafted joint will, the deceased unfortunately died.¹⁵⁴ An application was made to the court for the condonation of the unsigned draft will in terms of section 2(3) of the *Wills Act*. The question before the court was whether the draft will was “drafted” by the deceased as required by the section. The court found that a document drafted by the bank official could not be condoned by employing section 2(3). The court's reasoning was that, firstly, under the basic principle

¹⁴⁶ De Waal 2004 *SALJ* 533-534.

¹⁴⁷ De Waal 2004 *SALJ* 533-534.

¹⁴⁸ De Waal 2004 *SALJ* 533-534.

¹⁴⁹ 1996 2 ALL SA 161 (C).

¹⁵⁰ De Waal 2004 *SALJ* 533-534.

¹⁵¹ *Bekker* paras 2-3.

¹⁵² *Bekker* paras 2-3.

¹⁵³ *Bekker* paras 2-3.

¹⁵⁴ *Bekker* paras 2-3.

of statutory interpretation, effect should be given to the ordinary grammatical meaning of the words unless it would lead to absurdity, inconsistency, hardship, or anomaly.¹⁵⁵ The court held that section 2(3) does not contain absurdities and that there was no indication of inconsistencies, hardship, or anomaly in the *Wills Act* itself.¹⁵⁶

The SCA found that the will was not “drafted” by the deceased; therefore, section 2(3) could not be employed to condone the unexecuted joint will, as it was not personally drafted or dictated by a person as contemplated by section 2(3).¹⁵⁷ The court pointed out that although the deceased had instructed the bank to draft the will, the bank also used its own wording and standard clauses.¹⁵⁸ Therefore, it could not be said that the document was drafted by the deceased. The court took a strict interpretation, reasoning that if the legislature intended the passive writing, it would have drafted the phrase similar to section 2A of the *Wills Act* and would have adopted the wording that allows the testator “to cause a document to be drafted”.¹⁵⁹ On this line of reasoning, the court found that the word “drafted” had to be strictly construed to encompass those instances of the personal acts where the testator actively participates in the drafting of the will.¹⁶⁰ The will that was drafted by the bank official on the instructions of Mrs Bekker and the document was, therefore, not accepted by the court as a valid will.¹⁶¹ The previous will of the deceased with his former wife, Mildred, was held to be valid.¹⁶²

The legislature intended the word “drafted” in section 2(3) to have a limited meaning to the testator’s act in the drafting of the document purporting to be his will. By requiring the testator to personally draft the will, the legislature curtailed the possibilities of fraud. Therefore, a wider interpretation of the phrase would increase the chances of fraud. Paleker¹⁶³ criticised the narrow interpretation of the term “drafted” in that it may in the future attract a possible constitutional argument, as it unfairly discriminates against

¹⁵⁵ *Bekker* case para 12.

¹⁵⁶ *Bekker* case paras 13-14.

¹⁵⁷ *Bekker* case paras 20-21.

¹⁵⁸ *Bekker* case paras 20-21. See also *Webster* case 41D.

¹⁵⁹ *Bekker* case para 8.

¹⁶⁰ *Bekker* case para 21.

¹⁶¹ *Bekker* case para 21.

¹⁶² *Bekker* case para 21.

¹⁶³ Paleker 2004 *SALJ* 32-33.

people who are physically disabled, blind and illiterate, as for these people it is difficult or impossible to draft a will themselves or to dictate its precise terms to a third party.

The scope of the phrase “executed” was also not defined in the *Wills Act* despite appearing in several sections.¹⁶⁴ Before the *Amendment Act* and the *Webster* case, initials did not constitute a signature.¹⁶⁵ In the *Anderson* case, the court held that “executed” means a serious act by which the deceased confirms the document as the final expression of their testamentary wishes, changeable only by a new amendment or codicil.¹⁶⁶ Therefore, a document cannot be executed orally or impliedly; there must be a form of signature or mark that is affixed to the document. Where the will is executed, it is irrelevant who drafted it.¹⁶⁷ Therefore, signing could take the form of affixing a signature or a mark and would include the making of initials. Recently, in *Mokgoro v The Master of High Court*¹⁶⁸ (hereafter Mokgoro), the court relied on the ordinary grammatical meaning of the term “executed” and held that the deceased had executed the will “by virtue of the instructions set out in the email” she had sent to her trusted confidants.

2.6.3 The intention requirement

The third requirement in the application of section 2(3) is that the testator must have intended the document before the court to constitute his will or an amendment to a will. The intention requirement is the focus of the study, and although it is mentioned here, it will receive more attention in Chapter 3 onwards. The courts have consistently held that to satisfy the intention requirement, the document purporting to be a will or an amendment of a will must have been intended by the deceased to be the will or the amendment to a will that constitutes his final instruction concerning the disposal of his assets.¹⁶⁹ What the legislature sought to achieve by introducing section 2(3) into the *Wills Act* was to give effect to the testator's genuine intention.¹⁷⁰ The testator's intention regarding the will or amendment is therefore carefully scrutinised. The questions before

¹⁶⁴ See sections 2(1)(a)-(b); 2(2); 4A(1)-(2)(a); and 7 of the *Wills Act*.

¹⁶⁵ *FNB v Initiative for Specialized Resources* unreported case number 046733/2023 of 26 September 2024 para 7.4-7.6.

¹⁶⁶ *Anderson* 784G-785B.

¹⁶⁷ *Mdlulu v Delarey* 1998 1 SA 434 (W) 442F-H.

¹⁶⁸ Unreported. Case number 09/2025 (ZANCHC) of 1 August 2025 para 62.

¹⁶⁹ *Letsekga* 229. See also Wood-Bodley 2013 *SALJ* 245-246.

¹⁷⁰ *Henwick v The Master* 1995 2 SA 326 (C) 334I-J.

courts were whether the intention was present during the drafting of the document purporting to be a will or amendment, or whether the intention could be formed at a later stage, even though it was absent during the drafting. Therefore, the analysis of the intention requirement is analysed in instances of electronic documents; instructions to draft the will, and where the will or amendment was prepared on a different medium form containing testamentary dispositions.

In the *Ex Parte Maurice case*, Selikowitz J, in dealing with the intention requirement of section 2(3), said the following:¹⁷¹

in my view s 2(3) requires that the document in question must have been intended by the testator to be his/her will. A document which was intended to convey information about what the testator wishes to have included or has already included in his/her will does not suffice. Written instructions to an attorney or other advisors as to enable the recipient to draft the testator's will are not intended by the testator to constitute his/her will albeit that they record the author's intended testamentary dispositions.

Evidence as to the conduct of the testator is relevant in the formation of the intention required by the condonation provision. Before the *Van Wetten* case, the provisions of section 2(3) could not be applied to a document that was intended to convey information about the testator's status wishes; notes on changes to be made to the existing will; instructions to a third party to draft a will, *etc.* .

The SCA in the *Van Wetten* case formulated an approach to what it means by the intention of the deceased. The court made an inquiry into the document itself within the context of the surrounding circumstances. Case law analysis before the *Van Wetten* case indicates there has been uncertainty in the application of the intention requirement. As mentioned, the interpretation of the intention requirement before the *Van Wetten* case will be discussed in more detail in Chapter 3.

2.6.4 Onus of proof in a section 2(3) application

The condonation of an invalid will or amendment due to non-compliance with the prescribed requirement of section 2(1) requires the intervention of the court, which must be satisfied that the document drafted or executed was intended by the deceased to be

¹⁷¹ *Ex Parte Maurice* 716E-F.

his will. The *onus* rests on the person who seeks an order in terms of section 2(3) of the *Wills Act* to satisfy the court on a balance of probability that the person who drafted or executed the document intended it to be his will.¹⁷² The parties are required to act with the highest degree of good faith and present all pertinent facts and evidence to the court.¹⁷³ This standard of proof is appropriate because the applicants seeking relief under section 2(3) are purporting to speak for someone who is absent, as with *Ex Parte* applications.¹⁷⁴ Therefore, parties should place all the relevant facts before the court for the application to succeed.

A condonation application was opposed on the basis that the deceased never intended the disputed document to be his will. The fact that the deceased lacked testamentary capacity is not relevant in the condonation proceedings; however, it should be pleaded if it exists.¹⁷⁵ Where the document is condoned in terms of section 2(3), the issue of capacity should be raised in subsequent proceedings. The court may not raise *ex mero motu* an issue in a condonation proceeding if the issue was not pleaded by the respondents.¹⁷⁶

Despite the interpretation of the phrases of section 2(3), another application challenge on section 2(3) was the question as to whether the provisions of section 2(3) could be applied to testamentary instruments where none of the execution or amendment formalities were met. The question entails whether the court should still condone the document if some of the formalities are complied with, or if all the requirements are missing. In the *Webster* case, the court was of the view that some formalities must have been complied with, supporting the strict interpretation of section 2(3).¹⁷⁷ However, in the *Back* case, the court adopted a broader approach and concluded that, if the legislature had meant the provision to apply only in situations of partial or attempted compliance with the formal requirements, it would have stated this explicitly in the section. The court considered that there are exceptions to the rule of interpretation that the meaning of the word is to be attributed to every word in the statute; thus, the word “all” in the section

¹⁷² *Harlow v Becker* 1998 4 SA 639 (D) 647 C-D.

¹⁷³ Hofmeyr and Paleker *The Law of Succession in South Africa* 108-109.

¹⁷⁴ *Samuels v Juries* Unreported case number 2508/2022 (WCC) of 28 July 2023 para 31.

¹⁷⁵ Schoeman-Malan *et al* 2014 *Acta Juridica* 91-92. See also Jamneck 2008 *PER* 94-95.

¹⁷⁶ Schoeman-Malan *et al* 2014 *Acta Juridica* 91-92. See also De Waal 2004 *SALJ* 529-531.

¹⁷⁷ *Webster* 42E-G.

was “unnecessary”, and therefore a testamentary document is condonable if all the requirements of section 2(3) are met.¹⁷⁸

2.7 Conclusion

The chapter explored the foundational purpose, historical development, and judicial interpretation of Section 2(3) of the *Wills Act*, which serves as a crucial condonation provision for non-compliant wills or amendments to wills. Before the enactment of Section 2(3) in 1992, the formalities for the execution and amendment of wills (Section 2(1)(a) and (b)), which became uniform across South Africa in 1954. These requirements were primarily intended to ensure the authenticity of the testamentary documents, limit opportunities for fraud and undue influence, and secure the testator’s final deposition.

Courts historically adopted a strict approach in applying these formalities, resulting in wills being declared void for minor technical defects, even when the testator’s intentions were clear. Cases like *Leprosy* and *Kidwell* exemplify this strict adherence, demonstrating how formal compliance was prioritised over clear testamentary intent. This strictness caused significant frustration between the 1970s and early 1980s.

In remedying the tension between strict formalities and the frustration of testamentary intent, the SALC was called to investigate the law of succession between 1986 and 1987. The SALC considered options such as relaxing formalities and granting the High Courts dispensing powers. It ultimately recommended that the High Courts be empowered to condone wills or amendments that do not meet formal requirements, if the written document adequately proves the testator’s wishes on a balance of probabilities. The SALC’s recommendations were incorporated into a draft bill and included in the subsequent *Amendment Act* (enacted on 1 October 1992), which introduced Section 2(3) to the *Wills Act*.

The core purpose of Section 2(3) is to rescue a will or amendment from invalidity due to formal defects, ensuring that the failure to comply with formalities does not frustrate or defeat the genuine intention of testators. However, the formal requirements of Section 2(1) still apply, as Section 2(3) merely cures technical irregularities. The provisions of

¹⁷⁸ Back 170.

Section 2(3) are peremptory. Once the court is satisfied that the requirements (existence of a document, drafted or executed by the deceased; and the intention requirement) have been fulfilled, it must direct the Master of High Court to accept the document, and it has no discretion to deny such relief. The legal position settled in cases like *Macdonald* and *Van der Merwe* confirmed that printed formats of documents containing testamentary dispositions, even if generated and stored electronically (e.g., computer files or emails), can be condoned.

The SCA in the *Bekker* case adopted a narrow interpretation, requiring the deceased to have personally drafted the document or dictated the exact terms. Consequently, an unexecuted draft prepared by an attorney using their own wording, even if based on the deceased's instructions, cannot be rescued under the "drafted" requirement. This restrictive approach was criticized for potentially discriminating against physically challenged or illiterate persons. "Executed" implies a serious act by the deceased, such as affixing a signature or a mark (including initials), indicating the finality of their testamentary wishes. The intention requirement, however, posed challenges in the courts, as there are inconsistencies in the manner in which this requirement is applied. While there was debate regarding whether Section 2(3) required some compliance with Section 2(1) formalities, the *Back* case settled the wider view, holding that a document is condonable even if all requirements of Section 2(1) are missing, provided the requirements of Section 2(3) are fulfilled.

3 The interpretation of the intention requirement of section 2(3) of *Wills Act* prior to the *Van Wetten* case

3.1 Introduction

Following the enactment of section 2(3) of the *Wills Act*, courts promptly began to interpret and apply its provisions. As mentioned briefly in the preceding chapter, the court has taken different approaches to applying the provisions of section 2(3). Some courts leaned towards a strict interpretation of the requirements, while others adopted a flexible approach. The main focus of the study is to outline and analyse the different approaches taken by the courts regarding the interpretation of the intention requirement of section 2(3) of the *Wills Act* prior to the *Van Wetten* case, and to consider the fundamental jurisprudence that influenced subsequent orders in these matters.

The study covers cases spanning from 1993 to 2002, illustrating how the tension between adopting a strict interpretation and embracing the flexible or liberal approach initially shaped the application and interpretation of section 2(3).

Early jurisprudence applied section 2(3) strictly when the deceased instructed the document's drafting. The study shows courts rejecting documents for non-standard testamentary structure, lack of personal drafting, and absence of finality, underscoring strict compliance with formalities in interpreting the testator's intention. Key cases illustrating this strict approach include *Ex Parte Maurice, Anderson, Henwick, Webster, and Letsekga and Ramlal v Estate Late Ramdhanji*¹⁷⁹, illustrated judicial reluctance to broaden section 2(3) interpretation or deduce intent from contextual factors.

In contrast, there was a line of cases that advocated a broad or liberal approach to the interpretation of the provisions of section 2(3). This approach focused on the deceased's subjective testamentary intent for the specific document to operate as their will or amendment, even if drafted by a third party. The *Back* case is presented as the leading authority for this liberal approach. Other cases discussed include *Ex Parte Laxton*,¹⁸⁰ *O'*

¹⁷⁹ 2001 JOL 9143 (N) (hereinafter *Ramlal*).

¹⁸⁰ 1998 1 ALL SA 289 (N) (hereinafter *Ex Parte Laxton*).

*Connor v The Master*¹⁸¹, *Ex Parte Williams*¹⁸², and *Ndebele v The Master*¹⁸³. The move toward a more liberal approach was adopted cautiously; in some decisions, the courts remained careful in how they interpreted the intention requirement. The *Henwick* case illustrated this caution.

Despite the initial conservatism of the strict interpretation of section 2(3), subsequent case law began to show interest in the exploration of the intention requirement. The respective courts recognised that the deceased's intention does not have to be inferred solely from formal technicalities; instead, it could be established through a combination of direct and circumstantial facts related to the drafting or amendment of the will. Similarly, the *Bekker* court had displayed a growing willingness to consider documents, exemplifying a doctrinal shift towards a purposive interpretation of section 2(3).

The intention requirement in section 2(3) is also explored in situations where the document was either prepared solely by the deceased or drafted by a third party but subsequently came into the deceased's possession in its final form for execution. Examples of these cases are *Longue, Horn, Mdlulu v Delarey*¹⁸⁴, *Thirion v Die Meester*¹⁸⁵, and *Macdonald*.

By tracing the judicial pathways adopted, the study provides a basis for understanding the lack of unanimity in judgments when considering the intention requirement. The subsequent chapter will examine the case law decided under section 2(3) after the *Van Wetten* case, to assess how it influenced the shift towards a substantive interpretation of the intention requirement.

3.2 Strict interpretation of the intention requirement

3.2.1 Introduction

An influential line of early jurisprudence adopted a strict and literal approach, asserting that a document containing mere instructions to a third party to draft a will could not

¹⁸¹ 1999 3 ALL SA 652 (NC). (hereafter *O' Connor*).

¹⁸² 2000 (4) SA 168 (T) (hereafter *Ex Parte Williams*).

¹⁸³ 2000 1 ALL SA 475 (C) (hereafter *Ndebele*).

¹⁸⁴ 1998 1 ALL SA 343 (W) (hereafter *Mdlulu* case).

¹⁸⁵ 2001 4 SA 1078 (T) (hereafter *Thirion*).

satisfy the requirement that the deceased intended the document itself to be their final will. A core tenet of the strict view was the fundamental distinction between a document intended to be a will (vested with finality) and one containing instructions (anticipating a future document).

3.2.2 Rejection based on the document's structure and lack of finality

The strict approach focused heavily on the document's form and perceived lack of finality.

3.2.2.1 Ex Parte Maurice case

The *Ex Parte Maurice* case is identified as the first key example of the strict approach. The case involved an unsigned, handwritten joint will detailing the disposition of assets, which the deceased forwarded to a friend.¹⁸⁶

The court refused condonation for the unsigned joint will, holding that it indicated the document was instructions for drafting, not the final will itself, because the deceased's request to the friend to "read through and comment, if necessary, knock it into shape".¹⁸⁷ This emphasised that an intent to distribute assets was not equivalent to the deceased's intent regarding the document's final status.¹⁸⁸ The deceased still anticipated approving the document after it was "knocked into shape and put into legal jargon" based on the friend's advice.¹⁸⁹ Du Toit submitted that the decision was correct because the covering letter to the document made it clear that the document contained no more than instructions for the drafting of the will.¹⁹⁰

The court emphasised a strict interpretation, stating that the purpose of section 2(3) is to save a will invalid due to a formal defect in its attestation (like a lack of signature), not to condone documents where further documents were expected to formalize the deceased's wishes.¹⁹¹ The letter failed to establish the intention requirement because the

¹⁸⁶ *Ex Parte Maurice* 715D-G, 716A-J and 717A-D. The disposition included the transfer of assets to the survivor upon the death of the other, distribution to their children on simultaneous death, and appointment of an executor.

¹⁸⁷ *Ex Parte Maurice* 716D.

¹⁸⁸ *Ex Parte Maurice* 716B-D. See para 2.6.3 of the study.

¹⁸⁹ *Ex Parte Maurice* 716F. See also Jamneck *et al The law of Succession* para 5.4.3.

¹⁹⁰ Du Toit 2024 *THRHR* 312-313.

¹⁹¹ *Ex Parte Maurice* 716G-H.

deceased did not consider the document as his final will.¹⁹² Wood-Bodley¹⁹³ observed that the deceased did not consider the document as his final will, although it contained his intended dispositions. Similarly, the drafter's written advice to third parties about property dispositions would not satisfy the intention requirement and is treated as letters, instructions, or notes, not as a will.¹⁹⁴

The judgment emphasised a strict interpretation of the intention requirement of section 2(3), focusing on the document form and lack of finality, noting that a written instruction to an attorney to draft a will would not suffice for condonation.

3.2.2.2 Letsekga case

The *Letsekga* case continued to exemplify the strict approach. The deceased drafted a document intended to amend an existing will, but it was formally defective as it was unsigned and unattested, and some stipulations within it could not be related to the existing will.¹⁹⁵

The application for condonation was dismissed because it viewed the document as a memorandum intended to make changes, interpreting it as a possible discussion, or instructions for someone else to draft amendments, or merely a reminder.¹⁹⁶ Navsa J explicitly approved the passage from *Ex Parte Maurice* that established that written instructions to an attorney are generally not intended by the testator to constitute the final will.¹⁹⁷

The court stated that the wording of section 2(3) is clear that the testator must have intended the particular document to constitute their final instruction with regard to the disposal of their estate.¹⁹⁸

The application for condonation was dismissed on the basis that, given the form and structure of the document and surrounding circumstances (including living arrangements

¹⁹² *Ex Parte Maurice* 716E-G and 717F-G. See also Du Toit 2014 *APLJ* 74-75

¹⁹³ *Ex Parte Maurice* 717C. Wood-Bodley 2013 *SALJ* 246-247.

¹⁹⁴ *Ex Parte Maurice* 716F.

¹⁹⁵ *Letsekga* 227 and 229-231. See also Du Toit 2014 *APLJ* 71-72.

¹⁹⁶ *Letsekga* 230. Du Toit 2014 *APLJ* 71-72.

¹⁹⁷ *Letsekga* 229. See also para 2.6.3 of the study.

¹⁹⁸ *Letsekga* 229.

made by the deceased and applicant), the testator did not intend the particular document before the court to be his will or amendment. The *Letsekga* judgment, along with *Ex Parte Maurice*, collectively established that documents perceived as detailed instructions or preliminary notes, rather than the final testamentary document, would not be condoned under section 2(3).

3.2.2.3 Anderson case

The *Anderson* case further reinforced the strict interpretation, particularly highlighting the distinction between instructions and a document intended to be the final will. The document in question was handwritten by the deceased but lacked a date and signature, appearing in an unusual format, despite clear evidence that the deceased intended to change his will.¹⁹⁹

Thring J (with Friedman JP concurring) refused to grant the condonation order, aligning with the strict approach taken in *Ex Parte Maurice*. The court held that to satisfy section 2(3), the person drafting or executing the document must have done so with the specific intention that the document should itself constitute his will or an amendment of his will.²⁰⁰ Although it was clear that the deceased changed his mind regarding the distribution of his estate, proof of intention to alter the provisions of his will did not justify the granting of the order.²⁰¹

The court held that a testator's instruction to a lawyer or adviser to draft a will in a particular manner, no matter how specifically it is expressed, does not constitute a document made with the requisite intention under the subsection and therefore does not fall within its scope. The ruling supported a strict approach to that in *Ex Parte Maurice*, requiring that the document itself must have been intended by the testator to be his will.²⁰²

¹⁹⁹ *Anderson* 780-782. See also Wood-Bodley 2013 *SALJ* 246-247. The document was accompanied by a letter to his attorney requesting that a more suitable will be drafted.

²⁰⁰ *Anderson* 782A.

²⁰¹ *Anderson* 782 and 783. See also Schoeman-Malan *et al* 2014 *Acta Juridica* 92-93. Du Toit 2014 *APLJ* 69-70.

²⁰² *Anderson* 783. Van der Linde 2012 *De Jure* 424-245. See para 3.2.2.1 of this study.

3.2.2.4 Ramlal v Estate Late Ramdhani

The *Ramlal* case focused on a draft that was prepared by an attorney based on instructions that was never finalized or approved by the deceased.²⁰³

The court acknowledged the existing inconsistency among High Court decisions regarding the interpretation of section 2(3).²⁰⁴ Ultimately, the court refused condonation, aligning with the strict, formalistic approach and relying on the precedent set in *Anderson at 784G-785A*, emphasising that section 2(3) applies only to documents intended to confer finality. The court noted that "testators are notoriously fickle," highlighting the risk of their wishes changing between giving instructions and approving the final draft.²⁰⁵ Without the deceased's engagement with the final document (seeing and approving it), the necessary link between the testator and the formal manifestation of their intent is lost.²⁰⁶ Thus, it is necessary to approve a document intended to execute the client's final wishes upon their passing. The approval of the document holds significant importance, especially when the document in question embodies the client's final wishes during their lifetime.²⁰⁷

The decision reinforced the principle consistent with *Ex Parte Maurice* and *Letsekga* that instructions remain provisional until the testator takes a final, conclusive step to approve the specific document as their own will. This established that the risk of the testator changing their mind necessitates the crucial step of final approval before condonation can be granted.

3.2.2.5 Conclusion

The key points arising from the cases of *Ex Parte Maurice*, *Letsekga*, *Anderson* and *Ramlal v Estate Late Ramdhani* revolve around the strict interpretation of intention and finality required under section 2(3) to condone formal defects in a will or amendment to a will.

²⁰³ *Ramlal* 2-3. When the document was ready for signature, the deceased had already been admitted to the hospital and died unexpectedly before having the opportunity to see and execute it.

²⁰⁴ *Ramlal* 4-5. Referring to *Webster* para 41E-F (rejection of an unsigned document drafted by another) and *Ex Parte Laxton* para 224F-G (strict interpretation would not operate against illiterate people) illustrates this imbalance

²⁰⁵ *Ramlal* 7. Du Toit 2014 *APLJ* 74-75. Wood Bodley 2013 *SALJ* 254-256.

²⁰⁶ *Ramlal* 7.

²⁰⁷ *Ramlal* 8.

The most critical aspect of this jurisprudence is the fundamental distinction drawn between instructions and a final testamentary instrument. In essence, these judgments collectively established that for a document to be condoned, it must be more than just a detailed shopping list of bequests, *i.e.* it must be the completed will, if defectively executed. The document must embody the deceased's belief that it is the final word on the distribution of assets.

3.2.3 *Personal drafting constraint*

The section discusses the strict judicial interpretation of section 2(3) of the *Wills Act*, focusing on the personal drafting constraints necessary for document condonation. Specifically, it analyses the *Webster* and *Bekker* cases, which established a rigid requirement that the deceased must have personally drafted or executed the document for it to be considered will, even if unexecuted.

3.2.3.1 Webster case

In the *Webster* case, the deceased instructed his attorneys to draft a will and subsequently requested changes.²⁰⁸ He died three days later before providing the necessary information to effect those proposed changes.²⁰⁹

Magid J denied the order, ruling that the draft was not the deceased's complete will as it was partial, thus failing to satisfy section 2(3)'s requirements.²¹⁰ Crucially, the court stated that section 2(3) applies only to documents personally drafted or executed by the deceased, not those prepared by others.²¹¹

The judgment was criticised by Faber²¹² for its restrictive interpretation of the intention requirement, arguing that it diminished the scope of the condonation power and introduced inconsistencies. Faber concluded that the court had limited the scope of

²⁰⁸ *Webster* 38.

²⁰⁹ *Webster* 38.

²¹⁰ *Webster* 40. The document stated that the whole estate would devolve upon the trustee for the minor children. However, the deceased's actual intention, as evidenced by his instruction, was that the trust should relate only to the residue of the estate after the immovable property had been bequeathed to his partner.

²¹¹ *Webster* 42.

²¹² Faber 2022 *PELJ* 5-6.

section 2(3) so that it applied solely to wills that were executed irregularly, thereby excluding any unexecuted wills drafted by third parties.²¹³

The *Webster* decision reinforced a principle that an unsigned or unexecuted document must first meet an objective standard of personal drafting before a court will explore the testator's underlying subjective intentions. Where a third party has drafted the document in its entirety, the deceased's intention is irrelevant and cannot be taken into account, no matter how clearly it appears from the draft.

3.2.3.2 Bekker case

The *Bekker* judgment strongly confirmed and embraced the strict approach to condonation established in *Webster*, explicitly rejecting flexible or liberal interpretations, which were sometimes labelled "*asinine*".²¹⁴ Although the primary question involved the interpretation of the word "draft" in section 2(3), the court also found no ground for interpreting the provisions to have liberal meanings.

The court held that an unexecuted document would not be validated unless personally drafted by the deceased, confirming that it would not accept an unsigned document prepared by anyone else.²¹⁵ If the deceased failed the objective test of personal drafting, the court was precluded from granting the condonation order, regardless of what the deceased's intentions may have been.²¹⁶ The necessary intention was defined narrowly as an objective intent related to the physical document itself (*ten opsigte van die betrokke dokument*), rather than the deceased's general testamentary wishes.²¹⁷ The requirement for personal creation acts as a strict filter for condonation applications. The subjective requirement of intention was deemed secondary to the structural requirement of personal drafting or execution. Jamneck²¹⁸ noted that this decision influenced the intention requirement of the section by establishing a strict, narrow, and objective framework for its application.

²¹³ Faber 2022 *PELJ* 5-6.

²¹⁴ *Bekker* case para 20. Wood-Bodley 2004 *Obiter* 222-223. The facts of the *Bekker* case have already been set out in chapter 2, subsection 2.6.2 of this study.

²¹⁵ See para 2.6.2 of this study.

²¹⁶ Faber and Rabie 2005 *JJS* 200-201.

²¹⁷ Jamneck 2008 *PER* 98-99.

²¹⁸ Jamneck 2008 *PER* 98-99.

The ruling strictly limits condonation applications in that the court will not examine the testator's subjective intentions unless the document first meets the objective requirement of personal drafting. If a third party fully prepared the unexecuted document, the court will not consider the deceased's subjective intention, due to the absence of personal input. To qualify for possible condonation, the unexecuted document must have been personally drafted or executed by the deceased.

3.2.3.3 Conclusion

The strict judicial interpretation of section 2(3), supported in the *Webster* case and confirmed in *Bekker*, confirmed that an objective prerequisite (the deceased's verifiable action in creating the document) must be met before courts can inquire into the deceased's subjective testamentary intent. The analysis highlighted that documents prepared entirely by third parties are unlikely to be accepted, as the structural requirement of personal creation supersedes any evidence of general testamentary wishes. Ultimately, both cases solidified a narrow, objective framework where the document's origin acts as a strict filter for condonation applications.

3.3 Cautionary rule for the interpretation of the intention requirement

3.3.1 Henwick case

In *Henwick v Master*,²¹⁹ the testator and the second respondent created a valid will.²²⁰ After their divorce, he married the applicant, and they consulted a bank official for drafting a joint will.²²¹ The bank official drafted it, but only the applicant signed it, as the deceased died of a stroke before he could sign the joint will.²²² The application was primarily concerned with revocation under section 2A of the *Wills Act*. Nonetheless, the court gave important *obiter dicta* on the intention requirement for condonation under section 2(3), despite the parties later abandoning the section 2(3) relief.

Foxcroft J cautioned that although technical formalities might be waived in specific cases, the court "should not adopt a more relaxed approach to the real question, namely the

²¹⁹ *Henwick v Master* 1996 4 ALL SA 440 (C) (hereinafter *Henwick*).

²²⁰ *Henwick* 448.

²²¹ *Henwick* 448.

²²² *Henwick* 448.

testator's intention".²²³ The court maintained that strictness must be applied when determining the intention requirement, especially because condonation involves disregarding requirements designed to prevent fraud.²²⁴ De Waal²²⁵ also emphasised the need for scrutiny of the intention in the condonation application.

Thus, it is necessary to apply caution when determining the intention of the testator. The court indirectly challenged the restrictive view of personal drafting found in *Webster*, stating that a strict interpretation of section 2(3) did not preclude the conclusion that the testator who dictated and later approved his dictation had indeed drafted a will.²²⁶ The cautionary rule in *Henwick* stood in contrast to the more liberal interpretations found in cases like *Laxton* or *O'Connor*. The primary difference lies in the level of judicial scrutiny applied to the deceased's intention and the physical origin of the document. The strict framework has ultimately proven more persuasive in South African law, as it was largely vindicated by the SCA. In *Bekker*, the SCA resolved the "drafting" debate by endorsing the narrow interpretation, requiring that a document be personally drafted or dictated by the deceased.²²⁷ This effectively curtailed the liberal expansion seen in *Laxton* regarding unsigned, third-party drafted documents.

The *Henwick* case demonstrated that a high onus of proof is still mandatory to demonstrate that the deceased had a final, settled intention regarding an unexecuted document for condonation.²²⁸ The court's commentary thus positioned the court firmly among judgments supporting flexible interpretation of section 2(3), by agreeing that dictating and approving a document drafted by a third party should suffice, thereby explicitly criticising the *Webster* approach.

3.4 Liberal interpretation of the intention requirement

3.4.1 Introduction

²²³ *Henwick* 447.

²²⁴ *Henwick* 447.

²²⁵ De Waal 2004 *SALJ* 533-534.

²²⁶ *Henwick* 448.

²²⁷ *Bekker* paras 2-3.

²²⁸ *Henwick* 446. Schoeman-Malan *et al* 2014 *Acta Juridica* 93-94.

The section discusses the evolution of the liberal interpretation of the intention requirement in the condonation of wills. This approach focused on the testator's genuine intent for a document to be their final estate instruction, even if the document was drafted by a third party. The *Back* case is presented as the foundational precedent, illustrating how a court found that a draft will, although unsigned, was intended to be his final will because the deceased had approved its contents and the conditions for execution had been met. Subsequent rulings, including *Ex Parte Laxton*; *Ex Parte Williams*²²⁹ *Ndebele*, consistently followed this authority, solidifying the idea that the central test is whether the testator viewed the document as the final disposition of their estate.

3.4.2 *Back* case

The deceased communicated his intentions regarding specific bequests, and his attorney drafted a new will based on these instructions.²³⁰ The attorney suggested modifications, which were brought to the deceased's attention, and he approved them.²³¹ The deceased reviewed the prepared draft and affirmed his intention by responding, "This is how I want it".²³² The execution of the will was conditional on receiving a senior counsel's favourable opinion on tax issues, a condition that was secured the day prior to his death.²³³ Unfortunately, the deceased died before the fully drafted will could be signed.²³⁴

Van Zyl J held that physical, personal drafting is not necessary for section 2(3) to be applicable, concluding that the legislature did not intend to impose an additional formality before allowing the utilisation of this section.²³⁵ The court was convinced of the document's authenticity because the evidence showed the draft was complete, execution conditions were met, and, crucially, the deceased accepted the document.²³⁶ This acceptance served as the required evidence that the deceased intended to adopt the document as his will.

²²⁹ 2000 (4) SA 168 (T).

²³⁰ *Back* case 162.

²³¹ *Back* case 163.

²³² *Back* case 164.

²³³ *Back* case 164-165.

²³⁴ *Back* case 164.

²³⁵ *Back* 174. The court noted on page 162 that the intention of the legislation in introducing section 2(3) was to validate technically invalid wills in order to give effect to the wishes of the deceased testator.

²³⁶ *Back* 175.

Faber²³⁷ noted that the judgment has been analysed from a perspective of the “act-based model”, which suggests that the document is condonable because it contains the act of testation even if it was unexecuted and drafted by a third party.

The *Back* case became a key authority for issuing orders under section 2(3), as it adopted a broad approach to the intention requirement, thereby allowing courts to condone testamentary documents prepared by persons other than the testator.

3.4.3 *Ex Parte Laxton* case

In *Ex Parte Laxton*, the deceased and his wife instructed a bank official to draft a joint will.²³⁸ The document was drafted as per their instruction, and the amendments were made to their satisfaction.²³⁹ Although arrangements were made for signing, the deceased became ill and died before executing the will.²⁴⁰

The court confirmed that the unsigned document reflected the deceased's intent, disagreeing with the argument presented in the *Webster* case at paragraph 41B, which claimed that the legislature did not intend to grant legal effect to a document unsigned and drafted by someone other than the deceased.²⁴¹ The court followed the *Back* case (para 173H-174C, 174E) and *Henwick* case (para 334I), confirming the amendments were made in the deceased's presence and verbally approved by him to his wife.²⁴² Thus, the court ordered the Master of the High Court to accept the unsigned document as the deceased's last will under the *Administration of Estates Act*.²⁴³

3.4.4 *O' Connor* case

In *O' Connor* case, the deceased directed his lawyers to prepare his will. The will was created, and the attorney read its contents to the deceased.²⁴⁴ The applicant averred that the deceased confirmed that the written document accurately represented his wishes

²³⁷ Faber 2022 *PELJ* 10-11.

²³⁸ The deceased previously executed a will in 1994; however, only the photocopy of it could be found. The applicant seeks that the said photocopy will be accepted by the Master in the alternative.

²³⁹ *Ex Parte Laxton* 292.

²⁴⁰ *Ex Parte Laxton* 292.

²⁴¹ *Ex Parte Laxton* 293 and 296.

²⁴² *Ex Parte Laxton* 296.

²⁴³ *Ex Parte Laxton* 296.

²⁴⁴ *O' Connor* 655.

regarding the distribution of his estate.²⁴⁵ The deceased was advised to go to the local magistrate's office to have him assent to the will by placing his thumbprint on the document to comply with the execution formalities.²⁴⁶ At the magistrate's office, the two officials (the clerk and another person whose capacity was unknown) further read over the contents of the will to the deceased; the deceased attached his fingerprint to the will, and the officials signed the will above his fingerprint as witnesses.²⁴⁷

The will was rejected by the Master of the High Court because the commissioner of oaths failed to comply with section 2(1)(a)(v) of the *Wills Act* by not certifying or identifying himself as a commissioner of oaths.²⁴⁸ Despite the failure to fulfill all section 2(1) formalities, the court concluded that the deceased intended the document as his will, considering factors such as the confirmation of his wishes, the lack of fraud, and the participation of multiple individuals in the execution process.²⁴⁹

3.4.5 *Ex Parte Williams case*

In the early 2000s, a full bench in the *Ex Parte Williams* case was confronted with an unsigned document prepared by an attorney purporting to be the deceased's will.²⁵⁰ The testators reviewed the contents of the drafted will alongside the attorney's explanatory notes and were satisfied with the results.²⁵¹

The applicant and the deceased instructed an attorney to draft a new will. The deceased reviewed the drafted will and explanatory notes and was satisfied with the results. The deceased was verified as content with the will's contents. The applicant averred that the deceased was ready to sign the draft. The deceased died unexpectedly before signing.

The attorney verified that the deceased was content with the will's contents, having had the chance to voice any concerns and express approval.²⁵² The applicant requested amendments to the draft will and was ready to sign it afterward.²⁵³ The applicant averred

²⁴⁵ *O' Connor* 655.

²⁴⁶ *O' Connor* 655.

²⁴⁷ *O' Connor* 656.

²⁴⁸ *O' Connor* 656.

²⁴⁹ *O Connor* 659-660.

²⁵⁰ *Ex Parte Williams* 170 -180.

²⁵¹ *Ex Parte Williams* 180.

²⁵² *Ex Parte Williams* 180.

²⁵³ *Ex Parte Williams* 180.

that without amendments, the deceased was ready to sign the draft as it had been reviewed and discussed.²⁵⁴ Sadly, the individual died unexpectedly after the attorney visited his home and before he could sign the will.²⁵⁵

In dealing with the intention requirement, the court opined that the evidence and the characteristics of the document should be adequate to determine the testator's intention.²⁵⁶ Swart J opined that section 2(3) generally implies that testators must have subjectively intended the document to be their valid will.²⁵⁷ For instance, the testator might be completely unaware of the formal requirements and the severe repercussions of failing to adhere to them because of personal circumstances.²⁵⁸ Thus, "the test to be applied is not whether he in life regarded the document as a valid will but regarded it as an expression of the final disposition of his estate".²⁵⁹ Evidence showing that he would have signed the document as a will had he not passed away would tend to establish the intention as required by section 2(3).²⁶⁰ The court considered the following circumstances in reaching its conclusion:

- i. that the document was drawn as a formal last will and testament;²⁶¹ and
- ii. parties had been married out of the community of property for a long time;²⁶²
- iii. the existing will stated that the Applicant was the sole beneficiary; therefore, the draft will put the Applicant in the worst position as it disposes of the estate to legacies and trust beneficiaries.²⁶³

The court weighed the above evidence and was satisfied that the document was intended by the deceased to be her will.²⁶⁴ The document was accepted as a formal last will and

²⁵⁴ *Ex Parte Williams* 180.

²⁵⁵ *Ex Parte Williams* 181.

²⁵⁶ *Ex Parte Williams* 179.

²⁵⁷ *Ex Parte Williams* 179.

²⁵⁸ *Ex Parte Williams* 179.

²⁵⁹ *Ex Parte Williams* 179.

²⁶⁰ *Ex Parte Williams* para 179. Wood-Bodley 2013 *SALJ* 247-248.

²⁶¹ *Ex Parte Williams* 180.

²⁶² *Ex Parte Williams* 181.

²⁶³ *Ex Parte Williams* 181.

²⁶⁴ *Ex Parte Williams* 180.

testament.²⁶⁵ The court's finding supported the view of *Back* at 174 and *Ex Parte Laxton* at 244.

3.4.6 *Ndebele* case

In the *Ndebele* case, the deceased asked his lawyer to prepare a will.²⁶⁶ The document was drafted in accordance with his instructions, and he verified its contents.²⁶⁷ The deceased was murdered before signing the drafted will.²⁶⁸

The court also adopted the flexible approach as advocated in the *Back* case at 174 concerning the interpretation of the provisions of section 2(3). Considering all circumstances presented before the court, it was satisfied that the deceased regarded the document as his final instruction with regard to the disposal of his estate and thus satisfied the intention requirement of section 2(3).²⁶⁹

3.5 *Non-compliant wills and electronic documents*

3.5.1 *Introduction*

The subsection examines cases spanning from 1993 to 2002 that concern the condonation of non-compliant wills, particularly focusing on the interpretation of the deceased's intention under section 2(3) of the *Wills Act*. These cases frequently involve documents, including those drafted electronically, that failed to meet formal execution requirements, such as lacking witness signatures or proper formatting. Decisions like *Longue* and *Horn* demonstrate that courts prioritise the testamentary intent of the deceased, often allowing documents to be accepted as valid wills despite formal deficiencies.

The analysis highlights a general trend towards a flexible, intention-driven approach in succession law, even when formal requirements are strictly interpreted, underscoring that the status of the document rests on the deceased's final intent rather than its physical appearance or form alone. Cases such as *Mdlulu v Delarey* and *Macdonald* further

²⁶⁵ *Ex Parte Williams* 180.

²⁶⁶ *Ndebele* 479.

²⁶⁷ *Ndebele* 479.

²⁶⁸ *Ndebele* 477 and 479.

²⁶⁹ *Ndebele* 483.

explore how evidence of intent, including explicit statements and the document's contents, is crucial in the judicial determination of whether a document constitutes a final will and testament.

3.5.2 Longue case

The facts in the *Longue* case have already been stated in para 1.1 of this study. The court was satisfied that the disputed document was intended by the deceased to be his will and ordered the Master of High Court to accept it.²⁷⁰ This outcome aligns with the flexible, intention-driven approach seen in succession law regarding section 2(3), where the crucial factor is the deceased person's specific intent that the writing serves as their last will and testament, rather than its physical appearance or form. Judicial interpretation of section 2(3) consistently emphasises the need to scrutinise the testator's intention regarding the status of the will.²⁷¹

3.5.3 Horn case

Similarly, in the *Horn* case, the deceased was found dead in circumstances suggesting he had killed his two young children and then committed suicide. A testamentary document lacking the signatures of witnesses was found at the scene.²⁷²

The court emphasised that the intention is paramount, even if the formalities are missing, the document may be accepted if the deceased intended it to be his will.²⁷³ It was found that the deceased drafted the will and had no intention of revising it.²⁷⁴ The court condoned the document under section 2(3) and ordered the Master of High Court to accept it as a deceased will.²⁷⁵ This decision reaffirms a flexible, intention-driven approach in the condonation of non-compliant wills.

²⁷⁰ *Longue* 203.

²⁷¹ See para 2.6.3.

²⁷² *Horn* 467.

²⁷³ *Horn* 468.

²⁷⁴ *Horn* 468.

²⁷⁵ *Horn* 469.

3.5.4 *Mdlulu case*

In the *Mdlulu case*, the deceased drafted a two-page document bearing the signature of the deceased on the first page at the bottom and the second page at the end of the writing of the document.²⁷⁶ It was alleged by the plaintiff, among others, that the document did not comply with the formalities required by section 2(1)(a)(ii) and (iii) of the *Wills Act*.²⁷⁷

Evidence led to the court regarding the intention requirement showed firstly that the document was described as "The Last Will and Testament"; secondly, the contents of the document contains express statements regarding revocations and specific bequests; thirdly, the deceased educational background was deemed irrelevant; and lastly the deceased explained to the witnesses about her understanding of what a will is and its use.²⁷⁸

Regarding the intention requirement, the court noted that the question is not whether the document must have the form of a will, but rather whether it is intended by the deceased to have such status.²⁷⁹ It explains that the crucial factor is not the physical appearance or form of the document itself, but rather the deceased person's specific intent that the writing serve as their last will and testament.

The court endorsed a strict interpretation of the section on document format, as shown in its reference to the *Anderson* and *Letsekga* cases, however, it reached a favourable outcome. Only a particular document appearing in testamentary form would qualify for condonation under section 2(3).²⁸⁰ The court found the document intended by the deceased to be her final will.²⁸¹

²⁷⁶ *Mdlulu* 434.

²⁷⁷ *Mdulu* 439.

²⁷⁸ *Mdulu* 444.

²⁷⁹ *Mdulu* 443.

²⁸⁰ This argument is explored in depth by a scholar in subsection 4.2 of this study.

²⁸¹ *Mdulu* 439.

3.5.5 *Thirion case*

In the early 2000s, the court in *Thirion* dealt with the deceased's handwritten document, which was disputed as being the deceased's will because it was not signed by the testator in the presence of witnesses.²⁸²

In considering the intention requirement, the court considered that the possibility that the document might be regarded as a provisional note or a mere draft will, which the deceased may have wished to consider further, similar to an instruction to attorneys.²⁸³ However, the facts of the case showed that the deceased intended the document to be his will.²⁸⁴ The court was satisfied that the deceased wanted to make the applicant his heir, and the Master of High Court was ordered to accept the document as a will as such.²⁸⁵

3.5.6 *Macdonald case*

In the *Macdonald* case, the court focused mainly on the drafting requirement outlined in section 2(3), while less emphasis was placed on the intention requirement. However, the intention requirement was still considered.²⁸⁶ The court examined all the evidence presented to establish that the documents were intended to be the last will and testament of the deceased.²⁸⁷ The court held that the documents could not be treated as mere preliminary notes or drafts meant for discussing a will to be drawn up later; rather, they were clear and conclusive as a final will.²⁸⁸ This suggested that the papers were sufficiently explicit and complete in their contents. This determination signifies the legal weight the court assigned to the documents' existing format and clarity.

The court held that the document fulfilled all the requirements set out in section 2(3) for several reasons.²⁸⁹ Hattingh J endorsed the liberal interpretation of section 2(3), stating

²⁸² *Thirion* 1089. Furthermore, it could not be found that the deceased intended the document to be his will due to a lack of capacity to draw a will.

²⁸³ *Thirion* case 1091.

²⁸⁴ *Thirion* case 1091. The court held at page 1095B-C/D and 1095E-F that there was no evidence that the deceased's girlfriend attempted to influence him in the drafting or amending of the will.

²⁸⁵ *Thirion* 1096.

²⁸⁶ For facts of the case, see chapter 1.1 of the study.

²⁸⁷ *Macdonald* 72.

²⁸⁸ *Macdonald* 72.

²⁸⁹ *Macdonald* 72.

that the stricter approach would be inconsistent with the purpose of the section.²⁹⁰ Wood-Bodley²⁹¹ criticised the court's reliance on the liberal approach, stating that the document was drafted by the deceased, therefore, it was unnecessary to use the liberal approach to rescue the document. In the *Bekker* case, scholars contended that the SCA's liberal interpretation of the word "drafted" in section 2(3) effectively diminished the subsection's emphasis on testamentary intent, reducing it to a requirement equal in weight to the other formal requirements.²⁹² Faber and Rabie²⁹³, in particular, opined that the intention of the deceased becomes important once the drafting or execution requirement is met. Accordingly, to the judgment in the *Macdonald* case, the court suggested that it was satisfied that the document was drafted by the deceased with the intention for it to be regarded as his will. De Waal²⁹⁴ asserted that judicial interpretation of section 2(3) consistently emphasises the need to scrutinise the testator's intention regarding the status of a will or its amendment, and the strict approach used by the aforesaid courts supports his perspective.

3.6 Conclusion

The judicial interpretation of the intention requirement under section 2(3) of the *Wills Act* reveals a profound doctrinal conflict, initially characterised by a strict, formalistic approach that rigidly distinguished between mere instructions and a final testamentary instrument, which was subsequently challenged by a liberal, intention-driven approach prioritising the deceased's subjective wishes over formal compliance or personal drafting.

The move towards a liberal approach was not without caution; the court remained mindful of potential abuses of section 2(3). The courts' decisions were hinged on whether the testator personally adopted or endorsed the document. Judges sought to strike a balance between preventing abuse and honouring genuine wishes. The *Henwick* illustrated this tension vividly.

²⁹⁰ *Macdonald* 71. Wood-Bodley 2004 *SALJ* 36-37.

²⁹¹ Wood-Bodley 2004 *SALJ* 37-38.

²⁹² Schoeman-Malan *et al* 2014 *Acta Juridica* 90-91.

²⁹³ Faber and Rabie 2004 *JJS* 200-201.

²⁹⁴ De Waal 2004 *SALJ* 532-533.

In the years leading up to the *Van Wetten* case, the way in which the intention requirement in section 2(3) was interpreted and applied was characterised by inconsistency. There was a clear tension between a strict and a more flexible reading of this intention requirement. Formalism initially shaped succession law, but over time, a liberal perspective influenced its application, enabling the Supreme Court of Appeal to adopt a more assertive doctrinal approach in *Van Wetten*.

4 Discussion of the *Van Wetten* case as far as it relates to the intention requirement of section 2(3) of the *Wills Act*

4.1 Introduction

In the preceding chapter, it was shown that courts were torn between liberal and restrictive interpretations of the intention requirement in section 2(3), and that these differing approaches led to divergent outcomes. The courts recognised the distinction between informal documents intended to function as a will and those that were only drafts, notes, or descriptions of testamentary intentions. Accordingly, written instructions for drafting a will cannot be made the subject of an order under section 2(3).

This chapter discusses and evaluates the judgment in the *Van Wetten* case in relation to directions given to another person for drafting the deceased's will. The focus is on the approach used by the SCA regarding how the question relating to the intention requirement is to be framed and how the court understood it. The chapter will highlight the principles laid down by the SCA to determine the intention of the deceased regarding the disputed document under application in terms of section 2(3), the timing, and any possible changes thereto. The discussion will identify how the SCA addressed the question and the factors considered in answering it.

The chapter will begin with the outline of the relevant background of the *Van Wetten* case, thereby providing essential context for the legal issues at hand. Thereafter, it examines the contents of the disputed document in detail, alongside related documents that may bear upon its interpretation and evidentiary value. The chapter will identify the important factors considered by the court in its assessment of the disputed document and the circumstances surrounding its creation and presentation. A particular focus is on the SCA's approach to the establishment of the deceased's intention regarding the document as his will, with the chapter highlighting both comments and criticisms against and in support that have emerged in academic literature.

The next chapter (Chapter 5) will explore cases heard after the *Van Wetten* case, in order to determine whether the *Van Wetten* judgment has exerted influence on how subsequent cases approached the intention requirement.

4.2 Background to the *Van Wetten* case

The deceased and his wife, Ms Bosch, had two children together during their marriage, Corbin (born in 1994) and Eathan (born in 1998). While they were still married, they executed a joint will in 1995.²⁹⁵ Under the will, Ms Bosch was the sole beneficiary of the deceased's estate.²⁹⁶ Upon the deceased's death in February 2000, the executor appointed under the 1995 will began administering the estate.²⁹⁷

About 18 months later, the deceased's sister (Van Wetten) applied under section 2(3) of the *Wills Act* for the acceptance of a purported will allegedly drafted by the deceased on 5 September 1997 (the contested will).²⁹⁸ The document failed to meet the testamentary formalities required under section 2(1) of the *Wills Act*.²⁹⁹ The applicant claimed she found the contested will in a cupboard in the deceased's home shortly after his death, but did not inform Ms Bosch.³⁰⁰ She claimed that the disputed will was one of three sealed envelopes placed inside a single outer envelope that had originally been addressed to Mr Van der Westhuizen (hereafter the deceased's friend).³⁰¹ Inside the envelope were three additional envelopes, one of which held the disputed will and was addressed to Mr Mike Nolan (hereafter the attorney).³⁰² The remaining two were directed to Ms Bosch and Corbin, respectively.³⁰³ The friend of the deceased confirmed that the deceased handed him the outer envelope towards the end of 1997, but he never opened it.³⁰⁴ After the deceased's death, he remembered the envelope, tried unsuccessfully to contact the attorney about it, and then gave the outer envelope to Ms Bosch.³⁰⁵

²⁹⁵ *Van Wetten* para 4.

²⁹⁶ *Van Wetten* para 5.

²⁹⁷ *Van Wetten* para 5.

²⁹⁸ *Van Wetten* para 6.

²⁹⁹ The document was in the form of a letter addressed to the deceased attorney. See *Van Wetten* para 7.

³⁰⁰ *Van Wetten* para 6.

³⁰¹ *Van Wetten* para 7.

³⁰² *Van Wetten* para 7.

³⁰³ *Van Wetten* para 7.

³⁰⁴ *Van Wetten* para 7. The other two envelopes were addressed to Ms Bosch and "Corbin on his 21st birthday".

³⁰⁵ *Van Wetten* para 7.

4.3 *The form, provisions, handling of the contested will, and related letters*

The contested will was a letter written on the deceased's office stationery, dated 5 September 1997 and addressed to the deceased's attorney.³⁰⁶ The document was titled "Re: Will & Testament" and included several testamentary directions, personal reflections and special appointments.³⁰⁷ Key clauses relevant to the study include:

- (i) The deceased's revocation of his previous will declaration that all his previous wills he made with Bosch are invalid;
- (ii) The deceased explicitly appointed Mr Mike Nolan as the executor of his estate;
- (iii) The creation of an *inter vivos* trust for the benefit of Corbin;
- (iv) The deceased's withdrawal of the suretyship agreement in favour of Bosch and redirection of policy funds; and
- (v) A directive stating that, with effect from 5 September 1997, the disputed will is to be regarded as his will.

Additional statements attached to the above document concerned the closure of the deceased's bank and credit card accounts, and indicated that the private investigator's report regarding his wife's infidelity would be supplied, as it supports his decision to prepare the disputed will.³⁰⁸ The deceased made it clear that he was deeply unhappy with Ms Bosch, saying he was only staying with her for Corbin's sake. He spoke openly about the state of his marriage, explaining that he was miserable and believed his wife was being unfaithful.³⁰⁹ These suspected acts of infidelity left him feeling unloved and emotionally abandoned by his wife.³¹⁰

On handling the abovementioned envelope, the deceased's instruction to his attorneys in respect of access to the contents thereof, was framed as follows: "*maak oop as daar iets met my gebeur of ek anders besluit*".³¹¹ This directive was interpreted as a reference to

³⁰⁶ *Van Wetten* para 7.

³⁰⁷ *Van Wetten* para 11.

³⁰⁸ *Van Wetten* para 11.

³⁰⁹ *Van Wetten* para 17.

³¹⁰ *Van Wetten* para 17.

³¹¹ *Van Wetten* para 7.

the deceased's death.³¹² The conditions specified required that the document be opened either upon his death or if he later decided to change his mind.

In the letter he wrote to his wife, the deceased conveyed his mixed feelings about their marriage.³¹³ In the letter to Corbin, the deceased noted that he did not expect to be able to attend Corbin's 21st birthday.³¹⁴ Taking all the above documents together, a compelling backdrop to the will under consideration is provided.

4.4 Interpretative framework of the SCA

4.4.1 The approach to the intention requirement

The SCA, in attempting to ascertain the intention of the deceased, adopted a similar approach to that adopted in contractual disputes as deduced in the authority of *Delmas Milling Co Ltd v Du Plessis*.³¹⁵ The (then) Appellate Division in the aforesaid case formulated a two-stage interpretative method, namely the enquiry on the words of the document, and only where ambiguity arises may the court consider the surrounding circumstances.³¹⁶ In the *Van Wetten* case, the SCA took into account the words and language used in the disputed will. It would look at the circumstances in which the contested document was drafted only if any ambiguity or uncertainty were identified.³¹⁷

4.4.2 The principles laid down to determine the intention requirement

When asserting the facts of the case, the judgment began with an explanation of the law as it relates to section 2(3). The question before the SCA was whether the deceased intended the document he drafted on 5 September 1997 to be his will.³¹⁸ Lewis J unpacked the intention requirement in section 2(3) as follows:³¹⁹

In my view, however, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That

³¹² Wood-Bodley 2013 *SALJ* 616-617.

³¹³ *Van Wetten* para 12.

³¹⁴ *Van Wetten* para 13.

³¹⁵ 1955 3 SA 447. *Van Wetten* para 15.

³¹⁶ 1995 3 SA 447.

³¹⁷ *Van Wetten* para 15.

³¹⁸ *Van Wetten* para 15.

³¹⁹ *Van Wetten* para 16.

enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

According to the SCA, the question does not pertain to the meaning of the document *per se*, but whether the deceased intended the document to be his will or merely an instruction to his attorney to draft a will.³²⁰ Du Toit³²¹ noted that the inquiry concerns whether the deceased intended to create the instrument in question with *animus testandi* (the intention to make a will), rather than determining the deceased's intention as expressed in the instrument itself. In numerous instances not specified here, it has been determined that condonation cannot be applied to a written instruction for drafting a will.³²² As a guide to answer the question, the SCA had to look back at the intention requirement as prescribed in section 2(3) of the *Wills Act*. According to the SCA, the inquiry requires both an analysis of the document on its own and an assessment of the document in light of the circumstances surrounding its drafting.³²³ Schoeman-Malan³²⁴ notes that for this purpose, "surrounding circumstances" include all pertinent factors, such as any evidence of statements made by the deceased during their lifetime. This imported an element of flexibility into the interpretation of intention in section 2(3) applications.

4.4.2.1 The interpretation of the document in the context of the deceased's circumstances

As previously indicated, the SCA was tasked with determining the deceased's intention in relation to the disputed document by adopting a dual yet unified approach, namely, an examination of the document itself and the surrounding circumstances. The following subparagraphs will first address the latter (contextual and circumstantial factors) before turning to an analysis of the former (contents and nature of the document).

The SCA had to distinguish between the relevant factors and those that bore no material significance in determining what the deceased's intention was at the time of writing the contested will. It was noted from the judgment that evidence that does not throw light

³²⁰ *Van Wetten* para 16

³²¹ Du Toit 2014 *APLJ* 59-60.

³²² Relevant cases are *Ex Parte Maurice* at 716E-G, *Anderson* case at 784H-785A, *Ex Parte Williams* 179C.

³²³ *Van Wetten* para 16. Schoeman-Malan *et al* 2014 *Acta Juridica* 88-89.

³²⁴ Schoeman-Malan *et al* 2014 *Acta Juridica* 87-88.

on what was on the deceased's mind at the time of making the contested will would be regarded as irrelevant.³²⁵ Accordingly, the relevant circumstantial factors as guided by the approach in *Schnetler NO v Die Meester en Ander*³²⁶ are:

- i. The deceased's state at the time of writing the letter was contemplating suicide.³²⁷
- ii. The letter was handed to a friend (not the attorney) for safekeeping.

Inferring that the deceased had suicide in mind makes it unavoidable to conclude that, when he gave the envelope to his friend (Van der Westhuizen), he did not intend for the letter to be taken to an attorney for the purpose of having his will drafted.³²⁸ This suggested that the deceased did not mean for a friend to take the document to his lawyer for the purpose of drafting the will. Rather, the deceased anticipated that, by the time the document was opened and read, he would have passed away and thus would be unable to sign any document prepared by his lawyer.³²⁹ If it were an instruction to draft a will, the deceased would have already died when the document was drafted by the attorney.³³⁰ Therefore, the opportunity to execute such a will by the deceased would never have come forth. Wood-Bodley³³¹ noted that in such circumstances, the giving of instructions for drawing up the will would obviously have been futile, which forced the conclusion that the deceased had intended the letter itself to be his will. The view is also supported by a scholar.³³² The SCA was therefore convinced that, in light of the mentioned circumstances, the deceased intended the disputed document to be his will.³³³ Notably, the document had been given to a close friend, enclosed in a sealed envelope bearing the instruction to "open if something happens to me".³³⁴ The evidence in these circumstances indicated that the letter had never been intended to be sent to the attorney in order to draft a will. The letter was entrusted under circumstances where the deceased was in an emotionally heightened state, as he suspected that his wife was being

³²⁵ *Van Wetten* para 21.

³²⁶ 1999 4 SA 1250 (C).

³²⁷ *Van Wetten* para 18.

³²⁸ *Van Wetten* para 19.

³²⁹ *Van Wetten* para 19.

³³⁰ *Van Wetten* para 19. Wood-Bodley 2011 *SALJ* 615-616.

³³¹ Wood-Bodley 2011 *SALJ* 616-617. Wood-Bodley 2005 *SALJ* 53-55.

³³² Schoeman-Malan *et al* 2014 *Acta Juridica* 93-94.

³³³ *Van Wetten* para 19.

³³⁴ *Van Wetten* para 16.

unfaithful.³³⁵ It appears that he was already considering doing at the time that he entrusted the document to his friend.³³⁶

The author agrees with the SCA that, based on the surrounding circumstances, particularly the fact that the deceased was estranged from his family, the instruction in the will is clearly evidenced. The deceased made his intentions clear in the letter, in which he detailed instructions for the administration of his estate. It was corroborated that he never came back to his friend regarding the letter entrusted to him (even after he reconciled his relationship with Ms Bosch). The SCA was clear that the document must have been intended by the deceased to be nothing other than what it appears to be, for such a document qualifies as the deceased's will.

Another contention regarding the instruction, although not expressly mentioned in the court, is the conclusiveness of the disputed document. The expression in this case was clear and final as there was no room for amendment or approval of the document in case of an instruction to draft a will, unlike in *Ex Parte Maurice* at 717B-F, where the draft would still have to be considered by the testator, and the possibility exists that the testator would want/be able to make amendments.³³⁷ According to the SCA, the instruction for drawing up the will after the death of the testator would be irrelevant, as the testator would have been passed on that time.

4.4.2.2 The interpretation of the deceased's intention in the context of the document itself

It was also argued on behalf of the Respondent that the deceased had the knowledge of the formalities for the execution of a valid will, as he had drawn up a few accordingly.³³⁸ The SCA agreed that the contents of the will is somewhat incoherent.³³⁹ It entails some recording decisions; giving instructions and offering explanations for his decisions.³⁴⁰ Despite the mischief, the “decision” reached by the deceased (how he wanted his estate

³³⁵ *Van Wetten* para 17.

³³⁶ *Van Wetten* para 18.

³³⁷ Gildenhuys 2020 *LitNet* 517-518.

³³⁸ *Van Wetten* para 22.

³³⁹ *Van Wetten* para 23.

³⁴⁰ *Van Wetten* para 23.

to devolve) in the letter was clear.³⁴¹ The court found the following phrases were decisive in concluding that the deceased intended the document to be his will, rather than instructions:³⁴²

- i. The deceased stated, "I have made the following decisions."³⁴³
- ii. He explicitly declared that "declare all previous wills & testaments not valid from this day the 5 Sept 1997 drawn up by me or Karen-Anne."³⁴⁴
- iii. He stated that "I want you (Mr Mike Nolan) the executor of my will and cancel all previous executors" and I want my son Corbin Bosch ... to be my beneficial party."³⁴⁵
- iv. He concluded that "but as of today 5th September this is my will to be followed."³⁴⁶

The rest of the letter's contents do not diminish the deceased's clearly expressed "decision" to make the document his will. The court held that³⁴⁷

these are not the words of a person giving instructions for the drafting of his will. They are the words of a person who has made a decision to which immediate effect is to be given. They are his will. The words used by the deceased are thus also decisive of the question before the Court: the deceased intended the document to be his will.

The SCA held that the deceased intended the document to be his will.³⁴⁸ The additions included at the end of the document, such as closing the bank accounts and cancelling the credit cards, were interpreted as instructions to the executor for what he had to do after the deceased's death.³⁴⁹

Faber³⁵⁰ emphasised the connection between the document and the intention requirement, using the act-based perspective to better understand the concept of a will

³⁴¹ *Van Wetten* para 23.

³⁴² *Van Wetten* para 11.

³⁴³ *Van Wetten* para 11. Wood-Bodley 2005 *SALJ* 53-54. Describing the contents and purpose of the document.

³⁴⁴ *Van Wetten* para 11. Point no.1 of the letter.

³⁴⁵ *Van Wetten* para 11. Point no. 2 of the letter

³⁴⁶ *Van Wetten* para 11. Point no. 1 of the letter.

³⁴⁷ *Van Wetten* para 26.

³⁴⁸ *Van Wetten* para 27.

³⁴⁹ *Van Wetten* paras 11 and 24.

³⁵⁰ Faber 2021 *TSAR* 752-753.

within the legal framework. According to the act-based model, which posits that a will is the product of a continuous process rather than a result of meeting a set of isolated requirements, clarifies this relationship by linking specific acts performed during the will-making process.³⁵¹ The act-based perspective offered a clear method for addressing the intention requirement in testamentary rescue, which has traditionally involved judicial speculation.³⁵²

4.4.2.3 Timing of the intention of the deceased and its possible change

The SCA further gave clarity on the timing of ascertaining the intention and possible change thereon, as submitted by Ms Bosch, that the deceased changed his intention regarding the disputed will. She argued that the deceased changed his mind after drafting the disputed will, stating *inter alia* the following factors:

- i. That the parties had reconciled and had another child.³⁵³
- ii. She was subsequently nominated as a beneficiary on various new insurance policies.³⁵⁴
- iii. The deceased never mentioned the disputed will to anyone while he was sick until his demise.³⁵⁵

The contention brought by Ms Bosch was that the deceased appeared to have forgotten about the disputed will.³⁵⁶ The SCA found these factors irrelevant in determining the deceased's intention at the time of writing the contested will.³⁵⁷ The SCA stated that the deceased's intention regarding the document must be established at the time of the document creation or execution.³⁵⁸ The evidence of subsequent conduct is relevant only insofar as it reveals the deceased's state of mind during the time the document was created.³⁵⁹ The pertinent moment for determining the testator's intention is the time when

³⁵¹ Faber 2021 *TSAR* 752-753.

³⁵² Faber 2022 *PELJ* 16-17. The details of the approach are not examined in depth in this study.

³⁵³ *Van Wetten* para 20.

³⁵⁴ *Van Wetten* para 20.

³⁵⁵ *Van Wetten* para 20.

³⁵⁶ *Van Wetten* para 20.

³⁵⁷ *Van Wetten* para 21.

³⁵⁸ *Van Wetten* para 17-19. Du Toit 2014 *APLJ* 66-67. Wood-Bodley 2005 *SALJ* 55-55.

³⁵⁹ *Van Wetten* para 21.

the document in question is drafted or executed, as considered under section 2(3) proceedings.³⁶⁰ Wood-Bodley³⁶¹ notes that the necessary implication of this ruling, although not spelt out by the SCA in so many words and, therefore, not explained or debated in the judgment, is that the deceased's intention that the document be a will need only to exist at the time the document is made, and section 2(3) does not require that this intention be sustained until the deceased death. The SCA focused solely on the deceased's state of mind, not on evidence that occurred afterwards.³⁶² The scholar further indicated that a change of intention by the testator after the drafting or execution of the document is subsequently irrelevant, unless such a change is manifested in subsequent testamentary writing or a recognised manner of revocation of a valid will or part thereof.³⁶³ If the testator subsequently changes his mind, he cannot simply rely on the lapse of time of intention; he must perform a legally recognised act of revocation compliant with the rules for revoking the valid will.³⁶⁴

The SCA rejected Ms Bosch's contention that the document should be interpreted as a whole, according to principles of documentary interpretation, holding that, for a section 2(3) enquiry, the real question is not what the document means, but whether the deceased intended the document to be his will.³⁶⁵ That inquiry necessarily entails an examination of both the document itself and the document in the context of the surrounding circumstances.³⁶⁶ This decision overruled previous suggestions by South African lower courts that any alteration in the deceased's intention regarding the document had to be assessed by a court.³⁶⁷ Wood-Bodley held that the approach was an essential part of the SCA's reasoning, and, therefore, considers it to be the binding authority of the SCA.³⁶⁸

The court enforces strict timing on the deceased's intention that it must be determined at the moment the informal instrument is created or executed. A direct implication of this

³⁶⁰ *Van Wetten* para 19.

³⁶¹ Wood-Bodley 2005 *SALLJ* 55-55.

³⁶² *Van Wetten* para 21. The SCA also considered the surrounding circumstances and the language of the document to come to its final determination.

³⁶³ Wood-Bodley 2005 *SALJ* 54-55.

³⁶⁴ Wood-Bodley 2005 *SALJ* 54-55.

³⁶⁵ *Van Wetten* para 16.

³⁶⁶ Du Toit 2014 *APLJ* 67-68.

³⁶⁷ Du Toit 2014 *APLJ* 66-67.

³⁶⁸ Wood-Bodley 2005 *SALJ* 55-56.

ruling is that any evidence showing the deceased later changed their mind about the document is irrelevant and cannot be admitted. The SCA's approach implied that it must assess if the deceased, at the time of drafting or signing the document, intended for it to serve immediately as their will.³⁶⁹ If the document was created with the expectation that a subsequent, formal document would be prepared, the intention requirement would not be satisfied. The strict timing rule offers no accommodation to a transformation of intent during the drafting or execution of the document.

4.5 Analysis of the SCA decision

The SCA's interpretation of the intention requirement suggests that the intention requirement is viewed from a two-part perspective: namely, on the document itself and its contents.³⁷⁰ The SCA addressed the central issue by considering the circumstances in which the disputed will was created, the handling of the document, and the contents of the document itself.³⁷¹ De Waal and Schoeman-Malan³⁷² opined that the view involves the deceased's intention for the document to serve as his will. The court must depend on the drafted document, which forms the foundation for confirming the intention of a person who wishes to dispose of their property.³⁷³ Faber³⁷⁴ also supported this view by emphasising that certain documents (in this case, only non-compliant wills) can be subject to a condonation application.

The other view of the intention requirement emphasises how the deceased's intention is expressed, directing attention to the actual contents of the document.³⁷⁵ In the *Van Wetten* case, this view was confirmed by Lewis J when she noted that the question was not what the document meant, but whether the deceased had intended it to be his will.³⁷⁶ The court noted that answering this question requires scrutiny of the document itself, as well as its surrounding circumstances.³⁷⁷ Faber³⁷⁸ denoted that this view aims to give

³⁶⁹ *Van Wetten* para 21. See also Du Toit 2014 *APLJ* 66-67.

³⁷⁰ *Van Wetten* para 16. *Ex Parte Maurice* 716I-J.

³⁷¹ Wood-Bodley 2005 *SALJ* 54-55.

³⁷² De Waal and Schoeman-Malan *The Law of Succession* 83-84.

³⁷³ Schoeman-Malan 2017 *JJS* 94-95.

³⁷⁴ Faber 2022 *PELJ* 5-6.

³⁷⁵ De Waal and Schoeman-Malan *The Law of Succession* 83-84. Also see Faber 2022 *PELJ* 5-6.

³⁷⁶ *Van Wetten* para 16.

³⁷⁷ *Van Wetten* para 16.

³⁷⁸ Faber 2022 *PELJ* 6-7.

effect to the deceased's dispositive intention even where the document was not cast in a testamentary form. Scholars similarly preferred the view that the document's form and scope should not bar condonation, provided its testamentary nature and the deceased's intention have been established.³⁷⁹

Although the wording of the document supports the deceased's decision, its heavy reliance on an obvious inference of suicide to establish finality is also open to scrutiny. The SCA conclusion hinged on the fact of the deceased contemplating suicide, making any instruction for a future will futile because a dead person cannot execute a will.³⁸⁰ This emphasis on finality allowed the SCA to override the traditional presumptions that a document resembling instructions for drafting a will is incapable of testamentary rescue.³⁸¹ While the facts are compelling, this approach emphasises extraordinary circumstances (imminent death) as the primary determination for condoning a document that otherwise fell into a category of non-condonable instructions as held by the earlier courts.³⁸² Therefore, applications in which death is not expected in the near future would be less likely to succeed, as they would not meet this required element of immediacy.

The *Van Wetten* ruling directs courts to look to the surrounding circumstances to infer a testator's intention when dealing with documents that do not meet formal requirements. The effort to infer intention obligates the court to depend largely on circumstantial evidence, which creates a significant risk that the final conclusion will be based on speculation or the judge's personal assessment of the facts rather than on clear, legally established proof. Faber³⁸³ argued that the courts consequently overemphasise other aspects, such as the form of the document or circumstantial evidence, in an attempt to find the intention required by section 2(3).

While the SCA's approach in *Van Wetten* successfully prevents a testator's wishes from being frustrated by technicalities, it has arguably overextended the concept of intention as follows:

³⁷⁹ Schoeman-Malan *et al* 2014 *Acta Juridica* 90-91. Papadopoulos 2012 *SAMLJ* 99-100.

³⁸⁰ *Van Wetten* para 19-20.

³⁸¹ See para 4.4.2.2 of this study. Du Toit 2014 *APLJ* 67-68.

³⁸² See para 3.2 of this study. Wood-Bodley 2013 *SALJ* 248-249.

³⁸³ Faber 2022 *PELJ* 16-17.

- i. it permits informal notes to be treated with the same significance as formally executed wills;³⁸⁴
- ii. created a legal framework where subsequent changes of heart are ignored unless they meet formal revocation standards³⁸⁵ and
- iii. lead to a procedural approach that some scholars believe lacks a solid theoretical foundation, resulting in the current conceptual confusion regarding the essence of a will.³⁸⁶

4.6 *The stare decisis doctrine*

The primary function of the SCA is to hear and decide upon appeals from the High Court and other specialised tribunals.³⁸⁷ It rectifies potential judicial oversight and also shapes the legal narrative. This ensures that South African laws are interpreted and applied consistently, justly, and in the best interest of its people.³⁸⁸ The doctrine of *stare decisis et non quita movere* ("to stand by decisions and not to disturb settled law") underpins the aforementioned function of the SCA.³⁸⁹ Accordingly, the courts are bound by the decision of higher courts (SCA and Constitutional Court) and by its own decisions on matters of similar facts.³⁹⁰ The principle provides authoritative guidance in that previous judgments of higher courts are binding rather than persuasive. In *Daniels v Campbell*,³⁹¹ Moseneke J held that the doctrine of precedent, as an aspect of the rule of law, promotes justice by guaranteeing legal certainty, equality, uniform treatment, and fairness before the law.³⁹² Precedents of higher courts guide lower courts' decisions, which help to maintain impartiality in their decisions, promoting consistency and predictability, which essentially assures legal certainty.

³⁸⁴ Faber TSAR 2025 572-573. Faber noted this has led to constant uncertainties and inconsistencies in how courts identify testamentary intent in later cases like *Wren* and *Smith v Parsons*.

³⁸⁵ Wood-Bodley 2005 SALJ 56-57.

³⁸⁶ Faber 2021 TSAR 504-506.

³⁸⁷ Section 168(3)(a) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

³⁸⁸ Section 165 of the *Constitution*.

³⁸⁹ Brickhill 2010 *Constitutional Court Review* 92-93.

³⁹⁰ Brickhill 2010 *Constitutional Court Review* 92-93.

³⁹¹ 2004 5 SA 311 (CC).

³⁹² *Daniels v Campbell* 2004 5 SA 311 (CC) para 94.

While the *stare decisis* principle promotes legal certainty, it also allows for the evolution of legal principles through the higher courts' rulings. Therefore, in this regard, the SCA decision is binding on all lower courts, providing uniform authority on how the intention requirement must be assessed, ensuring that courts approach such questions consistently across the South African courts.

However, the doctrine is not absolute; it is limited by the constitutional values.³⁹³ Furthermore, there are exceptions in terms of where the court is satisfied that such a previous case was wrongly decided, or where a point was not argued, or where the issue was not distinguishable.³⁹⁴

4.7 Conclusion

The *Van Wetten* case highlighted the fundamental objective of section 2(3) of the *Wills Act*. The mere fact that a document is formatted as a letter to the attorney does not prevent section 2(3) from applying if the deceased intended that document to serve as his will. Lewis J laid down the following principles to assist in the determination of the intention requirement under section 2(3) proceedings:

- Evidence of subsequent change of intention is irrelevant and inadmissible.
- The clear and unambiguous words used in the documents are decisive in the determination of the intention.
- The surrounding circumstances (for example, the handling of the document, emotional state, and suicide reference) carry significant evidential value in investigating the deceased's intentions.
- The finality of the document is demanded.
- The deceased's intention to treat the document as his will is determined at the time it was made.

³⁹³ Section 2 of the *Constitution*.

³⁹⁴ *Daniels v Campbell* 2004 5 SA 311 (CC) para 95.

The above guidelines formed the core principles for determining the deceased's intention under section 2(3) of the *Wills Act*. The next part of this study will examine whether these principles were applied by subsequent courts. The SCA's interpretative approach to section 2(3) of the *Wills Act* reflects a delicate and sometimes controversial tension between protecting a testator's genuine wishes and maintaining the protective functions of legal formalities. Whether this approach adequately balances fairness or leans too far toward leniency is a subject of ongoing debate in South African law.

5 Analysis of the intention requirement as applied by courts after the *Van Wetten* case

5.1 Introduction

The *Van Wetten* case established the principles for identifying the intentions of a testator in a document intended as their will by the deceased.³⁹⁵ This involves analysing the document and its context. Important considerations include the mindset of the deceased at the time of drafting, excluding any evidence from after the drafting.

This chapter analyses the intention requirement in South African case law post-*Van Wetten*, exploring its influence on subsequent cases and its role as a precedent in interpreting deceased intentions in condonation applications. It reviews court interpretations of section 2(3) regarding a deceased's intention across various contexts, including electronic wills, draft wills, and informal documents.

This analysis will explore various court judgments to identify consistent patterns, divergences, and changes in how courts interpret the intention requirement. Relevant critiques from academia and the judiciary will be included, along with potential solutions, particularly where ambiguity in court decisions is evident. This evaluative method aims to shed light on the practical impacts of the *Van Wetten* decision and evaluate its lasting influence on the development of South African succession law, especially concerning condonation applications.

This chapter seeks to clarify the evolving principles that guide judicial interpretation of section 2(3) of the *Wills Act* by examining the trajectory of legal decisions following the *Van Wetten* ruling. It covers the evidentiary requirements necessary to establish the deceased's intent based on pertinent circumstances in condonation cases and analyses the interpretative methods used by different courts. Through this approach, the chapter offers a detailed understanding of how the judiciary reconciles the statutory criteria for wills with the overarching aim of ascertaining the deceased's genuine intentions.

³⁹⁵ See para 4.7 of this study.

5.2 Analysis of the intention requirement in the context of non-compliant wills and electronic documents

5.2.1 Introduction

The *Macdonald* and *Van der Merwe* cases suggested that electronic documents might be eligible for condonation, but the *Dryden* case was an exception, as the court refused to condone an email with the deceased's testamentary instructions.³⁹⁶ Nevertheless, in the *Mokgoro* case and *Perumal v Janse Van Rensburg*³⁹⁷ (hereafter *Perumal*), the non-compliant documents were recently accepted and condoned by the courts to serve as the deceased's wills. The rulings in these cases are analysed, along with the influence of the *Van Wetten* decision on their final outcomes.

5.2.2 Dryden case

In the *Dryden* case, the deceased sent an email with testamentary provisions to his partner (the Applicant).³⁹⁸ The email document had the subject line read as "final will" and the first sentence was "hi, this serves as my final will and testament".³⁹⁹ On 13 January 2016 (nine days after the email was sent), the applicant emailed the deceased's financial advisor, asking whether the email "will serve as a formal will in front of a court in the unlikely event that he were to die?".⁴⁰⁰ The advisor responded, stating he was "not an expert," but noted that more information (like ID numbers and full names of beneficiaries) was needed and warned that "an email can always be contested as anyone could have signed it".⁴⁰¹ The deceased was copied on this response, leading the court to conclude that both the deceased and the applicant were aware of potential disputes regarding the validity of the email as a will.⁴⁰²

³⁹⁶ See chapter 2, para 6.2.1. of this study.

³⁹⁷ Unreported case number 081849/2023 (ZAGPPHC) of 18 February 2025.

³⁹⁸ *Dryden* para 2.

³⁹⁹ *Dryden* para 6.

⁴⁰⁰ *Dryden* para 14

⁴⁰¹ *Dryden* para 15.

⁴⁰² *Dryden* para 15.

5.2.3 Analysis of the intention requirement in the *Dryden* case

The court was not satisfied that the deceased intended the document to be his will.⁴⁰³ According to the court, the deceased had drafted the email out of concern that a dispute may arise regarding his estate.⁴⁰⁴ The court noted a distinction between the email sent and the unexecuted electronic document in the *Van der Merwe* case, based on the nature of the document and the deceased's final intent.⁴⁰⁵ However, Du Toit⁴⁰⁶ found similarities between the cases. He argues that in both instances the electronic document explicitly stated that its contents were the deceased's specific testamentary dispositions.⁴⁰⁷ These facts were sufficient to outweigh the minor factual differences; instead, the court focused on the format of the document.

The court concluded that the evidence (specifically the deceased's meticulous nature, his knowledge of formalities, the advisor's warning, and the subsequent "actions list") rendered it improbable that he would have intended the disputed will (the email) to be his last will and testament.⁴⁰⁸ The court held that the email was only an assurance that he intended to make the applicant his beneficiary, not a legally binding will.⁴⁰⁹ In addition, another fact that led to the dismissal was the lack of final testamentary intent, despite the deceased having drafted the document and labelled it as a "Final will".⁴¹⁰ This determination highlights that while section 2(3) allows documents lacking legal formalities to be accepted, the deceased's intention to treat that specific document as his last will and testament must be satisfied. In this case, subsequent correspondence and actions showed the deceased and applicant were aware that the email lacked validity and needed further formal action.

The court considered the principles set out in the *Van Wetten* case by assessing the document in light of its surrounding circumstances, but it failed to recognise that the

⁴⁰³ *Dryden* para 16.

⁴⁰⁴ *Dryden* paras 13-15.

⁴⁰⁵ *Dryden* para 18. In *Van Der Merwe* at para 3, the document looked and acted like a formal will, lacking only the final signatures while in *Dryden*, the document (an email) was never prepared or intended to be signed or witnessed.

⁴⁰⁶ Du Toit 2020 *OUCLJ* 159-160.

⁴⁰⁷ Du Toit 2020 *OUCLJ* 159-160.

⁴⁰⁸ *Dryden* para 16.

⁴⁰⁹ *Mokgoro* para.

⁴¹⁰ *Dryden* paras 2-3.

intention for a document to serve as a will had to exist at the time the document was created, which could only change upon creation of a new will or codicil.⁴¹¹ However, Faber⁴¹² noted that the court's reasoning rested on the absence of a consistent emphasis on the act of testation. He also concluded that ambiguity remains regarding the document requirement since the court declined to accept an emailed will due to its electronic nature.⁴¹³ Accordingly, the *Dryden* case contradicts the *Van Wetten* precedent that format is not a determining factor in applying section 2(3) when assessing intention.

5.2.4 *Mokgoro case*

In the recent *Mokgoro* case, the deceased left two wills: a valid 2014 will and an electronic will of 2021, which was drafted by a financial institution.⁴¹⁴ The applicants did not argue that the electronic signature should be accepted but relied on section 2(3), because the will did not meet the formalities in section 2(1) of the *Wills Act*.⁴¹⁵

Pertinent to the study is the intention requirement (the third jurisdictional fact). The court held that the intention requirement in section 2(3) of the *Wills Act* was met.⁴¹⁶ In light of the above facts, the court concluded that the email in question made it evident that the deceased intended the 2021 electronic will to serve as her final will and testament. Lever J found that the applicants successfully established the three jurisdictional facts required for relief under section 2(3) of the *Wills Act*.⁴¹⁷

5.2.5 *Analysis of the intention requirement in the Mokgoro case*

The court's determination of the intention was in line with the principles established in *Van Wetten*.⁴¹⁸ The court's decision hinged on prioritising the proven testamentary intent

⁴¹¹ *Van Wetten* para 21. De Waal and Schoeman-Malan *The Law of Succession* 76-77.

⁴¹² Faber 2022 *PELJ* 5-6.

⁴¹³ Faber 2025 *TSAR* 577-578.

⁴¹⁴ *Mokgoro* para 24. The applicants sought relief under section 2(3) of the *Wills Act* because the electronic will of 2021 failed to comply with prescribed formalities. The deceased transmitted the electronic will to her trusted confidants (witnesses), instructing them to affix her electronic signature in the designated areas marked "testatrix" on each page, and requesting them to sign as witnesses.

⁴¹⁵ *Mokgoro* para 45.

⁴¹⁶ *Mokgoro* paras 24-25; 55; and 64. The deceased's unequivocal identification of the will; the document's finality was confirmed; the deceased accepted the document as her own; and the admission by the opposing party

⁴¹⁷ *Mokgoro* para 65.

⁴¹⁸ The principles set forth by the *Van Wetten* case are outlined in para 4.7 of this study.

of the deceased over the technical failure of execution formalities, as envisaged by section 2(3). The case was novel because the failure of formality stemmed specifically from the use of electronic signatures, which the *Wills Act* does not accommodate. The court directly addressed this by stating that, conceptually, it could see no justification for allowing an erroneous reliance on an electronic signature, or the electronic sending or storage of a will, to defeat a testator's true intentions, so long as the relevant jurisdictional requirements are met.⁴¹⁹

The court accepted the 2021 will as intended by the deceased to be her will, despite the use of electronic signatures. The intention requirement was satisfied by examining the document in light of the surrounding facts (the email and affidavits) to ascertain the genuine intention of the testator. This principle was articulated in the *Van Wetten* case (para 12-16), even though the *Mokgoro* judgment did not specifically refer to *Van Wetten* by name. The email was decisive because the deceased requested that the will be signed, describing it as "my last will and testament".⁴²⁰ The *Mokgoro* judgment sets a strong precedent for using section 2(3) as a safeguard when testators mistakenly depend on modern technology (electronic signatures), for document execution. It affirms that genuine testamentary intent would not be defeated by technical defects, provided that the testator personally drafted or executed the document. Although electronic signatures still lack statutory recognition or validity for will execution, the court's decision offers a significant remedy for documents prone to being invalidated due to erroneous reliance on electronic signatures.

In essence, the *Mokgoro* case contributes to the flexible approach established in *Van Wetten* by extending the substance-over-form inquiry into the digital era, specifically regarding electronic signatures and the definition of execution.

5.2.6 *Perumal* case

In *Perumal*, the deceased made amendments to his will on his laptop, which he later sent to the executor for finalisation.⁴²¹ The executor indicated that he had emailed the revised will to the deceased with the changes included; however, that specific email could not be

⁴¹⁹ *Mokgoro* para 46.

⁴²⁰ *Mokgoro* paras 25 and 56.

⁴²¹ *Perumal* para 10.

located.⁴²² Thirty days before his death, when the deceased experienced health complications, he left a voice message for the executor, reminding him that he had neither seen nor signed the amended will.⁴²³ The court found that the amended will was indeed made by the deceased as his last will.

5.2.7 Analysis of the intention requirement in the Perumal case

The deceased's intention in the *Perumal* case was established through a thorough examination of the document itself and, crucially, the surrounding circumstances, which satisfied the mandatory intention requirement under section 2(3) of the *Wills Act*. The most compelling proof of the deceased's intention came from a communication sent shortly before his death, based on timing and content as follows:

- i. Exactly thirty days before he died (on March 9, 2023), the deceased sent a voice message to the executor.⁴²⁴
- ii. In the voice message, the deceased inquired about the amended will and explicitly pointed out that he had "not yet seen or signed my will, my amended will". He stated he wanted an update so he could "get it done".⁴²⁵

The court found that the voice message confirmed the applicant's version that the deceased had not received the executor's email containing the final amended document.⁴²⁶ Therefore, the failure to execute (sign) the document was due to non-receipt, and not due to a change of mind.⁴²⁷ The court found that the voice message conveyed not only firm intent but also a sense of urgency to finalise the will, proving he had not changed his mind about his will.⁴²⁸

Alongside the voice note, the applicant satisfied this required standard of proof by submitting incontrovertible evidence of Stanton's conduct in the period leading up to his death. Stanton personally drafted the amendments on his laptop in July 2022, intending

⁴²² *Perumal* para 11.

⁴²³ *Perumal* para 12.

⁴²⁴ *Perumal* para 21.

⁴²⁵ *Perumal* para 21.

⁴²⁶ *Perumal* para 21.

⁴²⁷ *Perumal* para 22.

⁴²⁸ *Perumal* para 22.

to reflect the applicant as his life partner.⁴²⁹ The deceased's intention was established by the combination of his personal drafting of amendments reflecting his life partner's status and the undisputed, late-stage voice message that conclusively proved his failure to formally execute the will was a matter of delay and administrative failure, not a lack of testamentary intent.⁴³⁰ Consequently, the court found the requirements of section 2(3) were met and ordered the Master of High Court to accept the amended document as his last will and testament.⁴³¹

The respondents argued that Stanton's failure to sign the document between August 2022 and his death in April 2023 suggested he had changed his mind.⁴³² The court found that this speculation was completely destroyed by the voice note, which proved that Stanton believed he had not yet received the final version to sign and was actively seeking to finalise it.⁴³³

Based on the above-mentioned undisputed facts, the court found that the deceased's intention to have the document accepted as his last will and testament was definitively established. The deceased's subsequent conduct (the voice message) actively supported the application, transforming speculative resistance into an undisputed fact. The successful condonation of an unsigned document in *Peruma* stands in favourable contrast to cases like *Dryden*, where the application to condone an unsigned email failed, partly because the deceased, after becoming aware of the potential validity disputes, failed to take further action to formalise the document. In *Dryden*, the subsequent conduct directly weakened the application, causing the document to appear less like a final will and more like a preliminary idea. The contrast illustrates that the application of section 2(3) hinges less on the form of the document (typed draft *versus* email) and more on conclusive proof of the deceased's final, unretracted intention that the specific defective document should govern their estate upon death, as established by the *Van Wetten* principles (examining the document and surrounding circumstances).⁴³⁴

⁴²⁹ *Peruma* paras 10, 20 and 21.

⁴³⁰ *Peruma* paras 20-22

⁴³¹ *Peruma* para 22-23.

⁴³² *Peruma* paras 19 and 20.

⁴³³ *Peruma* para 19, 20 and 22.

⁴³⁴ See para 4.7 of this study.

Faber⁴³⁵ noted that the signature is generally viewed as the formality that permits one to distinguish between drafts and wills. Although the SCA has stated that a lack of a signature is not a complete bar to a document being declared a will under section 2(3), scholars noted that the greater the non-compliance with formalities, the more evidence is required to satisfy the court of the deceased's intention.⁴³⁶ The success of *Perumal* rests on the court being satisfied that the lack of signature was explained by the surrounding circumstances (the voice message confirming non-receipt). A scholarly commentator recommends that courts adopt a principled and consistent approach to the intention requirement.⁴³⁷ The complexity in application of the intention requirement arises because the intention is often determined based on the format and wording of informal documents (like suicide notes, wish lists, or, in *Perumal*, a typed draft) analysed against surrounding circumstances.⁴³⁸ Further submission is that courts must desist from relying on equitable considerations at the expense of legal certainty when determining condonation applications. In *Perumal*, the court avoided purely equitable considerations by relying on the indisputable factual evidence of the deceased's recent voice message and sense of urgency to execute the will. This strong factual basis helped insulate the *Perumal* judgment from the critique aimed at cases where courts pushed the boundaries based on perceived fairness rather than clear intent, as occurred in the *Mabika* case.⁴³⁹

The *Perumal* judgment does not expressly cite or reference the *Van Wetten* case. Nonetheless, the court's reasoning and approach clearly embody the legal principles entrenched by *Van Wetten*'s framework for condonation applications. The court applied a two-part inquiry similar to *Van Wetten* (focusing on the document itself and the surrounding circumstances) and relies on concrete, objectively verifiable contextual evidence (the voice note) to establish intention, thereby revealing the implicit influence of that seminal decision on how the intention requirement is interpreted.

⁴³⁵ Faber 2025 *TSAR* 575-576.

⁴³⁶ *Perumal* para 17. See also *Van der Merwe* para 14.

⁴³⁷ Schoeman-Malan *et al* 2014 *Acta Juridica* 102-103.

⁴³⁸ Schoeman-Malan *et al* 2014 *Acta Juridica* 87-88 and 93-94.

⁴³⁹ See para 5.3.6 of this study for discussion on the *Mabika* case.

5.3 *Instruction to draft a will (application forms, letters & standard wills)*

5.3.1 *Introduction*

Earlier case law was clear that written instructions for drafting a will or an amendment to a will cannot be regarded as a will or an amendment to a will.⁴⁴⁰ Nonetheless, the decision in *Van Wetten* changed this narrative and condoned (from evidence shown) that a document, despite being in the form of a letter of instruction, as having been intended by the deceased to be his will.

This subsection deals with determining the deceased's intentions as outlined in documents that appear to instruct the drafting of wills or amendments to wills. The documents encompass, but are not limited to, the deceased's filled "Banks application (for a will) forms," "standard wills," or instruction letters/emails, as well as any comparable documentation containing instructions from the deceased for drafting his will, or where a third party is involved in the will's preparation.

The essential details of cases such as *Longfellow*, *Mabika*, *Estate Late Williams v Hendricks*,⁴⁴¹ (hereafter *Estate Late Williams*) the appeal case of *De Reszke v Maras*, *Delpont v Le Roux*⁴⁴² (hereafter *Delpont*) and *Samuels v Samuels*⁴⁴³ (hereafter *Samuels*) will be concisely outlined. This will be followed by a discussion and analysis of the courts' intention requirement, along with relevant commentaries. The cases were selected based on input from scholars, referrals from other courts, and the fact that they were decided by the court in different years following the *Van Wetten* judgment.

5.3.2 *De Reszke v Maras (Appeal case)*

In the *De Reszke* case, the court was confronted with a letter addressed to an attorney, containing instructions for the drafting of a will.⁴⁴⁴ Cronje J dismissed the appeal, confirming the decision of the *court a quo* that the deceased did not have the concurrent

⁴⁴⁰ Knoetze 2004 *THRHR* 145-145.

⁴⁴¹ Unreported. Case number 17638/2020 (ZAWCHC) of 19 April 2021.

⁴⁴² Unreported. Case number D1703/2021 (ZAKZDHC) of 24 November 2022.

⁴⁴³ Unreported. Case no. 2508/2022 (ZAWCHC) of 28 July 2023.

⁴⁴⁴ *De Reszke* paras 2 to 10 for complete facts.

intention for the document to serve as his final will.⁴⁴⁵ The dispute was whether the deceased, in drafting the document, intended the same to be his will.⁴⁴⁶

5.3.3 Analysis of the intention requirement in De Reszke case

The SCA examined the facts surrounding the document's creation as guided by the *Van Wetten* case (para 16), noting that the document was initially drafted as instructions to an attorney rather than the will itself.⁴⁴⁷

The court evaluated the format and context of the document in order to arrive at its decision as follows:

- i. The document was typed on a company letterhead and addressed to a specific attorney. It begins, "Dear Mr Burger," and states that the deceased requested his employee "to nominate a lawyer of choice to handle his last will and testament, with the following terms and conditions".⁴⁴⁸
- ii. The deceased had instructed his employee to appoint an attorney to draft his will.⁴⁴⁹
- iii. After the document had been signed, the deceased informed another lawyer that he was unhappy with it and wanted a new one, and he directed the lawyer to draft it.⁴⁵⁰
- iv. The document was delivered to the attorney.⁴⁵¹
- v. The deceased was a meticulous businessperson who had previously executed a valid will.⁴⁵²

⁴⁴⁵ *De Reszke* paras 18 and 20.

⁴⁴⁶ *De Reszke* para 11.

⁴⁴⁷ *De Reszke* para 12.

⁴⁴⁸ *De Reszke* para 9.

⁴⁴⁹ *De Reszke* para 3.

⁴⁵⁰ *De Reszke* para 15.

⁴⁵¹ *De Reszke* para 17.

⁴⁵² *De Reszke* para 1.

This court's ruling highlights the *Van Wetten* principle that the intent must be present when the document is created or signed for it to be recognised as a valid will according to section 2(3) of the *Wills Act* as follows:

- i. The inquiry into the deceased's intention in the case necessitated an examination of the document itself and also of the document in the context of the surrounding circumstances.⁴⁵³ Furthermore, the *De Reszke* judgment explicitly cited the dictum regarding this inquiry approach from the *Van Wetten* case. This confirms that the method of inquiry (looking at both the document and the surrounding facts to determine the existence of genuine testamentary intention) was explicitly adopted and adhered to.
- ii. The court held that the deceased failed to establish that the requisite intention existed at the time of the signing document.⁴⁵⁴ The conclusion was drawn from the subsequent actions of the deceased, which did not align with the notion that the document was considered his will. For example, on 21 October 2001, the deceased contacted Attorney (Barnard) to draft a new will, expressing dissatisfaction with the earlier version.⁴⁵⁵ In contrast to *Van Wetten*, the court's intention was determined at the same time as the creation and signing of the document on 5 September 1997.⁴⁵⁶
- iii. The document language in *De Reszke* case indicated a mandate for further actions, thus lacking completeness. The document included multiple instructions addressed at either the attorney or the employee, which further highlighted its instructional character. For instance, it instructed the attorney: "You are to appoint Jackson Neethling as Auditor."⁴⁵⁷

The judgment in *De Reszke* did more than just refer to the *Van Wetten* case; it adopted the principles established by it as the guiding framework for its entire investigation into the deceased's intention. The finding followed precedents like *Ex Parte Maurice* and

⁴⁵³ *De Reszke* para 12. See *Van Wetten* para 21.

⁴⁵⁴ *De Reszke* para 16.

⁴⁵⁵ *De Reszke* para 17.

⁴⁵⁶ See *Van Wetten* paras 19 and 26.

⁴⁵⁷ *De Reszke* para 10.

Anderson, which established that the intended instructions to another person for drafting a will cannot be condoned.⁴⁵⁸ Therefore, the judgment in this case clarified the distinction between condonable will and non-condonable instructions.

The SCA rejected the application in *De Reszke* despite the precedent in *Van Wetten* because the specific factual contexts revealed a different testamentary intention regarding the documents. While both cases involved documents labeled or phrased as instructions to an attorney, the courts' determination turned on whether the deceased intended the document to be the final expression of their will or a mere precursor to one

5.3.4 *Longfellow case*

In the *Longfellow case*, the applicant was married to the deceased in 1995.⁴⁵⁹ In April 2007, the deceased was diagnosed with brain cancer, which subsequently led to a stroke, causing her hospitalisation.⁴⁶⁰ After being discharged from the hospital, she was sent home as there were no further medical options available.⁴⁶¹ As the deceased neared the end of her life, the applicant acted to secure her a will. When he could not obtain independent guidance, he bought a pre-printed will form from the retail store PNA (formerly CNA).⁴⁶² He told the deceased that he was going to fill in the blank spaces of the form to reflect that he would inherit the estate and be nominated to act as executor, a certain policy would be shared among the deceased's children, and that all previous wills would be revoked.⁴⁶³ The document was read back to the deceased, and she agreed to the contents thereof.⁴⁶⁴ The applicant arranged witnesses in order to witness the draft will and its filing and completion, but failed.⁴⁶⁵ The draft document was, therefore, neither signed nor witnessed by the deceased or witnesses. The court found that the applicant, not the deceased, initiated the drafting of the will, and that the draft reflected the applicant's wishes rather than the deceased's.⁴⁶⁶

⁴⁵⁸ See paras 3.2.2.1 and 3.2.2.3 of this study. Du Toit 2014 *APLJ* 72-73.

⁴⁵⁹ *Longfellow* paras 1-5.

⁴⁶⁰ *Longfellow* paras 6-7.

⁴⁶¹ *Longfellow* para 7.

⁴⁶² *Longfellow* para 50.

⁴⁶³ *Longfellow* para 52.

⁴⁶⁴ *Longfellow* para 55.

⁴⁶⁵ *Longfellow* para 56.

⁴⁶⁶ *Longfellow* paras 24 and 28-29. The court stated *ex abundanti*, that the applicant had unduly influenced the deceased.

5.3.5 Analysis of the intention requirement in the *Longfellow* case

The *Longfellow* case, therefore, followed the fundamental legal framework reinforced by *Van Wetten*, which required judicial scrutiny of the document and surrounding circumstances to establish the deceased's intention. This legal framework was the necessary basis for the consideration of facts in the *Longfellow* case. The court concluded that, in light of those circumstances, the document expressed the applicant's wishes rather than those of the deceased and, therefore, did not satisfy the intention requirement.⁴⁶⁷ Van der Linde⁴⁶⁸ expressed the view that, while the final decision in *Longfellow* is justified, the court unnecessarily entertained the intention requirement when the case could have been resolved on the second requirement (personal drafting or execution) being absent, given that the document was drafted by the husband. The finding that the document reflected the husband's will (not the deceased's), is jurisprudentially linked to undue influence, which displaces true intention.⁴⁶⁹ Van der Linde cautioned against equating a failure of intention under section 2(3) with common law undue influence, even though the facts in *Longfellow* clearly illustrated the difference between the two.⁴⁷⁰

In essence, *Longfellow* failed to persuade the court because the surrounding circumstances did not satisfy the court, on balance of probabilities, that the deceased intended the draft to be her final will.⁴⁷¹ Unlike the *Van Wetten* case, where extreme circumstances (contemplation of death) outweighed the document's informal nature, proving testamentary intention. In the *Longfellow*, the following factors created a gap in proving the deceased's genuine testamentary intention:

- i. lack of deceased initiation;⁴⁷²

⁴⁶⁷ *Longfellow* para 28.

⁴⁶⁸ Van der Linde 2012 *De Jure* 424-425. The document was not drafted or executed by a person who has since died.

⁴⁶⁹ Van der Linde 2012 *De Jure* 416-417.

⁴⁷⁰ Van der Linde 2012 *De Jure* 416-417

⁴⁷¹ The fact that the applicant initiated the drafting process, the document provisions were inconsistent with the deceased's wishes, e.g. the applicant's refusal to look after the daughter, and failure to formalise the document over a period of two weeks before death.

⁴⁷² *Longfellow* para 28.

- ii. failure to reflect the deceased's wishes;⁴⁷³
- iii. absence of independence confirmation;⁴⁷⁴
- iv. link to undue influence;⁴⁷⁵ and
- v. improbable intent regarding children.⁴⁷⁶

5.3.6 *Mabika case*

In the *Mabika* case, the deceased arranged to see a financial planner from the bank in order to give instructions to draft a will.⁴⁷⁷ She completed a document called "Application for the drafting of a will" and "Client information" wherein various items of personal information were contained.⁴⁷⁸ The document further included her specific instructions as to who was to benefit from her estate.⁴⁷⁹ The document further stated that the bank would prepare a will in accordance with her instructions, and that the will would be valid only once the completed document had been signed in terms of section 2(a)(i) of the *Wills Act*.⁴⁸⁰

The judgment lacks information on whether the deceased signed the forms or if the bank prepared a will per her instructions. The deceased was supposed to come later to sign a will once prepared by the bank.⁴⁸¹ However, her illness overtook her as she was hospitalised and, unfortunately, she died without executing a valid will.⁴⁸² An application under section 2(3) was submitted concerning her written directives to the bank, and the court had to determine for the first time whether an "application form" was intended by the deceased to serve as her will.

⁴⁷³ *Longfellow* para 28

⁴⁷⁴ While the applicant claimed he had read the document back to the deceased and she agreed, there was no independent evidence to corroborate this, and the surrounding circumstances failed to meet the onus of proof on balance of probabilities.

⁴⁷⁵ Van der Linde 2012 *De Jure* 416-417.

⁴⁷⁶ Given the applicant's admission that that he had a poor relationship with one of the deceased's daughters and refused to care for her, the court found it improbable the deceased would leave her entire estate to him, essentially disinheriting her children.

⁴⁷⁷ *Mabika* para 11.

⁴⁷⁸ *Mabika* para 11.

⁴⁷⁹ *Mabika* para 11.

⁴⁸⁰ *Mabika* para 11.

⁴⁸¹ *Mabika* para 11.

⁴⁸² *Mabika* paras 11 and 15.

5.3.7 Analysis of the intention requirement in the *Mabika* case

Moshidi J condoned the "application form" that contained instructions for the drafting of a will, besides the document's appearance and general purview.⁴⁸³ She invoked equitable consideration in support of the decision to issue a condonation order.⁴⁸⁴ A commentary was made that the document in question was clearly not meant to serve as a will but instead as guidance for drafting one, and thus, the decision in the *Mabika* case was incorrect.⁴⁸⁵ The court determined that, given the circumstances, it would be "greatly unjust" to recognise the document as the deceased's will, particularly since the husband would "unfairly" gain from it. This intention was not evident in the document, and the judgment did not clarify the origin of this notion. The judge's reliance on unfairness and injustice, and a desire to prevent the abusive husband from inheriting, were regarded as inappropriate, as the South African law does not permit the invocation of fairness or equity as freestanding norms in resolving legal disputes; such considerations are immaterial to an application for condonation.⁴⁸⁶

The decision in *Mabika* was criticised by scholars for being jurisprudentially unsound.⁴⁸⁷ The critiques focused on the court's alleged failure to correctly apply the intention requirement of the condonation provision, arguing that the outcome, while emotionally satisfying, lacked a solid legal basis.⁴⁸⁸ Most criticisms were based on failure to engage the intention requirement adequately,⁴⁸⁹ and reliance on extraneous factors.⁴⁹⁰ Wood-Bodley contended that Moshidi J failed to appreciate the difference between a broad intention to benefit or exclude a person from inheritance and the specific intention that a given document should serve as one's will.⁴⁹¹ It was argued that the judgment does not reflect the usual approach of South African courts to instructions for drafting a will in the context of a section 2(3) application, and that the result should have been aligned with

⁴⁸³ *Mabika* para 19.

⁴⁸⁴ *Mabika* para 15. Schoeman-Malan *et al* 2014 *Acta Juridica* 89-90.

⁴⁸⁵ Schoeman-Malan *et al* 2014 *Acta Juridica* 89-90.

⁴⁸⁶ Van der Linde 2012 *De Jure* 421-422. Du Toit 2014 *APLJ* 73-74.

⁴⁸⁷ Du Toit 2014 *APLJ* 73-74.

⁴⁸⁸ Wood-Bodley 2013 *SALJ* 244-245.

⁴⁸⁹ Du Toit 2014 *APLJ* 73-74. Wood-Bodley 2013 *SALJ* 247-248 and 254-256.

⁴⁹⁰ *Mabika* at para 15. Moshidi J based the decision largely on the surrounding circumstances, emphasising the first respondent's cruelty, the deceased's fear and estrangement, and the fact that she clearly intended to disinherit him.

⁴⁹¹ Wood-Bodley 2013 *SALJ* 256-257.

cases such as *Letsekga* and *De Reszke*, where condonation was refused.⁴⁹² The cited criticisms of the *Mabika* decision suggest that its ruling contradicts the precedent established by *Van Wetten* at para 18 concerning the application of section 2(3) of the *Wills Act* where imminent death negated the instruction interpretation.

5.3.8 *Estate Late Williams v Hendricks*

In the *Estate Late Williams* case, the deceased signed a bank document (will application) in which she gave instructions to a bank to draft her last will and testament.⁴⁹³ The deceased passed away due to ill health, and before her instructions for the drafting of a will were carried out.⁴⁹⁴ A condonation application was brought to court in respect of the bank's will application document.

5.3.9 *Analysis of the intention requirement in the Estate Late Williams case*

The court dismissed the application because the applicants could not prove that the deceased intended the document to be her will, as required by section 2(3).⁴⁹⁵ The court emphasised that the document's contents and the surrounding circumstances indicated clearly that the deceased did not intend it to be anything other than a draft. The counsel for the applicant relied on the *Van Wetten* case that a liberal approach should be adopted.⁴⁹⁶ However, the court drew a distinction between the facts of this case and those in *Van Wetten*.⁴⁹⁷ In contrast, the court noted that there was no evidence suggesting the deceased intended the bank application to serve any purpose other than what it plainly appeared to be (an instruction to prepare a will).⁴⁹⁸ The court also expressed reservations about the reasoning in the *Mabika* case, suggesting that the judge in the matter was guided by the equities of the case rather than strict adherence to the prescript of section 2(3) requiring proof of testamentary intention.⁴⁹⁹

⁴⁹² Du Toit 2014 *APLJ* 73-74. See para 3.2.2.2 and 5.3.2 of this study for the discussion of judgments in *Letsekga* and *De Reszke*.

⁴⁹³ *Estate Late Williams* para 2-5.

⁴⁹⁴ *Estate Late Williams* para 8.

⁴⁹⁵ *Estate Late Williams* paras 16 and 19.

⁴⁹⁶ *Estate Late Williams* para 10.

⁴⁹⁷ *Estate Late Williams* paras 4 and 11. According to the court in *Van Wetten*, the SCA found that the letter of instruction to an attorney was intended by the deceased will because of the surrounding circumstances, and was distraught and contemplated suicide.

⁴⁹⁸ *Estate Late Williams* para 12.

⁴⁹⁹ *Estate Late Williams* para 14-15.

It is concluded that the *Van Wetten* case had directly influenced the judgment in the *Late Estate Williams* by primarily serving as a point of comparison and distinction regarding the critical requirement of intention under section 2(3) of the *Wills Act*. This confirmed that application forms cannot be condoned. Such documents are intended as instructions to the banks or third parties for the drafting of the will and are not intended to operate as wills themselves. Faber⁵⁰⁰ concluded that *Late Estate Williams* serves as a good example of progress concerning the approval of an application form for drafting a will. The ruling reaffirmed the established principles in *Ex Parte Maurice* and *De Reszke*, which stressed that the doctrine of testamentary rescue does not extend to mere instructions given to another person to draft a will. The instructions for the preparation of a will lack the immediacy of intention required because the testator anticipates the creation and execution of a subsequent document.⁵⁰¹ The court confirmed that the unique circumstances and questionable judicial reliance on fairness and injustice in the *Mabika* case should not be followed when addressing documents that are clearly only preliminary steps in the will-making process.

5.3.10 Delport v Le Roux

In *Delport v Le Roux*, it was alleged that the deceased instructed an accountant to draft the will.⁵⁰² The accountant drafted the will and read it to the deceased, who signed it in the accountant's presence.⁵⁰³ However, the signing occurred without two witnesses, thus failing to meet the requirements outlined in section 2(1)(a)(ii) and (iii) of the *Wills Act*.⁵⁰⁴

5.3.11 Analysis of the intention requirement in the Delport case

The court was not satisfied that the requirement of section 2(3) was satisfied, primarily based on the precedent of *Webster*.⁵⁰⁵ The court noted that section 2(3) is intended to cure non-compliance only when the document was drafted or executed by the deceased

⁵⁰⁰ Faber 2025 *TSAR* 577-578.

⁵⁰¹ Du Toit 2014 *APLJ* 69-70.

⁵⁰² *Delport* para 5.

⁵⁰³ *Delport* para 5.

⁵⁰⁴ *Delport* paras 5-7.

⁵⁰⁵ See para 3.2.2.2 for discussion in *Webster* case.

personally.⁵⁰⁶ The court noted the circumstances that led to the drafting of the document and the document's contents. Examination into the deceased's circumstances revealed contradictory evidence.⁵⁰⁷ Despite the aforementioned circumstances, the court was not satisfied that the document was intended by the deceased to be his will.⁵⁰⁸ The court's primary reason for dismissal was the manner in which the document was drafted and executed, rather than focusing on the intention of the deceased regarding the document.⁵⁰⁹ Faber⁵¹⁰ contended that the court did not adequately differentiate between the crucial, basic drafting and execution of the will, which is a fundamental distinction when applying the second requirement. In *Van Wetten's* judgment, the meaning of "drafted" or "executed" has been acquired from the *Bekker* case, which requires that the document must have been drafted by the deceased person personally.⁵¹¹ The *Delpont* used the same principle (derived from *Webster*) to conclude that the legislation did not intend to validate an unsigned document drafted by someone other than the deceased. The court emphasised that the intention must be demonstrated in writing in his own hand.⁵¹² Because the will was drafted by an accountant and not the deceased himself, the requirements of section 2(3) were not satisfied. The case contributed to the existing legal uncertainty regarding the interpretation and application of section 2(3) of the *Wills Act*, due to the error related to the requirements for condonation, as stated above.

5.3.12 *Samuels v Juries*

The dispute in the *Samuel* case concerned a document referred to as a "candidate will," which was derived from a handwritten "draft will" created by the deceased and the first applicant in May 2003.⁵¹³ A candidate will differed materially from the 2003 handwritten

⁵⁰⁶ *Delpont* para 23-24. The case did not specifically reference the *Van Wetten* principles instead, it concentrated on the interpretation and application of section 2(3) while relying on the precedent established in the *Webster* case.

⁵⁰⁷ The applicant averred that they cared for the deceased as he was abandoned by his family. The respondents countered arguments that revealed that the applicant's claims were false, and they were supporting the deceased financially. Also see *Delpont* para 4, and paras 12-13.

⁵⁰⁸ *Delpont* paras 24 and 27.

⁵⁰⁹ *Delpont* para 24.

⁵¹⁰ Faber 2025 *TSAR* 577-578. He asserts the distinction is crucial, as after the *Bekker* case ruling, an unexecuted document by a third party cannot be condoned.

⁵¹¹ *Van Wetten* para 15.

⁵¹² *Delpont* para 21.

⁵¹³ *Samuels* para 13.

draft.⁵¹⁴ In late 2006, just a few months prior to the drafting of the "candidate will", the deceased suffered a stroke.⁵¹⁵ This stroke resulted in the deceased losing the ability to read, write, and speak.⁵¹⁶ The first applicant and the deceased signed the "candidate will" on 14 February 2007, with the deceased using his right thumbprint on both pages.⁵¹⁷ The candidate failed to meet the valid will requirements as it has the deceased's thumbprint was placed without a Commissioner of Oaths' presence, and the two witnesses did not sign simultaneously.⁵¹⁸

5.3.13 Analysis of the intention requirement in Samuels case

The court concentrated exclusively on the intention requirement of section 2(3).⁵¹⁹ The court found that the applicant's averments were deficient because they failed to explain how the contents of the will were conveyed to the deceased (who could not read, write, or speak) on 14 February 2007, and how the deceased communicated his agreement.⁵²⁰

The *Van Wetten* case was cited as a precedent to define the scope of inquiry needed to satisfy the intention requirement under section 2(3).⁵²¹ By relying on *Van Wetten*, the court was directed to look beyond the mere existence of the thumbprint and scrutinise the facts surrounding the document drafting, particularly given that the deceased's inability to read, write, or speak after a stroke.⁵²² The examination uncovered inconsistencies in the applicant's case, namely failure to describe the communications and any agreement, incorrect portrayal of the amendments to the will, and uncertainty as to who the beneficiaries are.⁵²³ The applicant failed to discharge the burden of proof that the "candidate will" reflected the deceased's intention, especially when considering the views against the deceased's circumstances and material discrepancies.⁵²⁴ Hofmeyr

⁵¹⁴ *Samuels* para 15. Examples of differences include adding a second immovable property, new cash provisions, and policy changes..

⁵¹⁵ *Samuels* para 4.

⁵¹⁶ *Samuels* para 4.

⁵¹⁷ *Samuels* para 14.

⁵¹⁸ *Samuels* paras 3 and 21.

⁵¹⁹ *Samuels* para 29. The court made no determination regarding the "draft" requirement, because the necessary intent must still be established for the application to succeed.

⁵²⁰ *Samuels* para 34-35. The applicant's reply that the deceased communicated by nodding and showing a thumbs up, was found insufficient by the court. Also see para 37.

⁵²¹ *Samuels* para 30-31. *Van Wetten* para 16.

⁵²² *Samuels* paras 4 and 33.

⁵²³ *Samuels* paras 5-6, 17-18 and 35.

⁵²⁴ *Samuels* paras 32-34.

AJ stated that the applicants did not discharge their burden of proving the intention due to many and material discrepancies, and failure to make a complete and fair disclosure, noting the highlighted standard of proof required in section 2(3) applications.⁵²⁵ The court's main concern was the lack of evidence that the deceased understood and intended the final document, given its material differences from the prior draft and the communication difficulties.⁵²⁶ It was crucial for the applicants to prove that the deceased, post-stroke, truly understood and intended the altered document to be his will.

The Court also applied the *Van Wetten* principle of the surrounding circumstances.⁵²⁷ The court similarly focused intensely on the surrounding circumstances, particularly the deceased's physical and mental state, to assess the validity of the purported intentions. The court applied the *Van Wetten* approach, requiring compelling proof that the deceased intended the disputed document as his final will, and found the evidence insufficient under that strict scrutiny. The application was therefore justifiably dismissed, following the legal framework established by the *Van Wetten* case.

The *Samuels* case played an important role in the interpretation and application of section 2(3), placing emphasis on the high evidential standards and good faith. The court emphasised that the threshold for proving intention is high, observing that in section 2(3) applications where parties claim to speak on behalf of someone who is absent, they are required to act with the utmost good faith and disclose all relevant facts and evidence to the court.⁵²⁸ Due to substantial inconsistencies in the evidence, the court found the case deficient in proving the crucial element of intention and, therefore, dismissed the application. The facts in *Samuels* are similar to *Longfellow*, and both cases serve as cautionary examples regarding the application of section 2(3), where an incapacitated testator relies on an interested family member to create a will, illustrating the court's

⁵²⁵ *Samuels* paras 31 and 38. The court noted that the applicants erroneously described the changes as "small" and relating only to "movables". However, the court identified a crucial material difference: the added provision concerning a second immovable property not mentioned in the 2003 draft.

⁵²⁶ *Samuels* paras 23-37.

⁵²⁷ *Van Wetten* paras 14, 19 and 26.

⁵²⁸ *Samuels* para 31.

strict requirement that the applicant must prove, unequivocally and with full disclosure, the deceased's final intention regarding that specific document.⁵²⁹

5.4 Analysis of the intention requirement in the context of informal documents (suicide note, "wish list", "diary extract" and journal)

5.4.1 Introduction

This subsection will explore how the courts dealt with the intention requirement in informal documents such as suicide notes, wish lists, and diary extracts. Only the facts pertaining to the relevant surrounding and background circumstances of the cases and decisive to the judgment are stated. Cases like *Smith* (involving suicide notes), *Taylor* ("wish list"), *Dikgale* ("diary extract"), and *Qhali v Rikhotso*⁵³⁰ (journal) were selected as they each represent different types of informal documents that are eligible for condonation under section 2(3) of the *Wills Act*.

5.4.2 Smith case (suicide note)

In the *Smith* case, the court *a quo* refused condonation of a document (suicide note) as an amendment to a will.⁵³¹ The deceased signed the suicide note with his nickname and placed it under a crucifix on the kitchen counter, where it was found after his death.⁵³² The note was a personal letter addressed to his partner and, most importantly, included instructions regarding the disposition of his property.⁵³³ The SCA found the suicide note clear and unequivocal, intended by the deceased to amend his will.⁵³⁴

5.4.3 Analysis of Smith's judgment

In the analysis of the intention requirement, the SCA confirmed and used the analytical framework established in the *Van Wetten* case.⁵³⁵ The decision in *Smith* focused on substance over form, in that despite the document appearing informal, the SCA illustrated

⁵²⁹ The similar facts in both cases stem from the testator's physical incapacity, the document being drafted by a third party, and concerns regarding the authenticity and influence.

⁵³⁰ Unreported. Case number 9629/2020 (ZAGOHHC) of 16 September 2022. (hereafter *Qhali*).

⁵³¹ *Smith* paras 1 and 4.

⁵³² *Smith* para 12-13. The deceased had an existing will, which was locked in a brown envelope located in a safe.

⁵³³ *Smith* para 13.

⁵³⁴ Wood-Bodley 2011 *PER* 619-620. Faber 2022 *PELJ* 6-7.

⁵³⁵ *Smith* para 7. See also *Van Wetten* para 16.

that the power of condonation is not restricted to documents that resemble formal wills but also applies to informal documents. Faber⁵³⁶ considered *Smith* as “perfectly aligned with *Van Wetten v Bosch*” because the SCA in both cases focused on the substance of the document (the intention to dispose of property) rather than the format. He concludes that the decision in *Smith* emphasises the need to seek the deceased’s true intention and not be blinded by the mere form of the document.⁵³⁷ The inference that the deceased was contemplating suicide was decisive in establishing the requisite intention. In the case of *Smith*, the note was penned on the day of his death, leading the SCA to reason that the deceased did not intend the letter to serve as an amendment to his will, as he knew he was about to take his own life.⁵³⁸

The core principle derived from the *Van Wetten* case is that an informal document contemplating imminent death is deemed to be the final testamentary instruction because drafting a formal will later, would be nonsensical. This was also a key factor in the *Smith* case.⁵³⁹ The court looked past the format and focused on the fact that the suicide notes clearly embodied the act of testament.⁵⁴⁰

The *Smith* case highlighted the practical difficulty in separating testamatory intention (required under section 2(3)) from the testamentary capacity (required under section 4). The Court *a quo* was concerned with the rationality (rational state of the deceased due to depression) and used this doubt regarding the deceased's mental state to question whether he had the requisite intention to mend his will.⁵⁴¹ The SCA focused on the intention only, aligning with the legal principle that section 2(3) proceedings focus solely on the intention to create a will, not the capacity to do so.⁵⁴² The *Smith* judgment confirmed the *Van Wetten* case’s flexible, functional application of section 2(3) to give effect to a testator’s clear, unequivocal intention, even in an informal suicide note, thereby extending condonation to a non-testamentary document that embodies testation.

⁵³⁶ Faber 2022 *PELJ* 6-7. Wood-Bodley 2011 *SALJ* 619-620

⁵³⁷ Wood-Bodley 2011 *SALJ* 619-520.

⁵³⁸ *Smith* para 14. See also Wood-Bodley 2011 *SALJ* 616-617.

⁵³⁹ Wood-Bodley 2011 *SALJ* 616-617.

⁵⁴⁰ Faber 2022 *PELJ* 2-3 and 6-7.

⁵⁴¹ *Smith* para 4. Wood-Bodley 2011 *SALJ* 614-615.

⁵⁴² Wood-Bodley 2011 *SALJ* 617-618. See also De Waal 2010 *Annual Survey of South African Law* 1175-1176.

5.4.4 *Taylor case ("wish list")*

In the *Taylor* case, the deceased had executed a will on 23 March 2006 in terms of which he bequeathed his immovable property to his children, and personal effects and residue to his wife (the applicant).⁵⁴³ On 6 September 2006, he drafted another document ("wish list") on the distribution of some of his movable assets and the use of his immovable property after his death.⁵⁴⁴ The "wish list" bore a date and his signature, but was not attested to by witnesses.⁵⁴⁵ Griffiths J refused condonation of the "wish list" on the grounds that the testator had not formed the intention required by section 2(3).⁵⁴⁶ The reasons and analysis of the court's decision, which led to the rejection of the document refusal, will be discussed in the following subsection.

5.4.5 *Analysis of Taylor's judgment*

The court stated that the language employed in the document did not demonstrate the intention to amend his last will and testament.⁵⁴⁷ Instead, it appeared to indicate the deceased desired his family to work together to distribute the assets fairly and equitably. Faber⁵⁴⁸ opined that the deceased intended the "wish list" to be merely a guide in the distribution of his assets rather than an amendment of his existing will. He noted that the intent that the document should serve as guidance necessarily excludes the dispositive intention and *animus testandi*.⁵⁴⁹ This exclusion meant that the document was disqualified as one embodying the act of testation.⁵⁵⁰ The court noted that, while the deceased must have known that death was approaching, the evidence did not establish that it was imminent, and it was improbable that he would have a chance to have the document formally executed even if he had desired to do so.⁵⁵¹

The circumstances in *Taylor* differ significantly from *Smith* and *Van Wetten*, where the deceased contemplated suicide when drafting the documents (suicide note and letter).

⁵⁴³ *Taylor* para 7.

⁵⁴⁴ *Taylor* para 9.

⁵⁴⁵ *Taylor* para 10.

⁵⁴⁶ *Taylor* paras 13-16 and 22-23. Also see Schoeman-Malan *et al* 2014 *Acta Juridica* 89-90.

⁵⁴⁷ *Taylor* para 15. Also see Van der Linde 2012 *De Jure* 423-424.

⁵⁴⁸ Faber 2022 *PELJ* 8-9.

⁵⁴⁹ Faber 2022 *PELJ* 8-9.

⁵⁵⁰ Faber 2022 *PELJ* 8-9.

⁵⁵¹ *Taylor* para 20. See also Du Toit 2014 *APLJ* 18-19.

These were the compelling factors in these cases that led the court to find in favour that they had intended the documents to be their final wills.⁵⁵² In both *Taylor* and *Smith V Parsons*⁵⁵³ (hereafter *Smith quo*), the courts refused to condone the suicide note (*Smith quo*) and the wish list (*Taylor*) on similar grounds, namely that the document format and structure were “not the type ... normally found in testamentary documents”.⁵⁵⁴ In contrast, in the *Smith* case the SCA reached the opposite conclusion, holding that the deceased’s intention to amend the will was expressed clearly and unequivocally in the instructions set out in the suicide note.⁵⁵⁵ In addition, the “wish list” was drafted six months following the execution of his will and about two months before his passing, indicating that his death was not imminent. The evidence failed to substantiate the claim that his death was so near that he would not have had the chance to formally execute the document if he had chosen to do so.⁵⁵⁶

The court's refusal to grant condonation was deemed “hardly surprising” by Du Toit,⁵⁵⁷ due to its failure to demonstrate finality, aligning with the uniform approach of South African courts regarding the intention requirement of the condonation provision. The case is noted by Du Toit⁵⁵⁸ for supporting the reasoning established in *Van Wetten* (which also dealt with a deceased's final intent regarding an informal document), despite having a different outcome.

5.4.6 *Dikgale* case (“diary extract”)

In *Dikgale*, the court was confronted with an informal document referred to as “diary extracts” found among the deceased's belongings, having directives regarding the handling of her property upon death.⁵⁵⁹ Teffo J was satisfied that the deceased intended the “diary extracts” to operate as her will.⁵⁶⁰

⁵⁵² See paragraphs 4.5 and 5.4.3 of this study. Van der Linde 2012 *De Jure* 423-424.

⁵⁵³ *Smith v Parsons* 2009 3 SA 519 (D).

⁵⁵⁴ *Smith quo* para 23. *Taylor* para 19.

⁵⁵⁵ *Smith* case para 15.

⁵⁵⁶ Du Toit 2014 *APLJ* 77-76.

⁵⁵⁷ Du Toit 2014 *APLJ* 75-76.

⁵⁵⁸ Du Toit 2014 *APLJ* 75-76.

⁵⁵⁹ *Dikgale* para 4.

⁵⁶⁰ *Dikgale* paras 18-19.

5.4.7 Analysis of *Dikgale's* judgment

The court in *Dikgale* applied the legal framework established in *Van Wetten* by focusing on the intention requirement.⁵⁶¹ Regarding the examination of the document and its surrounding circumstances, the *Dikgale* case relied on several factors inherent in the document and its contents to determine the finality of the intention.⁵⁶² Du Toit⁵⁶³ argued that the divergent and contentious outcomes in cases *Dikgale* and *Mabika* may be partially attributable to the fact that testamentary rescue cases in South African High Courts are frequently heard by single judges. He contended that the courts' interaction with the legal principles concerning the necessary intention for testamentary rescue has been minimal at most.⁵⁶⁴ The criticisms directed at earlier similar rulings for failing to understand the particular intent needed for testamentary rescue are equally relevant to Judge Teffo's decision in *Dikgale*.⁵⁶⁵ Even though the *Van Wetten* framework set the main focus of the inquiry in *Dikgale*, the court's engagement with the principle lacked the thoroughness that jurisprudence requires.

5.4.8 *Qhali v Rikhotso (journal)*

In the *Qhali* case, a "journal" was presented to the court for condonation, which set out the deceased's instructions regarding the distribution of the estate and was written in her own handwriting.⁵⁶⁶ The court found that the plaintiffs had satisfied the requirements of section 2(3).⁵⁶⁷

5.4.9 The analysis of *Qhali's* judgment

The court found that the "journal" constituted the deceased's final instruction regarding the assets.⁵⁶⁸ The court followed the principle established in *Van Wetten* as follows:

⁵⁶¹ *Van Wetten* para 16. *Dikgale* para 24.

⁵⁶² *Dikgale* paras 4, 10, and 23. The diary entries addressed the distribution of assets, were written and signed, and included an analysis of the close relations between the deceased and the applicant.

⁵⁶³ Du Toit 2014 *APLJ* 76-77.

⁵⁶⁴ Du Toit 2014 *APLJ* 77-76.

⁵⁶⁵ Du Toit 2014 *APLJ* 76-77.

⁵⁶⁶ *Qhali* paras 4-5.

⁵⁶⁷ *Qhali* paras 96 and 115.

⁵⁶⁸ *Qhali* para 115.

- i. The court analysed the “journal” contents in the context of the surrounding circumstances.⁵⁶⁹
- ii. The finality in the *Qhali* case was established primarily through the specificity and comprehensive nature of the distributive decision regarding the assets, policies, and personal belongings, demonstrating that the deceased was trying to sort out her affairs while facing looming death.⁵⁷⁰
- iii. The timing of the intention – the intention was clear in the context of the deceased's impending death from cancer, as noted in the “journal” entries in September 2006.⁵⁷¹

In conclusion, the approach used in the *Qhali* case to determine whether the deceased intended her “journal” to be a final will, used the criteria regarding the testamentary intent and finality established by the *Van Wetten* case. The outcome on *Qhali* demonstrated that a South African court, when applying the condonation power, is willing to look beyond the superficial appearance of the document to the distributive intention that the document must embody the written manifestation of the testator’s dispositive intention and *animus testandi*.⁵⁷² Similar to the *Van Wetten* judgment, the extraordinary circumstances surrounding the creation and preservation of the document were decisive in proving the deceased intended the documents to be the final will, overriding their informal appearance.⁵⁷³

5.5 Conclusion

The *Van Wetten* ruling provided the essential framework for determining testamentary intent, guiding courts to look beyond technical formalities to the true disposition of the deceased. Ultimately, the trajectory of South African succession law confirms that the inquiry mandated by *Van Wetten* in analysing the document and its surrounding context

⁵⁶⁹ *Qhali* paras 26-27, 98-99, and 101-106. Awareness of mortality; a journal containing final instructions for the disposal of the estate and specific directives and bequests. See also *Van Wetten* para 12.

⁵⁷⁰ *Qhali* paras 101 and 114. *Van Wetten* para 26.

⁵⁷¹ *Qhali* paras 100-101. *Van Wetten* paras 20-21, Faber 2022 *PELJ* 10-11.

⁵⁷² Faber 2022 *PELJ* 2-3.

⁵⁷³ *Qhali* paras 10, 19-20, and 102. See also Faber 2022 *PELJ* 18-19.

remains the crucial mechanism for reconciling statutory criteria with the genuine, dispositive intentions of the deceased.

This subsection examined how *Van Wetten's* principles are applied across various contexts, including the treatment of electronic documents, instructions for drafting a will, and informal testamentary documents, with a focus on the intention requirement of section 2(3) of the *Wills Act*. The analysis of case law revealed a strong adherence to, and evolution of, the principles established in seminal cases:

- i. Judgments concerning instructional documents hinged on distinguishing between a general intent to create a will and the requisite intent that the document itself be the final will.
- ii. The principle derived from *Van Wetten* that the extraordinary circumstances surrounding the creation of a document can outweigh its informality was decisive in several informal document cases.

While most courts adhere strictly to the *Van Wetten* principles, there are instances where judges have applied the intention requirement divergently (*Mabika* case) or where the application lacked the thoroughness required by jurisprudence (*Dikgale* case).

The *Van Wetten* decision cemented the contextual and flexible approach to the intention requirement in South African succession law, allowing courts to validate documents based on proven genuine intent, even when lacking formalities. However, the analysis shows that the outcome in condonation cases often rests on the court's subjective assessment of the "surrounding circumstances," particularly whether the deceased truly intended the specific non-compliant document (not just the instructions within it) to be their final testament. This distinction is clearest when comparing the success of documents drafted in the immediacy of death (*Van Wetten*, *Smith* and *Qhali*) against the failure of documents intended merely as instructions for future action (*De Reszke* and *Williams*).

6 Conclusion and recommendations

6.1 Conclusion

The study analysed post-*Van Wetten* case law, prompted by earlier courts' divergent outcomes when interpreting the intention requirement. The courts were shifting between a strict, literal approach (rejecting instructions) and a liberal approach, with no consensus. This study was conducted to answer the question of how courts have interpreted and applied the intention requirement in section 2(3) of the *Wills Act* following the SCA's judgment in the *Van Wetten* case, which established authoritative principles on how to determine the intention of the deceased in condonations applications.

The SCA in the *Van Wetten* case mandated a flexible and broad approach, requiring a two-pronged inquiry: examining the document itself and the document in the context of surrounding circumstances. The core question is whether the deceased intended the document to be their will, not merely what the document means. Crucially, the SCA ruled that intention must be ascertained at the time the document was drafted or executed, rendering subsequent changes to intention irrelevant, unless manifested by revocation. This inquiry, mandated by *Van Wetten*, requires judicial scrutiny of the document's substance and the context in which it was created to establish the necessary intent of finality (*animus testandi*). The timing of the intention was strictly observed in that the intent must have existed at the moment of drafting or execution.

Post-*Van Wetten* courts have shown consideration of *Van Wetten's* principles. However, the continued inconsistencies and uncertainty arise because the final outcome frequently depends on the court's subjective assessment of the factual evidence proving finality in the surrounding circumstances, particularly when dealing with contemporary issues, such as non-compliant wills, informal, and electronic documents. The extraordinary circumstances, such as the contemplation of imminent death (for example, *Smith* involving a suicide note, and *Qhali* involving a journal), were decisive in confirming final testamentary intent. Conversely, documents lacking such finality were rejected (for example, the "wish list" in *Taylor*). The courts generally continued to distinguish rigorously between final documents and mere instructions (for example, the *De Reszke v Maras* appeal and *Late Estate Williams v Hendricks*), although the *Mabika* case showed a

jurisprudentially criticised divergence where equitable considerations outweighed strict adherence to the intention requirement.

6.2 Recommendations

Based on the findings regarding the intention requirement of section 2(3), the following recommendations are made:

- i. The well-settled principles established by the *Van Wetten* case, concerning the timing of intention and the contextual examination of the document, should be consistently upheld as the foundation for judicial decisions.
- ii. Courts should continue to adopt a more flexible approach to testamentary intent.
- iii. The primary focus of the intention requirement in condonation applications should be placed on establishing whether the testator made the disposition of property with the necessary *animus testandi* (the intention to make a will).
- iv. Adopting this *animus testandi*, a focused approach will allow the condonation provision to better serve the testator's true intentions while acknowledging the realities of the evolving technological era, particularly concerning electronic documents.

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