

ARTICLE:

ELECTRONIC WILLS IN SOUTH AFRICA

By **Sizwe Snail** and **Nicholas Hall**

Technology will be used by people, and it will be used for purposes that politicians legislate against. Generally, a will must be executed on paper with the manuscript signature of the testator and witnesses being affixed to the paper. However, in the case of wills by sailors, soldiers and airmen, it is possible for a will be to given orally to another person on the battle-field. Despite the legislation passed by politicians to legislate for human behaviour, there are times when humans will do as they please, as in the case of a will. Legal practitioners are compelled to take cognizance of these developments and evaluate the use of data transmission for legally recognized acts, such as discussed in this article in relation to the execution of valid wills.¹

Although South Africa has legislation governing electronic data transmissions (the Electronic Communication Transaction Act) (ECT),² it is not possible to use a data message as a method of executing a valid will. This is strictly prohibited by section (4)4 and Schedule 2(3) of the ECT.³ Furthermore, the Wills Act⁴ prescribes, in section 2(1)(a), that a will must be (1) in writing, (2) signed, (3) attested by two competent witnesses and (4) every page must be initialed by the testator. This means the use of an e-mail does not satisfy the requirements for a valid will, and even partial compliance of the provisions of the Wills Act render the will void from the beginning.⁵ The legal problems created by this scenario bear careful consideration. Consider each of the requirements are discussed below.

Writing requirement

With regard to the writing requirement, both section 3 of the Interpretation Act,⁶ as well as section 12 of the ECT are very clear. Section 12 of the ECT provides as follows:

Writing

12 A requirement in law that a document or information must be in writing is met if the document or information is-

- a. in the form of a data message; and
- b. accessible in a manner usable for subsequent reference.

Section 3 of the Interpretation Act provides:

3 Interpretation of expressions relating to writing

In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.

Taken together, it is clear that information is not without legal force merely because it is wholly or partially contained in a data message.

Signature requirement

This also applies to the signature and initialing requirement, as contained in section 13 of the ECT, which recognizes the use of electronic data messages as valid signatures, although section 13(1) provides that 'Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used', which implies that to be enforceable, a signature needs to be an advanced electronic signature (otherwise known as a digital signature or AeS), unless some other form of signature is agreed between the parties.

Since the Wills Act requires a will to be signed in order for it to be valid, an electronic will would have to be signed using an AeS. In 2007, the South African

¹ Sizwe Snail, 'The Validity and Enforceability of Electronic Wills' *De Rebus*, (August 2006), 51.

² Act 25 of 2002.

³ Sizwe Snail, 'E-pos-kontrakte is oorwegend

bindend – wet sluit vier gevalle uitdruklik uit', in Beeld 6 February 2006.

⁴ Act 34 of 1964.

⁵ Sizwe Snail, 'The Validity and Enforceability of

Electronic Wills' De Rebus, (August 2006), 51.

⁶ Act 33 of 1957.

Accreditation Authority was created as provided for by the ECT.⁷ One of the requirements of the Authority is to accredit products and services used in support of electronic signatures. In order for an electronic signature to be an AeS, it would have to be signed using an accredited service or product. To date there have been no providers accredited by the Authority. While there seems to be little up-take for this service, it shows a willingness on behalf of the legislature and executive to advance the laws of the country to meet the demands of our digital lifestyles. This also means that South Africa has the necessary infrastructure in place to support electronic wills, should the laws be amended.

Competent witnesses

There is a legal difficulty in relation to the requirement that there must be two competent witness who must attest the document, just as it is also difficult to determine the witness's identities. However, the provisions of section 3 of the ECT (the interpretation clause) does not exclude any statutory or common law from being applied to, recognizing or accommodating electronic transaction: 'This Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in this Act.' In theory, each witness could also use an AeS to sign and initial an electronic will.

Macdonald v The Master

In the case of *Macdonald v The Master*⁸ the court held that a draft will in the form of an electronically stored document which was stored on a computer hard-disk, can be condoned in terms of section 2(3) of the Wills Act, even if all the statutory requirements have not been satisfied, and it is possible to admit such a draft will as valid proof of an existing will.⁹

The deceased committed suicide on or about 14 December 2000 and left in his own handwriting four notes dated 13 December 2000 on a bedside table next to the bed on which he was lying. On of the notes read as follows:¹⁰

I, Malcom Scott MacDonald, ID 5609065240106, do hereby declare that my last will and testament can be

found on my PC at IBM under directory
C:/windows/mystuff/mywill/personal.¹¹

The following day the notes containing the passwords to the electronic files referred to were handed to IBM employees who obtained access to the file contents and printed the contents on to paper, which purported to be his last will and testament. It was handed to his widow. The file was then deleted. The Master then refused to accept it, because it did not comply with the formalities as set out in section 2(1)(a).¹² Two Witnesses from IBM testified in court that at the deceased was a senior IT specialist in the employ of IBM and that only he had access to the particular computer that contained the provisions of the document that he intended would be his will.¹³ The court set out the requirements to establish the elements that the applicants had to prove for the will to be accepted:

In order to be successful with their application under this section, the applicants must, on a balance of probabilities, establish:

- (a) the documents, annexures A and F were drafted by the deceased;
- (b) that the deceased had died since the drafting of the documents; and
- (c) the documents were intended by the deceased to be his will.¹⁴

While the court was satisfied with the fact that the second requirement had been proved, it still had to determine whether the other two requirements of section 2(3) had been satisfied. Subsequently it had to determine whether the data message constituted a draft will that was intended to be his last will and testament, and whether the document had been drafted by the deceased. The court had to distinguish between the strict approach which requires that the document be drafted in the deceased's handwriting, and the liberal approach which states that the document need not be in the deceased handwriting and may be typed by the deceased or even dictated by the deceased.¹⁵

In deciding in favour of the liberal approach the court

⁷ Chapter VI, Part 1.

⁸ 2002 (5) SA 64.

⁹ Steve Cornelius 'Condonation of Electronic documents in terms of section 2(3) of the Wills Act' *Tydskrif vir Suid Afrikaanse Reg.* (2003)(1), 210.

¹⁰ Steve Cornelius 'Condonation of Electronic

documents in terms of section 2(3) of the Wills Act' *Tydskrif vir Suid Afrikaanse Reg.* (2003)(1), 210.

¹¹ *Macdonald v The Master* note 1 at [67 F-H].

¹² *Back v Master of the Supreme Court 1996 2 All SA 161 (c) at 70 A-D.*

¹³ Steve Cornelius 'Condonation of Electronic

documents in terms of section 2(3) of the Wills Act' *Tydskrif vir Suid Afrikaanse Reg.* (2003)(1), 208.

¹⁴ *Macdonald v The Master* at 70 F-G.

¹⁵ *Macdonald v The Master* at 71 C-G.

held, at 71A-B that:

The retention of the formal requirements of s 2(1) and the peremptory nature of s 2(3) do not justify a strict interpretation of s 2(3). Not only is this inconsistent with the very purpose of s 2(3), namely to prevent the last wishes of a testator from being nullified by a non-compliance with technical formalities, but it also does not take cognizance of the realities of the technological world we live in.

Finally, the court had to establish whether the draft will was the testator's last will and testament. The court applied the flowing reasoning in deciding the question in the affirmative, at 72 A-B:

The principal requirement on which the Court should be satisfied, on a balance of probabilities, is that the person who executed the document intended the document to be his will. All the evidence, as well as the nature and contents of the documents themselves, clearly indicate that the documents were intended to be the last will and testament of the deceased. Of importance is that these documents are not a preliminary sketch or notes or discussion of a will still to be drafted, but are clearly a finally drafted will and testament.

The court held that on a balance of probabilities the applicant had proved that the data message contained her late husband's last will and testament based on the three-part test embodied in section 2(3) of the Wills Act. Interestingly, the court went further and warned that the power of the court, as stipulated in section 2(3) of the Wills Act, is a discretionary power that must be used sparingly and must not be seen as legal precedent as a means of validating electronic wills.¹⁶

When the court exercises its power to condone the failure to comply with the statutory formalities, it must always look at each fact of each case. In the *MacDonald* decision, the court held the following factors to be of importance, at 72 C-G:

- (a) the documents are a clear indication of the deceased's intention that they should be regarded as his last will and testament;
- (b) the documents are not preliminary sketches or notes for discussion with an attorney or anybody else to draft a will, but his final wishes;
- (c) there is no element of suspicion of fraud attached to the documents and their reproduction;
- (d) there is no suspicion that there could have been any tempering with the computer or the documents;
- (e) not only did the documents exist on the computer, but there was indeed clear reference by the testator to these specific documents in his notes;
- (f) there was a clear indication by the deceased where this document could be found on his computer;
- (g) only the deceased had access, by way of secret password, to put the documents on the computer;
- (h) only the deceased could have typed the said documents;
- (i) they could only be extracted upon the instructions of the deceased in his own handwriting and only with the deceased's own secret code.

As a result of this decision, it can be argued that there is no legal certainty in South Africa as to how and where data messages can be used for the purposes of conveying the last wishes and final testament of a person that has died. In the normal course of events, only in specific and unique cases will it be necessary to provide such evidentiary material as stipulated in the *MacDonald* case where no valid will exists on paper.

Arguably, the *MacDonald* decision ought to be extended not only to draft wills but to wills executed

¹⁶ 72 H-73A.

electronically. That is, a digital document that has been digitally signed by the testator and witnesses with the intent of being a testator's last and final testament.¹⁷ It would also be possible for the legislature to specifically amend the Wills and ECT Act to allow the commissioning of electronic wills.¹⁸

Technology has evolved and been taken up by people so quickly, that it is possible that when politicians passed the relevant legislation, little or no consideration was given to the way people would use the technology. It is suggested that the legislature ought to consider amending the ECT and the Wills Act to cater for wills in electronic format, for the very reason that people will use the technology for this purpose.¹⁹ This approach is, it is suggested, a better approach, because the law cannot possibly try and prevent the development of technological advances, which also would apply to deeds of sale, and other formally prescribed documents.²⁰

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¹⁷ Sizwe Snail, 'The Validity and Enforceability of Electronic Wills' *De Rebus*, (August 2006), 51.

¹⁸ Note NRS 133.085, where Nevada has made provisions for electronic wills:

1. An electronic will is a will of a testator that:
 - (a) Is written, created and stored in an electronic record;
 - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
 - (c) Is created and stored in such a manner that:
 - (1) Only one authoritative copy exists;
 - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
 - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
 - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.
2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all

of his or her estate, real and personal, but the estate is chargeable with the payment of the testator's debts.

3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this State. An electronic will is valid and has the same force and effect as if formally executed.
4. An electronic will shall be deemed to be executed in this State if the authoritative copy of the electronic will is:
 - (a) Transmitted to and maintained by a custodian designated in the electronic will at the custodian's place of business in this State or at the custodian's residence in this State; or
 - (b) Maintained by the testator at the testator's place of business in this State or at the testator's residence in this State.
5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.
6. As used in this section:
 - (a) "Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of

measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.

(b) "Authoritative copy" means the original, unique, identifiable and unalterable electronic record of an electronic will.

¹⁹ In the respect of electronic wills in other jurisdictions, see the US case of *Taylor v Holt* CA Tennessee Knoxville 18 August 2003, discussed in Stephen Mason, *Electronic Signatures in Law* (2nd edition, 2007, Tottel), 10.16 and the Norwegian case LB-2006-27667, 20 August 2007, Borgarting appellate court relating to the validity of an electronic will, translated into English with a commentary by Professor Jon Bing, *Digital Evidence and Electronic Signature Law Journal*, 5 (2008) 137-140.

²⁰ Sizwe Snail, 'The Validity and Enforceability of Electronic Wills' *De Rebus*, (August 2006), 51.