DID YOU SAY "ASININE" MILORD?

Bekker v Naude 2003 5 SA 173 (SCA)

1 Introduction

Bekker v Naude (2003 5 SA 173 (SCA)) concerned the vexing question of whether a will that was drafted by an attorney or other advisor of a person since deceased, but which was never executed by the deceased and indeed complies with none of the formalities for a valid will, can be accepted as a document that was "drafted" by the deceased and therefore be "rescued" and made effective in terms of the power of condonation conferred on a court by section 2(3) of the Wills Act 7 of 1953 (as amended) (hereinafter called "the Act" or the "Wills Act") if the court is satisfied that the deceased intended the document to be his or her will. Since section 2(3) was enacted in 1992 there have been no less than 25 reported decisions concerning it, and many of them have concerned this question (for a discussion of the leading cases see Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2ed (2002) 57-66, hereinafter referred to as "Corbett"). The first few decisions concerning this question took a narrow approach to the meaning of the term "drafted" in section 2(3) that did not favour rescue, but a more flexible or liberal approach emerged which was soon favoured by the weight of judicial opinion (see Corbett 59-65). The apogee of this approach to section 2(3) is perhaps the decision in *Ex parte Williams: In re Williams' Estate* (2000 4 SA 168 (T)) where Swart J, delivering the unanimous judgment of a full bench of the Transvaal Provincial Division, went so far as to describe the strict approach to section 2(3) as "an asinine culmination of the very sound reason for promulgating s 2(3)" (see *Ex parte Williams: In re Williams' Estate supra* 177G-H). However, the Supreme Court of Appeal has now overruled the flexible or liberal approach in a unanimous judgment in *Bekker v Naude* (*supra*) in which the so-called "asinine" arguments have been accepted and applied! Such are the vagaries of statutory interpretation. What follows is an account and evaluation of this decision; but first it will be useful to set out the provisions of section 2(3). It reads as follows:

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

2 The facts and judgment

Bekker v Naude (*supra*) concerned a joint will drafted by a bank official for the deceased and the appellant (the unsuccessful applicant in the court *a quo*), to whom the deceased was married. During October 1993 the deceased and the appellant consulted with an official of Absa Bank and requested that a joint will be drawn up for them. They explained what they required, the bank official took notes, and these notes were sent to the bank's head office where other bank officials used the bank's standard precedents to draw up a draft will ("'n konsep-testament"). The will was posted to the deceased and the appellant with the request that they sign it in the presence of witnesses but it had not been signed at the time the deceased died, despite the fact that it had then been in his possession for some years (see *Bekker v Naude supra* par 2 and 3 for these facts). An application to the court a quo (the WLD) for the rescue of the draft will was unsuccessful (the judge was unaware of a full bench decision against him in *Ex parte Williams: In re Williams' Estate supra*) but leave to appeal was granted.

Olivier JA, who delivered the unanimous judgment of the Supreme Court of Appeal, pointed out that the document was drawn up by an official of the bank on the instructions of the deceased and his wife, and was never signed. This raised the legal question whether the document was "drafted" by the deceased; and involved the debate whether, in the context of section 2(3) of the Wills Act, the word "drafted" (or "opgestel") has the limited meaning of *personally* written, *personally* typed or *personally* brought into being through other means; or whether it has the wider meaning of *caused to be drafted* ("*laat* opstel"), as in *caused* to be written, *caused* to be typed, or *caused* to be made ("soos in *laat* skryf, laat tik of laat maak het") (see *Bekker v Naude supra* par 8 (although italics have been used for emphasis here as in the reported judgment, the original judgment used underlining)).

Olivier JA then referred briefly to the decisions that have supported the narrow and liberal interpretations respectively, alluded to some of the arguments used as ingenious, and indicated that it was unnecessary for him to go through all the arguments used because in his view the narrow interpretation was clearly the correct one, for a number of reasons (see *Bekker v Naude supra* par 11). Olivier JA began by referring to the basic principle that the ordinary, grammatical, meaning of a word must be used unless it would lead to absurdity, inconsistency or hardship, or result in an anomaly, such that the court in the light of an interpretation of the legislation as a whole, is convinced that a strictly literal interpretation was not intended by the legislature (see *Bekker v Naude supra* par 12). He indicated that none of these grounds for departing from the ordinary meaning were present and that on the contrary there are strong indications in the Act that the legislature intended a strict interpretation of the word "opgestel" in section 2(3). These indications were to be found in section 2A, which was enacted at the same

time as section 2(3), and which clearly indicated that the legislature was aware of the distinction between "opstel" and "laat opstel" and expressly used the wider words where that was intended. That the legislature did not do so in section 2(3) was, in the opinion of Olivier JA, a decisive indication that in section 2(3) the narrow meaning was intended; and he found the contrary opinions expressed in *Williams Ex parte Williams: In re Williams' Estate* (*supra*) and *Back NNO v Master of the Supreme Court* ([1996] 2 All SA 161 (C)) to be unconvincing. Olivier JA expressly confirmed that the judgments in *Webster v The Master* (1996 1 SA 34 (D)) and *Olivier v Die Meester: In re Boedel Wyle Olivier* (1997 1 SA 836 (T)) are correct on this point (see *Bekker v Naude supra* par 14). It is important to note, however, that Olivier JA did not refer to, much less endorse, the argument that was advanced in *Webster v The Master* (*supra*) and *Olivier v Die Meester: In re Boedel Wyle Olivier* (*supra*) that *substantial compliance* with the will-making formalities is a prerequisite for the use of section 2(3). Furthermore, it is clear from *Bekker* that handwritten drafting is not required either (contra *Webster v The Master supra* and contra Wood-Bodley "The 'Rescue Provisions' of the Wills Act 1953 (as amended)" 1997 *SALJ* 1 10-12).

Olivier JA then proceeded to deal with various arguments that were cited by Van Zyl J in *Back NNO v Master of the Supreme Court* (*supra*) in favour of a broad interpretation. Van Zyl J had argued with respect to section 2(3) that it was the intention of the legislature to avoid the situation where a testator's clearly expressed intentions are frustrated by non-compliance with formalities, and that to interpret section 2(3) as requiring personal drafting would have the absurd result of increasing the formalities, not reducing them. Regarding this argument, Olivier JA held that, although the intention of the legislature was to confer on the courts a power of condonation, this clearly did not mean that all prerequisites were thrown overboard. The requirement of a document drafted by the testator had been included, in unambiguous language, and for good reason. Will-making formalities have existed for centuries in an attempt to prevent fraud, and disputes after a testator's death, and this objective was kept in mind by the legislature even as it conferred a power of condonation. The requirement of a document personally drafted by the testator guarantees a degree of reliability because it requires evidence of personal conduct by the testator out of which his or her intention can be clearly deduced. If the broader interpretation advocated by Van Zyl J were to be adopted, the possibilities for fraud and false allegations after the testator's death would be much greater (see *Bekker v Naude supra* par 16).

Olivier JA also rejected Van Zyl J's argument that for the purposes of section 2(3) it is not the function of the court to ascertain whether or not the document before the court was drafted or executed by the deceased, but merely whether it was intended to be the deceased's will. Olivier JA found

this approach to be in conflict with the wording of section 2(3) and he stated that it simply could not be correct (see *Bekker v Naude supra* par 17).

Another argument that had been advanced by Van Zyl J in favour of a broad interpretation was that it was in conformity with the recommendation of the Law Commission (s 2(3) was introduced following a recommendation by the South African Law Commission (see *Review of the Law of Succession* (Project 22 June 1991 par 2.29)). However, Olivier JA pointed out that the Law Commission's recommendation in this respect was not accepted by the legislature, which introduced the requirement of a document drafted by the deceased, and that the history of section 2(3) therefore indicates clearly that the legislature intended the narrower approach to the section (see *Bekker v Naude supra* par 18 and 19).

Olivier JA concluded, therefore, that there are no grounds for departing from the ordinary literal meaning of section 2(3), and that

> "Die hof het 'n 'kondoneringsbevoegdheid' slegs indien die voorgenome testament deur die oorledene persoonlik tot stand gebring was." (*Bekker v Naude supra* par 20. This may be translated as: "The court has a power of condonation only if the proposed will was brought into existence by the testator personally.")

Although a literal reading of this statement suggests that even a document executed by the testator, but without full compliance with the formalities, must have been drafted by the testator personally if it is to be rescued, this clearly was not Olivier JA's intention, for such an approach is not referred to elsewhere in his judgment and would be in conflict with the language of the section, which refers to a document "drafted or executed" by a person who has died.

In the light of Olivier JA's interpretation of section 2(3), the will prepared by the bank did not meet the requirements of the section, and the judgment of the court *a quo*, refusing an order in terms of the section, was accordingly upheld (see *Bekker v Naude supra* par 20 and 21).

3 Evaluation and discussion

An authoritative decision on the compass of section 2(3) has been sorely needed, and the particular interpretation adopted in *Bekker v Naude* (*supra*) is, in my view, correct and to be welcomed. However, the judgment leaves a number of unanswered questions.

Whilst it is clear that a document drafted by an advisor and merely read and approved by the deceased no longer qualifies as a document drafted by the deceased, there is an element of ambiguity around exactly how personal the drafting must be. What of the will dictated by the deceased to a secretary for typing? Describing the strict approach, which is the approach he subsequently adopted, Olivier JA refers in one part of the judgment to a

document "personally written or typed or brought into being *personally* by other means" (see par 9, my translation), and in another part to one "*personally* drafted, written, typed or brought into existence, *as for example by dictation"* (see par 8, my translation, italics supplied). Whilst it seems clear from the second quotation that a document typed by a secretary but dictated by the deceased would qualify for rescue, the compass of "personally drafted" is not entirely clear. Must the typed document first have been read and approved by the deceased? What if the document is dictated into a dictaphone and only typed after the deceased's death? What if it is typed by a secretary on a computer, approved by the deceased "on screen", and only printed after the deceased's death? (See *Macdonald v The Master* 2002 5 SA 64 (O) for a similar situation, except that the deceased typed the document himself.) However, these are exceptional circumstances.

Section 2(3) provides for the rescue of a document "drafted or executed" by a person who has died. Although *Bekker v Naude* (*supra*) was concerned only with an unexecuted document, the judgment has implications for the rescue of documents not drafted by the deceased that have been executed, albeit defectively. The argument in favour of requiring personal drafting in order for an unexecuted document to be rescued, which is based on a comparison of the language of section 2(3) and section 2A, also applies to a document that has been defectively executed. All three subsections of section 2A expressly provide for some act done or *caused to be done* by the deceased which, when coupled with revocatory intention, triggers the operation of the section, thereby permitting the court to declare the deceased's defective attempt at revocation to be legally effective. However, section 2(3) does not make provision for a document which the deceased has *caused to be executed*; on the contrary, with respect to an executed document, it requires a document executed "by a person who has died". It follows from this significant difference between section 2(3) and section 2A that the maxim *qui facit per alium, facit per se* (*ie* he who acts through another, acts in person) is not intended to apply with respect to section 2(3) and that personal conduct by the deceased is required, whether one is dealing with a document drafted by the deceased or one executed by the deceased. If this view is correct, then a document executed by an amanuensis on behalf of the testator, but which is defective for any reason, whether relating to the certification requirements of section 2(1)(a)(v), or otherwise, cannot be rescued, unless the document was personally drafted by the deceased (an unlikely situation), because the document was not personally executed by the person who has died. However, the rescue of a document signed by the deceased with a mark will not be hit by this difficulty. Although the differential treatment of these two situations may at first blush appear to be anomalous, the use of an amanuensis could increase the possibilities for fraud (particularly where the formality that is lacking is certification by a commissioner of oaths), therefore the exclusion of such documents from the ambit of section 2(3) can be justified (for the rescue of a document executed

with a thumbprint, in which the certification formalities were not complied with, see *O'Connor v The Master* 1999 4 SA 614 (NC), also [1999] 3 All SA 652 (NC)).

In the nature of things, few testators draft their own wills – most defectively executed wills will have been drafted by an advisor. Therefore, a consequence of the decision in *Bekker* is going to be a greater focus on the meaning of the term "executed" in the context of section 2(3). The compass of the word "executed" will be crucial whenever there is a defective attempt at execution of a will that was drafted by an attorney or other advisor. When will a document be regarded as having been executed by the deceased? What level of compliance with the will-making formalities will be required? What, for example, of a document that is merely signed at the bottom of the last page, with no initialling or signing of earlier pages? Or of a document that is only signed at the top of the page? What of the will in *In the Estate of Cook (deceased)* ([1960] 1 All ER 689 (PDA)) which simply ended with the words "Your loving mother"? The possible permutations are legion.

The term "executed" appears in a number of sections of the Act in addition to section 2(3). (See s 2(1)(a) and (b), s 2(2), s 2B, s 3*bis*(1), s 3*bis*(1)(a)(i) and (ii), s 3*bis*(1)(e), s 3*bis*(2) and (3) and s 4A(1) and (2)(a). The term "executed" appears in s 7.) The term is not defined in the Act, and the *Bekker* judgment gives no guidance as to how it is to be interpreted, save for its timely reminder that the so-called golden rule of interpretation applies also to section 2(3).

The dictionary definitions of "execute" are not particularly helpful in this context. Insofar as the definitions are relevant to the execution of documents, they carry the connotation of compliance with the formalities required to give validity to the document concerned. Thus, in the context of executing documents, *The Oxford English Dictionary* Vol III (1933) defines the term as follows:

> "To go through the formalities necessary to the validity of (a legal act, e.g. a bequest, agreement, mortgage, etc.). Hence, to complete and give validity to (the instrument by which such act is effected) by performing what the law requires to be done, as by signing, sealing, etc."

Funk & Wagnalls Standard Dictionary of the English Language (1974) includes the definition "to make legal or valid by fulfilling all requirements of law". In *Jowitt's Dictionary of English Law* (Burke 2ed (1977)) the definition of "execute" begins "to complete or carry into effect. Thus, to execute a deed is to sign, seal and deliver it". In *The Oxford Companion to Law* (Walker (1980)), "execution of deeds" refers to "the rules defining in what way a deed or will must be authenticated by a party to be legally valid and effective". *West's Law and Commercial Dictionary in Five Languages* (1985) defines "execute" thus: "To complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill (*sic*) the

command or purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note." *A Dictionary of Modern Legal Usage* (Garner (1987)) has the following definition:

> "**execute** (= to sign and deliver; to make valid by observing certain required formalities) is useful lawyers' ARGOT in reference to completing legal documents … In this sense the word means 'to go through the formalities necessary to the validity of (a legal act) – hence, to complete and give validity to (the instrument by which such an act is effected) by performing what the law requires to be done'".

Encarta Concise English Dictionary (2001) includes the definition "to sign a will or other legal document in the presence of witnesses in order to make it binding".

Despite the dictionary emphasis on compliance with the legal requirements for validity, compliance with formalities is clearly not what is intended by the use of the term "execute" in section 2(3). The word "execute" needs to be interpreted in conjunction with the qualifying phrase used later in section 2(3), which reads "although it does not comply with all the formalities for the execution or amendment of wills". There have been various views as to the import of the word "all" in that phrase with some early decisions suggesting that some degree of compliance with the will-making formalities is required (see *Stoltz I D v The Master* 1994 2 PH G2 (E) 7; *Webster v The Master supra* especially 42F-G; *Horn v Horn* 1995 1 SA 48 (W) especially 49F-H; *Back NNO v Master of the Supreme Court* [1996] 2 All SA 161 (C) 170*c-e*; *Ex parte Williams: In re Williams' Estate supra* 179G-180C; see also Wood-Bodley *supra* 6-8; and Corbett 64-65). However, it is implicit in *Bekker v Naude* (*supra*) (contra *Webster v The Master supra*, and *Horn v Horn supra*) that a document that has merely been drafted by the deceased, without execution in any way, can be rescued, provided the deceased drafted it personally. Accordingly, it seems clear that section 2(3) may be used irrespective of whether all, any, or only one of the will-making requirements was not complied with (this was also the interpretation adopted in *Stoltz I D v The Master supra* 7).

A number of points can be made around this requirement of an "executed" document. A document is executed by the act of signing (*cf Mdlulu v Delarey* [1998] 1 All SA 434 (W) 442*h*). That is signing by affixing either a signature or by affixing a mark; and initials constitute a form of mark, except where the definition of "sign" in the Wills Act is applicable (as to the meaning of "sign" and "signature" in ordinary usage, untrammelled by any definition in the Wills Act, see the discussion in *Harpur NO v Govindamall* 1993 4 SA 751 (A) 756I-759F). The words "although it does not comply with all the formalities for the execution or amendment of wills" in section 2(3) indicate that there is no need to comply in any respect with the detailed requirements of the will-making formalities, such as the use of witnesses, the number of signatures that must be affixed to the document, or the precise position of the testator's signature, in order to bring the document within the

ambit of section 2(3). "Execution" implies a serious act by which the deceased indicates that the document constitutes the final expression of his or her testamentary wishes not subject to change except by means of a fresh and separate amendment or codicil (see *Anderson and Wagner NNO v The Master* 1996 3 SA 779 (CPD) 784G-785B where the intention required by s 2(3) is discussed). A document cannot be executed orally, or impliedly – there must be some signature or mark which is affixed to the document with the serious intention I have referred to above. The method of execution used by the deceased may influence the conclusion whether the document was intended to be a will, particularly in view of the principle *caveat subscriptor* in terms of which one is bound by what appears *above* one's signature.

The execution of a document in electronic format would be problematic. The legal recognition of data messages, and the electronic signature of them, conferred by the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") does not apply to the Wills Act (see s 4(3) read with Schedule 1 of the ECT Act), nor must the ECT Act be construed as giving validity to "[t]he *execution*, retention and presentation of a will or codicil as defined in the Wills Act, 1953" (Schedule 2 read with s 4(4) of the ECT Act, emphasis supplied). However, if the deceased personally drafted the will as a data message (*eg* as a computer file) and it was printed after the deceased's death and the court could be persuaded that in the context of section 2(3) of the Wills Act this meant that the deceased drafted the document that was printed after his or her death, or if the court could be persuaded, without reliance on the provisions of the ECT Act, that the data message itself was a "document" within the meaning of that term in section 2(3) of the Wills Act, then it might be possible to rescue it. However, the matter is problematic.

It will probably be clear in most instances whether a document has been executed within the meaning of section 2(3) but it is inevitable that there will be some difficult cases. Where a deceased accidentally omitted to sign one page of a multiple-page will, as occurred in *Theron v Master of the High Court* ([2001] 3 SA 507 (NC)), rescue should be possible. However, where one page of the will executed by the deceased is approved by her in draft form but does not comprise part of the final printing of the executed will, as occurred in *Ex parte De Swardt NNO* (1998 2 SA 203 (C)), then it is doubtful that rescue will now be possible. The decision in *De Swardt* was based on the ground that, by reading and approving the draft will prepared by her attorney, the deceased could be regarded as having drafted the will herself (*Ex parte De Swardt NNO supra* 206H-J), but this ground is now excluded by the decision in *Bekker*. It will be difficult to regard a page of a will as having been executed by the deceased when it was not part of the document that was executed, even though it was present in an earlier draft, and therefore it seems that it will not longer be possible to rescue a will in those circumstances. What of the following fictitious scenario? The deceased leaves a handwritten suicide note on his bedside table. The note reads "I

can't go on anymore. My will is attached. Sorry. *Michael*". The word in italics is written as a signature. Attached to the note with a pin is a typed will that was posted to the deceased by his attorney as a draft for approval. This will is not signed, initialled, or marked by anyone, except that the amount in one legacy has been altered by hand and the deceased's signature appears next to the alteration. Do we have here a will that has been executed for the purposes of section 2(3)?

4 Conclusion

A document must have been personally drafted or personally executed by the deceased to qualify for rescue in terms of section 2(3) of the Wills Act. It will no longer be possible for an unexecuted document, drafted by an attorney, accountant, bank, or other advisor, to be rescued from invalidity using section 2(3). Where the document is indeed *executed*, however, then it will be irrelevant who drafted it (see *Mdlulu v Delarey supra* 442*f-h*).

Although most situations will probably be straightforward, there is room for debate as to what qualifies as personal drafting or personal execution. It seems clear, however, that substantial compliance with the will-making formalities is not required for a document to be regarded as having been executed within the meaning of section 2(3).

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