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Condonation confusion

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Abstract

Some problems have arisen with the interpretation of the formalities for the execution of wills in sec. 2(1) of the *Wills Act* 7 of 1953. The courts were given the power of condonation in sec. 2(3) of the *Act* to prevent wills from being declared invalid when some of the formalities had not been complied with. The provisions in sec. 2(3) appear to be controversial. The basic principles have become the subject of continuing debate through case law. The High Courts constantly disagree when they have to interpret the basic principles for the condonation of non-compliance with formalities. The reform envisaged by the legislator at the outset has not resulted in a satisfactory solution. Sec. 2(3) has been deliberated from every possible perspective. Despite Supreme Court of Appeal judgements on the interpretation of concepts such as 'document', 'drafted or executed' and 'intention', sec. 2(3), in its current form, can never provide for all possibilities. The more one analyses and discusses sec. 2(3), the more indistinguishable the interaction between the applicable principles becomes. This article discusses recent cases that have come before the Gauteng High Court in Pretoria, in which two vastly different sets of facts resulted in identical judgements on sec. 2(3). This inquiry reveals that practical challenges remain for the courts and it is concluded that urgent intervention by the legislature has become a necessity.

1. Introduction

In terms of sec. 2(3) of the *Wills Act,*[1] the courts are empowered to give legal effect to documents where there is non-compliance with the formalities for the execution (and drafting) of wills.[2] This condonation provision is also occasionally called the "rescue provision" as it saves "documents" purported to be "wills" from being regarded as invalid.[3] Soon after the enactment of the *Law of Succession Amendment Act*,[4] controversy started with regard to the application of this provision.[5] It has been said:[6]

> Now, more than two decades after the enactment of s 2(3), a retrospective of South African courts' engagement with testamentary condonation tells an interesting, and at times disconcerting, tale

1 *Wills Act* 7/1953.
2 De Waal 2011:1038; Wood-Bodley 2013:244; Schoeman-Malan *et al.* 2014:80-105; De Waal & Schoeman-Malan 2015:67; Faber & Du Toit 2015:316.
3 Du Toit 2014:56-82.
4 *Law of Succession Amendment Act* 43/1992.
5 Du Toit 2014:58.
6 De Waal 2014:20-21; Schoeman-Malan *et al.* 2014:80.

> of the struggles associated with judicial attempts to give practical effect to statutory law reform.

The courts are constantly called upon to construe the exact meaning of the words used by the legislature and to determine the scope of the section.[7] The courts are not in agreement in their interpretation of sec. 2(3),[8] and neither are scholars and authors who have also commented comprehensively in this regard.[9] Two schools of thought have developed.[10] Some scholars favour a strict approach, while others prefer a more flexible approach. The High Court remarked as follows in *Thompson v Master, Western Cape High Court and Others*:[11]

> It has been suggested in academic circles that the hallmark of the strict approach is to apply the power of condonation cautiously, as opposed to the flexible approach, which has been characterised by a more robust interpretation and the application of the section. Commentators go further to suggest that in instances where a more flexible approach is adopted, the overriding consideration has been whether the intention requirement has been met, whilst in instances where a strict approach has been adopted, the tendency has been to give more focus to the drafting requirement.

It often seems as if all the arguments and different points of view aimed at clarifying the provisions are in vain, as controversy remains.[12] Despite several rulings by the High Courts and the Supreme Court of Appeal on sec. 2(3), some judgements demonstrate a lack of precision and consistency when applying the relevant principles and a failure to follow precedent on the matter.[13]

The purpose of this article is to discuss some recent judgements that dealt with sec. 2(3) to illustrate certain inconsistencies in the application of the section.[14] In this regard, two recent cases from the North Gauteng High Court will be discussed. Both these cases, *Van Vuuren v The Master of the High Court,*[15] and *Barnard v Master of the High Court Pretoria*,[16] were argued during 2015 before Pretorius J. Although a comparison of these

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7 Van der Linde 2012:413; Du Toit 2014:58; De Waal & Schoeman-Malan 2015:70.
8 See De Waal & Schoeman-Malan 2015:70; Schoeman-Malan *et al.* 2014:90.
9 See Wood-Bodley 2013:244; Du Toit 2014:56 ff.; Schoeman-Malan *et al.* 2014:80-105; De Waal & Schoeman-Malan 2015:67 ff.; Faber & Du Toit 2015:316.
10 Wood-Bodley 2013:244; Schoeman-Malan *et al.* 2014:80-105; De Waal & Schoeman-Malan 2015:67; Faber & Du Toit 2015:316.
11 *Thompson v Master, Western Cape High Court and Others* [2015] ZAWCHC 67:par. 17.
12 Van der Linde 2012:421-422; Wood-Bodley 2013:244; Du Toit 2014:66.
13 Van der Linde 2012:421-422; Du Toit 2014:56; De Waal 2014:20-21.
14 Schoeman-Malan *et al.* 2014:88; Wood-Bodley 2015:734.
15 *Van Vuuren v The Master of the High Court* [2015] ZAGPPHC 67 (3 March 2015).
16 *Barnard v Master of the High Court Pretoria* [2015] ZAGPPHC 393 (17 June 2015).

two cases might appear questionable at first, due to the vastly different facts pertaining to each case, the reason for choosing these cases will become apparent from the discussion. This contribution does not seek to reopen the debate on the requirements for the application of sec. 2(3). It only discusses certain aspects of the provision in the context of the two judgements.[17]

2. Requirements for the application of sec. 2(3)

2.1 Basic requirements

The requirements for condonation are set out in sec. 2(3) of the *Wills Act* and have over time become trite law.[18] Three requirements must be met before a court can "rescue" a purported will and order the Master to accept a "document" for the purpose of administering an estate. These requirements are as follows: There should be:

- a document (that does not comply with sec. 2(1) of the *Wills Act*);[19]
- drafted or executed (sometimes it is required that the deceased must have acted personally);[20]
- with the intention that the document should be a will.[21]

All three requirements have been analysed and discussed in great detail and confirmed by the Supreme Court of Appeal in *Bekker v Naude*,[22] *Van Wetten v Bosch,*[23] *De Reszke v Maras,*[24] *Van der Merwe v The Master*,[25] *Smith v Parsons,*[26] and *Raubenheimer v Raubenheimer.*[27] Judicial analysis

17 See also *Thompson v Master, Western Cape High Court*:n 11. For another disastrous application of sec. 2(3), see *Opperman v Opperman and Others* (3659/2015) [2016] ZAFSHC 26 (3 March 2016).

18 De Waal 2011:1033-1072; 2012:831-864. Van der Linde 2012:413; Du Toit 2014:61; Schoeman-Malan *et al.* 2014:80-105.

19 De Waal & Schoeman-Malan 2015:73; *Bekker v Naude* 2003 5 SA 173 (SCA); *Van der Merwe v The Master* 2010 6 SA 544 (SCA); *Smith v Parsons* 2010 4 SA 378 (SCA); *Lipchick v Master of the High Court* [2011] ZAGPJHC 49.

20 *Thompson v Master, Western Cape High Court*:n 11; *Bekker v Naude:*n 19; *De Reszke v Maras* 2006 2 SA 277 (SCA). This clearly indicates that there is confusion about these concepts. Schoeman-Malan *et al.* 2014:84.

21 *Bekker v* Naude:n 19; Van *Wetten v Bosch* 2004 1 SA 348 (SCA); *Van der Merwe v The Master*:n 19; *Smith v Parsons*:n 19. See De Waal 2011:1039; Van der Linde 2012:413; De Waal & Schoeman-Malan 2015:75 ff.

22 *Bekker v Naude* 2003 5 SA 173 (SCA).

23 *Van Wetten v Bosch* 2004 1 SA 348 (SCA).

24 *De Reszke v Maras* 2006 2 SA 277 (SCA).

25 *Van der Merwe v The Master* 2010 6 SA 544 (SCA).

26 *Smith v Parsons* 2010 4 SA 378 (SCA).

27 *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA).

to establish the requirements for sec. 2(3) shows that the requirements are often intertwined and that the ambit of the section remains uncertain, despite several pertinent judgements by the Supreme Court of Appeal. All the requirements revolve around the "document" intended to be a will, but which does not comply with the requirements of sec. 2(1).

2.2 What constitutes a "document"?

To establish if a "document" falls within the scope of sec. 2(3), it should be borne in mind that only a "document" that legally complies with the provisions of sec. 2(1) of the *Wills Act* can qualify as a "purported will".[28] The "document" serves as evidence of the "drafted or executed" requirement and whether the deceased had the required intention or not. The basic principles of the law of succession and the formalities for the execution of a will remain, and it can only be rescued when a document does not comply with the formalities in sec. 2(1). It is accepted that the document must be in writing.[29] An analysis of case law shows that the courts have condoned almost any form of "document", including emails, letters, diary entries, and suicide notes.[30]

Sec. 2(3) does not prescribe formalities for the execution of wills or "formalities" for condonation. The section only sets the legal framework for the condonation of non-compliance with the formalities in sec. 2(1). Unfortunately, the courts appear to have established a formalistic framework that must be complied with before a document is to be condoned. It seems that this framework has become a set of additional formalities. Sec. 2(3) cannot be applied in isolation and it should still be founded on the basic requirements for the "execution of wills" as prescribed in sec. 2(1). The purpose of sec. 2(3) is only to rescue "wills" that would have been valid if executed as prescribed.[31] The underlying principle is neither to condone "documents" in general nor to create new formalities.

28 Only documents in respect of which there was non-compliance with the formalities in sec. 2(1) qualify for a sec. 2(3) application.

29 Du Toit 2014:61; De Waal & Schoeman-Malan 2015:50.

30 See *Van Wetten v Bosch*:n 21; *Smith v Parsons*:n 19. A good example of this wide interpretation is found in *Dikgale v Master of the High Court, Polokwane* [2013] ZAGPPHC 86. In this case, the deceased made two entries in her diary and signed them. These cryptic diary entries were, in fact, regarded as a *document* for the purposes of sec. 2(3).

31 Du Toit 2014:61.

2.3 Classification of case law

To establish where in the broader scope of sec. 2(3) the cases under discussion fall, case law dealing with sec. 2(3) will be divided into two categories:[32]

(a) The first category includes cases where the testator has personally drafted a document in his/her own handwriting or was personally involved in the drafting of the document. In some instances, it happens that the testator also signed the document.[33] The case of *Van Vuuren v The Master of the High Court* falls in this category.[34]

(b) The second category of cases deals with situations where the testator requested someone else (usually a friend, lawyer, bank consultant or financial advisor) to draft a document on his/her behalf.[35] Two possibilities can occur from this scenario:

(i) When a document is drafted for the deceased and no further formalities (for execution) have been complied with, the document will normally not be condoned without scrutinising the intention requirement.[36] The reason for this is that it is difficult to establish the intention of the testator when there is no indication that s/he had associated him-/herself with the content of the document.[37]

(ii) However, when an attempt is made to "execute" the document, but some or all of the formalities have not been complied with, the courts tend to condone these documents.[38] The latter scenario presented itself in *Barnard v Master of the High Court Pretoria*,[39] where the deceased asked her attorney to draft a will for her, but the execution process was incomplete, resulting in the document being invalid.

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32 De Waal & Schoeman-Malan 2015:69.

33 In *Bekker v Naude*:n 19. It was a requirement that the document must be prepared personally by the testator or at least there must be a personal relation to the document. See also *Van der Merwe v The Master*:n 19; *Taylor v Taylor* [2011] ZAECPEHC 48; *Smith v Parsons*:n 19; *Lipchick v Master*:n 19, and the recent case *Thompson v Master, Western Cape High Court*:n 11.

34 *Van Vuuren v The Master of the High Court* [2015] ZAGPPHC 67 (3 March 2015):n 15. See also De Waal & Schoeman-Malan 2015:69 fns 131 and 132.

35 See De Waal & Schoeman-Malan 2015:69 fns 133-135; *Raubenheimer v Raubenheimer*:n 27.

36 Schoeman-Malan 2013a:413-431; 2013b:684-706; Wood-Bodley 2013:249, 252.

37 *Anderson and Wagner v The Master* 1996 (3) SA 779 (C).

38 *Raubenheimer v Raubenheimer*:n 27; *Mankelegane v Simon* 2013 JDR 1851 (GSJ); Du Toit 2014:58.

39 *Barnard v Master of the High Court Pretoria* [2015] ZAGPPHC 393 (17 June 2015):n 16.

3. The facts

3.1 Van Vuuren case

An application was brought by the daughters of the late Dawid van Vuuren for the condonation of "a document" in terms of sec. 2(3) of the *Wills Act*. The "disputed document" was a signed document, which the deceased presented to his secretary on 7 July 2008 for her to sign as a witness. The deceased afterwards telephoned his personal assistant and faxed a "copy of the document" to her. He informed her that the content of the document was confidential, and asked her to file the document along with his personal documents.[40] After the deceased had passed away, the personal assistant handed the purported will to the deceased's attorney. Interestingly, the original will document was nowhere to be found and no other will had been created.[41] As the document did not comply with the testamentary formalities set out in sec. 2(1) of the *Wills Act,* the Master declined to accept and register it as a will.[42] The deceased was survived by two daughters and two sons.[43] The daughters were nominated as the beneficiaries in the "document".[44] The condonation application was opposed by one of the sons of the deceased on the basis that the original document (will) could not be found.[45]

3.2 Barnard case

In this case, the daughter of Mrs de Meillon (the deceased) brought an application for the condonation of a "document" in terms of sec. 2(3) of the *Wills Act*. The deceased desired to execute a "new" will shortly before her death in 2012.[46] Accompanied by her caregiver, she consulted a psychologist to confirm her testamentary capacity.[47] She then instructed her attorney to draft her will. The attorney did this and handed it to the testatrix for execution. Three days after he had handed the document to the testatrix, the latter's health suddenly deteriorated and she was admitted to hospital. However, she insisted on signing the will before she was admitted to hospital.[48] She signed the "will" in the presence of a witness (her caregiver) and her daughter (the applicant). Later that day, a second witness (the housekeeper) also signed the will in her and the applicant's presence, but not in the presence of the other witness.

40 *Van Vuuren*:par. 2.
41 *Van Vuuren*:par. 19.
42 *Van Vuuren*:par. 1; *Administration of Estates Act* 65/1966:sec. 8.
43 *Van Vuuren*:par. 4.
44 *Van Vuuren*:paras. 2-3.
45 *Van Vuuren*:par. 1. He alleges that the deceased died intestate:par. 4.
46 *Barnard*:par. 6.
47 *Barnard*:par. 9.
48 *Barnard*:par. 13.

The deceased passed away approximately two weeks later and is survived by her daughter (the applicant) and two sons.[49] The deceased also left a previous will, which was executed in 2010. The 2010 will was submitted to the Master and he appointed an executor in terms of the will.[50] The "disputed document", which resembles the previous will, was not submitted to the Master. In the latter, a property that was previously bequeathed to the deceased's other son (the fourth respondent) was now left to another son.[51] The fourth respondent opposed the application for condonation on two grounds.[52] He argued that the "disputed will" must first have been submitted to the Master before an application could be brought for condonation, and that the deceased had lacked the necessary testamentary capacity to execute a will.[53]

4. Preliminary remarks on the judgements

4.1 Motivation for execution of "disputed" documents

Prima facie, the facts of *Van Vuuren* and *Barnard* are different. However, in both cases, the testators were very emotional when the respective documents were drafted[54] and it seems that, in both cases, the underlying reason for the making of the "wills" had to do with disharmony among relatives. In the *Van Vuuren* case, it is alleged that the deceased had threatened to disinherit his son (the fourth respondent) if he did not give up smoking.[55]

In the *Barnard* case, the deceased anticipated that there might be disagreement between family members after her death.[56] She mentioned to the psychologist that recent events had upset her and that she was left with a tough decision. The deceased had also explained that her one son needed more care and financial support than the other children. She had foreseen that her other son (fourth respondent) would not be satisfied with the changes in her will.[57]

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49 *Barnard*:par. 2. Her one son, who had been injured in an accident, was represented by a *curator bonis*.

50 *Barnard*:par. 5.

51 *Barnard*:par. 7.

52 *Barnard*:paras. 3, 13.

53 *Barnard*:paras. 9-12.

54 The fourth respondent denied that he had told the fifth respondent that the testator drafted the 2008 will as a threat to stop him from smoking and that he admits that he has only realised after his father's death that he had been serious when threatening to disinherit him.

55 *Van Vuuren*:par. 14. These allegations were made by the fifth respondent. *Van Vuuren*:par. 15.

56 *Barnard*:par. 9.

57 *Barnard*:par. 12. An application for leave to appeal was lodged against the judgement: See *Meillon v Barnard* [2015] ZAGPPHC 664 (6 August 2015), but was rejected by the court.

4.2 Formalities for the execution of a will

As noted earlier, whilst sec. 2(1) of the *Wills Act* states the formalities for the execution of wills, sec. 2(3) does not stand unconnected or on its own. A prerequisite for sec. 2(3) to take effect is that it should first be established whether the "document" falls within the ambit of sec. 2(1).[58]

4.2.1 Sec. 2(1) requirements

If any of the formalities laid down in sec. 2(1) are lacking, the (will) is invalid.[59] The relevant formalities for the proper execution of a will may be summarised as follows:

- It is required that the will should be signed by the testator at the end of the document;
- The testator should sign in the presence of two competent witnesses who are present at the same time;[60]
- The same two witnesses should then sign the last page of the will in the presence of the testator and in the presence of each other;[61]
- If the will consists of more than one page, the testator must sign each page.[62]

De Waal and Schoeman-Malan explain the reasons for these formalities as follows by:[63]

> This consideration – a *protective function* – is thus in fact a basic function of the formality requirements. But the formality requirements also go beyond simply protection against fraud. They also serve, for example, to warn a prospective testator about the full significance of the action that is to be undertaken (a *cautionary function*), and it helps to ensure reliable evidence regarding the testator's last wishes (it thus has an *evidentiary function* that contributes towards certainty and helps to avoid disputes after the testator's death).[64]

These functions should be borne in mind when a condonation application is served before the court. Both the "documents" under discussion reflect non-compliance with sec. 2(1) of the *Wills Act* and could, therefore, fall

58 *Wills Act* 7/1953:sec. 1 defines a "will" as "including a codicil and any other testamentary writing". See also Corbett *et al.* 2001:51; De Waal & Schoeman-Malan 2015:54.
59 De Waal & Schoeman-Malan 2015:67, 86.
60 *Wills Act* 7/1953:sec. 2(1)(a)(i) and (ii). See *Van Vuuren*:par. 5; *Barnard*:par. 17.
61 *Wills Act* 7/1953:sec. 2(1)(a)(iii).
62 It can be signed anywhere on the page: *Wills Act* 7/1953:sec. 2(1)(a)(iv). The witnesses are not required to sign the other pages. See Corbett *et al.* 2001:51; De Waal & Schoeman-Malan 2015:54.
63 De Waal & Schoeman-Malan 2015:54. See also Du Toit 2014:56.
64 Van der Linde 2012:413; Schoeman-Malan *et al.* 2014:81ff.

within the ambit of sec. 2(3), subject to the basic principles for condonation being complied with.[65]

4.2.2 Non-compliance with sec. 2(1)

In *Van Vuuren's* case, the document was drafted by the deceased in his own handwriting and signed by him. However, only one witness signed the will and the document was not signed in the presence of this witness, as the deceased's signature was already on the document when the deceased asked his secretary to sign as the witness.[66] Measured against the requirements for sec. 2(1)(a), the document before the court did not comply with subsecs (ii) and (iii).

In *Barnard's* case, the "document" was drafted by an attorney and handed to the deceased for execution. This document also did not comply with sec. 2(1)(a), as it is required in subparagraph (iii) that at least two competent witnesses had to sign the will *in the presence of the testator and each other*.[67]

Coincidentally both "documents" were signed by one witness only.[68] In both cases, however, the non-compliance with the formalities goes beyond the witnesses not properly signing in terms of sec. 2(1).[69] In *Van Vuuren's* case, a problem that was not considered at all is that only "a copy" (*i.e.*, a faxed copy) of the disputed document was available. Furthermore, in *Barnard's* case, the first two pages were not signed at all[70] and, although the original "disputed document" was available, it was not submitted to the Master as required by sec. 8 of the *Administration of Estates Act*.[71]

4.3 Copy of a missing document in Van Vuuren

An important aspect that had apparently gone unnoticed by the court in *Van Vuuren's* case is that the Master can only accept an original document as "a will" and may, for the purposes of the *Administration of Estates Act,* also accept a duplicate original will.[72] The issues of "condonation" and "lost wills" are often conflated. When an original will is lost, a copy can

65 De Waal & Schoeman-Malan 2015:67-68.
66 It is also possible for the testator to acknowledge his signature in the presence of at least two witnesses. There is no indication in the judgement that the deceased had acknowledged his signature. The secretary, however, stated that she knew that it was his signature. See also *Bosch v Nel* 1992 3 SA 600 (T); De Waal 2012:835.
67 Author's emphasis.
68 *Van Vuuren*:par. 2; *Barnard*:par. 6.
69 *Van Vuuren*:par. 3; *Barnard*:paras. 8 and 11.
70 *Barnard*:par. 14.
71 *Administration of Estates Act* 66/1965. A point *in limine* was taken by the respondent.
72 *Administration of Estates Act* 66/1965:sec. 8(4B).

only serve as proof of the content of the lost will.[73] The unique question that arose in *Van Vuuren's* case is whether a "faxed copy of a document" can be regarded as a "document" for purposes of sec. 2(3).[74] As the original document, which did not constitute a will for lack of compliance with the formalities prescribed by sec. 2(1) could not be found after the death of the deceased, the question consequently arises as to whether a copy of that document can reflect the intention of the deceased.[75] In *Yokwana v Yokwana*,[76] the facts were similar. The court, however, did not apply sec. 2(3), but relied on the common-law principles and ordered the Master to accept a "copy of a lost will", even though such "document" was not originally executed in compliance with the prescribed execution formalities. However, for a court to order the Master to accept a copy of a lost will, the common law requires that the original will must have been validly executed in compliance with sec. 2(1) of the *Wills Act*.

In *Van Vuuren's* case, a "faxed copy" of a "lost document" was condoned.[77] It is not clear whether "a copy of a document" could be regarded as a paper version of a "document". It is furthermore uncertain whether the intention requirement in sec. 2(3) could be met in such circumstances (whether the deceased could have had the intention *that a copy should be his will as required in sec. 2(3)*.[78] Faber and Du Toit argue in this regard that, if there is "a copy of an original will", the copy cannot serve as a document for condonation.[79] They remark as follows:

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73 See Faber & Du Toit (2015:312): "The aforementioned dubious manner in which South African courts have engaged (at times) with the common law rules on lost wills is manifest also in their engagement with lost wills in the context of the Wills Act's condonation dispensation."

74 De Waal 2012:843; Schoeman-Malan 2013b:700; Wood-Bodley 2015:734.

75 Faber & Du Toit 2015:313.

76 *Yokwana v Yokwana* [2013] ZAWCHC 22 (13 February 2013). The original will could not be traced, but it appeared from the copy that the will had not been properly executed.

77 The question that should have been considered is whether a faxed copy of the original missing document can serve as a document for condonation before the court. See Faber & Du Toit (2015:312): "Unsurprisingly, this possibility of testamentary rescue has raised the question whether, for example, a copy of a lost will can be condoned successfully."

78 The meaning of 'document' in the context of sec. 2(3) has been discussed in several court cases. Schoeman-Malan *et al.* (2014:88) argue that Davis AJ's *modus operandi* of accepting such a copy in a condonation application in *Hassan v Mentor* [2012] ZAGPPHC 74 (24 April 2012) "blurred the lines between statutory testamentary rescue under s 2(3), on the one hand, and the reconstruction of a lost will under the common law, on the other hand." There is already a risk that is taken by condoning documents. See also *Thompson v Master, Western Cape High Court*:n 11.

79 Faber & Du Toit 2015:326. Compare also for the possibly erroneous application of sec. 2(3) *Marais v Botha* [2008] ZAWCHC 111; *Haribans v Haribans* 2011 JDR 1441 (KZP); *AH v AGM* [2013] JOL 30416 (GNP). For a discussion of the issue of the application of sec. 2(3) in the context of a lost will, see De Waal 2011:1042-1043; De Waal 2013:990-991; Schoeman-Malan 2013b:688, 701.

> In *Van Vuuren v The Master* [2015] ZAGPPHC 67 (3 March 2015) the Gauteng high court was explicit in its application of section 2(3) of the Wills Act in a lost-will scenario. This judgment, it is submitted, is patently wrong when evaluated against the precedent set in *Ex parte Porter*, as the document that served before the court – a faxed copy of the document originally signed by the testator – was certainly not, as section 2(3) of the Wills Act requires, the actual piece of paper that the deceased contemplated as his will.

The court did not bear in mind that sec. 2(3) deals with "documents purported to be wills" and that the same requirements to establish what "constitutes a will" should be applied to establish what "constitutes a document".[80]

4.4 Submission of "a document" to the Master

In the *Barnard* case, the issue was raised that only a document rejected by the Master can form the subject of an application for condonation in terms of sec. 2(3). The respondent argued that the sec. 2(3) application was premature, as the document had not been lodged with the Master.[81] The court did not address the question adequately. Although sec. 2(3) does not explicitly require the submission of a document to the Master, the administration of an estate, including the acceptance and registration of wills, is regulated by sec. 8 of the *Administration of Estates Act*.[82] Sec. 8 stipulates as follows:

> Transmission or delivery of wills to Master and registration thereof
>
> (1) Any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master.
>
> (2) .....
>
> (3) Any such document which has been received by the Master, shall be registered by him in a register of estates, and he shall cause any

80 See also De Waal 2012:843; Schoeman-Malan 2013b:700; Schoeman-Malan *et al.* 2014:80-105. Faber & Du Toit (2015:312) ask the question: "Die vraag ontstaan derhalwe of artikel 2(3) se bedoelingsvereiste só ruim is dat byvoorbeeld 'n afskrif van 'n verlore testament – wat op sigwaarde groter ooreenkoms toon met 'n testament as voorgenoemde dokumente – ook onder die subartikel se kondonasiebedeling tuisgebring kan word".

81 *Barnard*:par. 3. Faber & Du Toit (2015:316) explain: "The master's rejection of a document purporting to be a will by reason of its non-compliance with the execution formalities stipulated in section 2(1)(a) of the *Wills Act* has, since 1992, raised the possibility of invoking the high court's condonation power in terms of section 2(3) of the *Wills Act* to rescue the invalid will".

82 *Administration of Estates Act* 66/1965. See the emphasis in *Barnard*:par. 32.

> such document which is closed to be opened for the purpose of such registration.
>
> (4) If it appears to the Master that any such document, being or purporting to be a will, is for any reason invalid, he may, notwithstanding registration thereof in terms of sub-section (3), refuse to accept it for the purposes of this Act until the validity thereof has been determined by the Court.

The court failed to deal directly with the question as to whether submission of a document, purporting to be a will, to the Master is a prerequisite for an application in terms of sec. 2(3) and, peculiarly, remarked as follows:[83]

> Although the Master is bound to register every will properly lodged with him in terms of section 8 of the Act, the said will in question as mentioned in the Notice of Motion was never brought to the attention of the Master for consideration. Even if the will has been lodged the master is going to reject it based on the fact that it does not comply with section 2[1][a][IV] [sic] of the Wills Act.[84]

No reason is evident as to why this document was not submitted to the Master.[85] The relevant point seems to have been misunderstood. The question was never whether the Master would have disregarded the document, but whether it should have been submitted to the Master for purposes of registration. This contention by the respondent was sidestepped with reference to *Logue and Another v The Master*, where the court stated the following:[86]

> By refusing to accept documents purporting to be the will of a testator, the Master would cause an application to be made by one or more interested parties, in which event all other interested parties would have to be joined.

Reference to the *Logue* case in this context is unfortunate, as it merely confirms that if a document (purporting to be a will) was available at the death of a person, that document should have been submitted to the Master.[87] Meyerowitz has argued in this regard that conveyance or delivery to the Master of "any document being or purporting to be a will" is broad enough to include revoked wills (that are still in existence) and unsigned (invalid) documents.[88] One can draw the conclusion that documents that are the subject of sec. 2(3) applications should, pursuant to the provisions

83 *Barnard*:par. 32.
84 Reference should be to sec. 2(1)(a)(iv) and not sec. 2[1][a][IV]. Despite the Master indicating in his opinion to the court that he would have disregarded the will in terms of sec. 2(1)(a)(iv), the court only used his argument to find that there is no need for submitting the will first to the Master before a sec. 2(3) application can be made.
85 *Administration of Estates Act* 66/1965:sec. 8(4B) originally reads that the Master could accept a "duplicate of the original will".
86 *Logue and Another v The Master* 1995 1 SA 199 (N) 204.
87 *Barnard*:par. 4.
88 Meyerowitz 2010:par. 3.1.

of sec. 8, also be submitted to the Master and the Master should register these documents.[89] It is, however, submitted that the transmission or submission of a document purporting to be a will cannot, on a proper interpretation of sec. 2(3), be regarded as a precondition for an application for condonation.[90] If such a document is not submitted to the Master before the application, it unnecessarily slows down the administration process.[91]

According to the evidence before the court in the *Barnard* case, the applicant, the caregiver, the housekeeper and the attorney were all aware of the fact that a "new will" was drafted and executed by the deceased two weeks prior to her death. One can only speculate as to the reason for this document not being submitted to the Master and why it had taken from February 2013, when an executor was appointed in terms of the 2010 will, until the time that the purported document was presented to the court.

4.5 Testamentary capacity to execute a will

Sec. 4 of the *Wills Act*[92] requires that a testator should have the necessary testamentary capacity (i.e., the ability) to understand the nature and effect of the act of executing a will.[93] If the deceased lacked this capacity (*animus testandi*), the will is consequently invalid. The same requirement must be present in respect of a "testamentary writing" or a "document intended to be a will". This prerequisite should, however, not be confused with the intention that a document contains testamentary provisions and should serve as the deceased's will, as referred to in sec. 2(3).[94] Testamentary capacity remains a factual question and should be established from all the relevant evidence.[95] It often happens that, when an application is made for

89 Corbett *et al.* 2001:66; Meyerowitz 2010:par. 3.4; Faber & Du Toit 2015:315-316; Abrie *et al.* 2015:113-114; *Logue v The Master*:n 87.

90 Once the order for condonation has been granted, such order together with the condoned will be submitted to the Master.

91 As it happened in the *Barnard* case:n 16.

92 *Wills Act* 7/1953. Schoeman-Malan 2015a:605.

93 De Waal & Schoeman-Malan 2015:38. Van der Linde (2012:416) states: "As mentioned above, the third requirement should have been addressed only once the first two requirements had been met. Let's, however, assume for a moment that personal drafting was not required by the courts. Courts (see *Harlow v Becker* 1998 4 SA 639 (D)) and authors (see Jamneck "Artikel 2(3) van die Wet op Testamente: 'n Praktiese probleem by litigasie 2008 *PER* 90) have indicated the importance of differentiating between the intention to make a will, to which section 2(3) refers (*Harlow* 645J) and the mental capacity to make a will in terms of section 4. Section 2(3) requires that the person who has executed or drafted the document, must have intended it to be his/her will. However, in terms of both common law and the Wills Act, the mental capacity to make a valid will embraces more than a mere intention on the part of the testator for the document to be a will (*Harlow* 643F-G, 644A-C, 647B-C)".

94 De Waal 2010:1172-1173; 2011:1035: See also *Thirion v Die Meester* 2001 (4) SA 1078 (T); *De Reszke v Maras* 2003 (6) SA 676 (C); 2006 (1) SA 401 (C); De Waal 2004:529; Schoeman-Malan 2015a:605ff.

95 De Waal 2010:1172-1173.

condonation in terms of sec. 2(3), a counter application is made disputing the testamentary capacity of the deceased at the time of execution of the document.[96] In this regard, De Waal and Schoeman-Malan, with reference to *Harlow v Becker*, state as follows:[97]

> In this case the interaction (including the issue of the burden of proof) between an application in terms of s 2(3) and an application for the annulment of a will because of the absence of testamentary capacity is set out in as far as such applications are relevant in the same action. The party that wants a condonation order in terms of s 2(3) bears the burden of proof to show compliance with the requirements of the section. If the latter is successful, the burden of proof shifts to the person who claims that the testator did not have the necessary testamentary capacity.

Recently, several cases dealing with the issue of testamentary capacity, in the context of sec. 2(3), were reported.[98] The question as to whether a testator had the mental capacity to make a valid will at a certain point in time is not an easy one to answer.[99] In *De Reszke v Maras*, the court decided on condonation without making a finding on testamentary capacity.[100] The Supreme Court of Appeal is clear on this – the intention referred to in sec. 2(3) is established from the *document itself* and *surrounding circumstances*.[101]

In *Barnard's* case, the testatrix's testamentary capacity was, in fact, questioned by one of her sons. Although evidence was presented on the mental capacity of the deceased, the court did not apply any test to establish her capacity to understand the *nature and effect of the act*.[102] The onus was on the son to prove that the testatrix was incapable of forming the necessary intention to make a valid will.[103] From the evidence presented, it seems that there was a history of visits to psychologists.[104] Whether the evidence was insufficient to substantiate the claim of incapacity is not

96 *Harlow v Becker* 1998 4 SA 639 (D); *Thirion v Meester van die Hooggeregshof* [2002] 1 All SA 346 (T); *De Reszke v Maras* 2003 6 SA 676 (C); 2006 1 SA 401 (C). See also Corbett *et al.* 2001:74; Jamneck 2008:90; De Waal 2014:21.

97 See De Waal & Schoeman-Malan 2015:42 n 44.

98 *Lipchick v The Master*:n 19. See also *Malan v Strauss* FSHC (unreported) 2013-11-28 case number 1462/2012; *Vermeulen v Vermeulen* [2012] NAHC 23; *Scott v Master of the High Court Bloemfontein* [2012] ZAFSHC 190; *Vermeulen v Vermeulen* 2014 NASC 7.

99 Van der Linde 2012:416.

100 De Waal (2010:1172-1173) rightly criticized the judgement for citing contradictory psychiatric reports and speculating on the deceased's mental capacity. Such a course of action was unnecessary particularly in light of the directives on dealing with the burden of proof enunciated in *Harlow's* case.

101 Author's emphasis. *Van Wetten v Bosch*:n 21; Schoeman-Malan *et al.* 2014:93; De Waal & Schoeman-Malan 2015:38-39.

102 *Barnard*:paras 25-28.

103 Van der Linde 2012:416.

104 *Barnard*:paras 25-26 *versus* paras. 27-19. The case could have been referred for evidence on this aspect.

evident from the judgement, as the court did not refer to, or deal with sec. 4 of the *Wills Act*.[105]

5. Discussion by the court of sec. 2(3)

It cannot be ignored that the judgements handed down in the *Van Vuuren* and *Barnard* cases, on the application of sec. 2(3), contain an almost *verbatim* reference to the same case law.[106] As explained earlier, the facts of the two cases are completely different. In the *Barnard* judgement, the judge emphasised certain phrases. The reasons for the judgements will be gathered from these highlighted sentences.

5.1 "The law" as explained by the court

After asserting the facts in each of the cases, each judgement starts off with an explanation of "the law" as set out in sec. 2(1)(a)(i), (ii) and (iii) of the *Wills Act*. The three subparagraphs are then quoted. In the *Barnard* case, the court also referred to the provisions of sec. 2(3).[107] As indicated earlier, the *Van Vuuren* case does, in fact, fall within the ambit of either paragraphs (i) or (ii) of subsec. 2(1)(a), whereas the *Barnard* case (although the court did not refer to subpar. (iv) in this context), also deals with it (as the testatrix did not sign the first two pages of the will).

A second aspect addressed by the court is the *intention of the legislature* with the promulgation of sec. 2(3). In this regard, the court refers to *Van der Merwe v The Master*, where Navsa JA held:[108]

> By enacting s 2(3) of the Act, the legislator[109] was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators.[110] 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 s 2(3) are peremptory once the jurisdictional requirements have been satisfied*.[111]

From this quote, it is clear that condonation should only be granted by the courts once the jurisdictional requirements have been satisfied. Jurisdictional requirements are the requirements set by the section in order to bring the case within the ambit of that section.

105 *Wills Act* 7/1953.
106 *Van Vuuren*:paras 6-11; *Barnard*:paras. 18-22.
107 *Barnard*:par. 17.
108 *Van der Merwe v The Master*:par. 14. See *Van Vuuren*:par. 6 and *Barnard*:par. 18.
109 The text in the judgement refers to "legislature".
110 De Waal & Schoeman-Malan 2015:70.
111 Court's emphasis.

5.2 Documents in Van Vuuren and Barnard

It must be emphasised that it is not entirely clear from the *Van Vuuren* and *Barnard* cases how the court approached the provisions of secs 2(1) and 2(3), other than to say that both the "documents" were condoned, as the court was convinced that it was the intention of the respective deceased that the "document" should be their wills.[112] The judgement in *Van Vuuren's* case was given, despite the widely maintained position that a copy of the document does not qualify in terms of sec. 2(3) for condonation.[113] The court, in both the cases, referred to the relatively old case of *Olivier v Die Meester en Andere: in re boedel wyle Olivier*,[114] where it was established that "there must be a document which the deceased had compiled or executed".[115] In *Van Vuuren's* case, the court found that: "[I]n the present matter it is common cause that the deceased had *executed the disputed* document", and in *Barnard's* case that: "[I]n the present matter it is common cause that the attorney had compiled the document on instructions from the deceased when according to him she was fully capable at the time to do so. The deceased had *executed the disputed* document".[116]

It can be argued that, in both these cases, there was "a paper version" of wishes of the deceased. However, a paper version is not enough. It has already been stated that a copy of a document cannot be regarded as a document for purposes of a sec. 2(3) application. If, on the other hand, an "original will" was in possession of the deceased and it could not be found after his death, the common law regulates the reconstruction of the content of the will with reference to a copy thereof.[117] As stated earlier, the lost document (original) was not properly executed in terms of sec. 2(1) and, as a result, not subject to the aforesaid common law rule.[118] Contrary to the *Van Vuuren* case, the original document that purported to be a will was before the court in the *Barnard* case and the content thereof was not in dispute.[119]

The court then, in identically worded paragraphs in each of the judgements, paused to explain that it accepted that the deceased had the *requisite intention* when *drafting and signing* the document and that it was (would be),[120] his/her final will and testament.

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112 Faber & Du Toit 2015:313.

113 The requirement for a document goes beyond a piece of paper. See Wood-Bodley 2013:247.

114 *Olivier v Die Meester en Andere: in re boedel wyle Olivier* 1997(1) SA 836 (TPA). The court did not refer to *Bekker v Naude*:n 19.

115 See *Van Vuuren*:par. 7.

116 *Barnard*:par. 19.

117 *Van Vuuren*:par. 8. The judge ruled: "It is common cause that no will and testament could be found after the deceased's death, apart from this document. The applicants searched all the deceased's documents, but could not find the original of the document or any other will or testament."

118 See Wood-Bodley 2015:734.

119 *Barnard*:par. 19.

120 *Van Vuuren*:par. 8; *Barnard*:par. 20. Only the one word differs.

5.3 Drafted or executed

As a rule, the words "drafted or executed" have different meanings in the context of wills.[121] Seemingly, the court misinterpreted the difference between "drafting" and "execution", as neither document had been properly "executed".[122] "Drafted" means that the document had been formulated (also dictated),[123] or written down (also on a computer),[124] by the testator him-/herself or by someone on his/her behalf. Only after the document had been drafted, would it (usually) be executed. "Execution" means that the process of compliance with the formality requirements had been embarked upon.[125] If some of the requirements have not been met, the "execution process" is defective and results in the will being invalid.[126] Although the Supreme Court of Appeal ruled in *Bekker v Naude* that the drafting requirement should be interpreted strictly, the same court condoned a document in *Raubenheimer v Raubenheimer* that was, in fact, drafted on behalf of the deceased and where there was personal involvement by the deceased.[127]

The courts should bear in mind that sec. 2(1) deals only with the *execution* of a "testamentary writing" and not with the "drafting" aspect of a will as such. While the word "drafted" is not used in sec. 2(1), it does appear in sec. 2(3). The use of "drafting" in sec. 2(3), therefore, refers to an "unexecuted" or "incompletely executed" document. In *Bekker v Naude*,[128] a further distinction is made in this regard between "drafted" and "caused to be drafted". In this context, "caused to be drafted" means, as in *Barnard's* case, that the testator did not draft the document him-/herself, but that someone else did it for him/her. A will that has been properly executed is valid and does not fall within the scope of sec. 2(3).[129] A properly executed lost will can be reconstructed by using a copy of the will. This implies that the will was drafted (by someone) and executed (by complying with the formalities).[130]

As noted earlier in the *Van Vuuren* case, the deceased personally drafted the will and, in the *Barnard* case, the document was drafted on behalf of

121 Schoeman-Malan *et al.* 2014:88; De Waal & Schoeman-Malan 2015:73. For a good example of the distinction between 'drafted' and 'executed', see *Mankelengane v Simon*:n 38.
122 See discussion below.
123 *Bekker v Naude*:n 19.
124 *Van der Merwe v The Master*:n 19.
125 See the full discussion in De Waal (2004:529) or *De Reszke v Maras* 2003 (6) SA 676 (C), which clearly indicates that there is confusion about these concepts.
126 *Raubenheimer v Raubenheimer*:n 27; *Mankelengane v Simon*:n 38.
127 *Raubenheimer v Raubenheimer*:n 27. See, however, *Thompson v Master, Western Cape High Court*:n 11 where the strict approach in *Bekker v Naude*:n 19 is followed.
128 *Bekker v Naude*:paras. 9, 14.
129 See De Waal & Schoeman-Malan 2015:74. For lost original wills, see Faber & Du Toit (2015:313); Schoeman-Malan (2013b:688).
130 See *Yokwana v Yokwana*:n 76.

the deceased.[131] If, for argument's sake, the dispute "whether the faxed copy was a document or not" is left aside, the second question would be whether the document was "drafted or executed by the deceased". In *Van Vuuren's* case, the original "document" was, in fact, drafted and partially executed by the deceased personally.[132] It would, therefore, have complied with the "personally drafted" requirement (if the original was available) as foreseen in *Bekker v Naude*, where personal drafting (including dictating) was required.[133] One would have expected the High Court to have referred to the Supreme Court of Appeal's decision in *Bekker v Naude* as authority on this aspect.[134] In *Barnard's* case, an attorney drafted the will. The difference between drafting and executing is clearly illustrated by the facts of this case. The attorney "drafted" the document at the request of the deceased and she attempted "to execute" the document. Within the ambit of sec. 2(1), the executing process was, however, defective.

When the two judgements are analysed in terms of the issue of "drafting and executing", it becomes apparent that no distinction is made between the two concepts. The court relies on *De Reszke v Maras* and emphasises the words *"for grant of relief under s 2(3) a court must be satisfied that the 'deceased person' who drafted or executed the document intended it to be his will".*[135] It is not forthcoming whether this highlighted phrase is supposed to sanction the "drafting" or "executing" or the "intention" requirement. It does, however, appear that "the deceased person had drafted the document" in *Van Vuuren's* case and that "the deceased person did not draft it" in *Barnard's* case, but had to some extent executed it. As a matter of fact, the exact same principles were applied in both the *Van Vuuren* and the *Barnard* cases without the court dealing with the dispute concerning the concept of "personal drafting", "caused to be drafted" and "execution". The approach followed in the two cases leaves the impression of ignorance about the difference between the concepts of "drafting" and "execution" and a misunderstanding of the pertinent case law.[136]

5.4 Intention requirement

It appears that the intention requirement has, over time, become the overriding requirement and the centre of the controversy, as it remains

131 *Bekker v Naude*:n 19; *Raubenheimer v Raubenheimer*:n 27; *Mankelengane v Simon*:n 38.

132 *Van Vuuren*:par. 1.

133 See also *Thompson v Master, Western Cape High Court*:n 11.

134 The court did not refer to the well-known case of *Bekker v Naude*:n 19 in any of the cases.

135 Author's emphasis. *Van Vuuren:*par. 9; *Barnard*:par. 21.

136 *Van Vuuren*:par. 1; *Barnard*:par. 15. It is common cause that, in both cases, it was not disputed that the deceased were the authors of the documents before the court.

uncertain exactly what it entails.[137] The questions often asked regarding the required intention are

(i) has the deceased intended that the specific document (content of the document) be his/her will;[138]

(ii) when should the deceased have had the intention,[139] and

(iii) how should the intention be established?

To answer these questions, the court has to rely on the "drafted or executed document", as it serves as a basis for the confirmation of the intention of a person wanting to dispose of his/her assets. *De Reszke* confirmed that the intention should have been that a specific document is the "will" and that the intention should be present concurrently with the execution or drafting of the document.[140]

The court in the *Van Vuuren* and the *Barnard* cases refers to *Van Wetten v Bosch*,[141] where Lewis JA held that the real question is not what the document means, but whether the deceased intended it to be his/her will:[142]

> 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*.[143] That enquiry if[144] necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.[145]

The intention (to dispose of property, and appoint beneficiaries) implies that both prerequisites (the document [presented to the court] and the drafting or execution process) came about because of the desired intention of the deceased to execute a will.[146] To establish the intention,

137 See De Waal 2004:529; Schoeman-Malan 2013b:688; De Waal & Schoeman-Malan 2015:76.

138 To establish the required intention in relation to a document and the execution process, the court has to study the drafted or defective executed document. See Wood-Bodley 2013:246-248.

139 The required intention must thus exist at the time of the drafting and/or execution of the document, and the testator cannot form it at a later stage. *Anderson and Wagner v The Master*:n 37; De Waal & Schoeman-Malan 2015:75-76.

140 *De Reszke v Maras:*par. 11. See also Schoeman-Malan *et al.* 2014:96.

141 *Van Wetten v Bosch*:n 21.

142 See *Van Vuuren*:par. 10; *Barnard*:par. 22. Both paragraphs refer to "if necessity".

143 Court's emphasis.

144 In *Van Wetten v Bosch*:par. 16, the judgement used the word "of" and not "if".

145 In *Van Vuuren*:n 15, the court concluded: "The will, (document) which the deceased describes as "Testament", provided for the appointment of an executrix. The testator was thus aware of the role and function of an executor. There can be no doubt that he had the intention that the document was legally his will."

146 De Waal 2012:834-835; *Raubenheimer v Raubenheimer*:par. 3.

the courts have also taken circumstances surrounding the "drawing of the document" into account.[147] The court confirmed this methodology in both cases and stated in this regard:[148]

> The court has to be satisfied that the disputed document was drafted by the deceased and that it was the deceased's intent that this is to be his last will. The surrounding circumstances in this instance have to be examined and considered for this court to make a decision.[149]

In *Van Vuuren's* case, the court was satisfied that the deceased had the required intention. Although he had not signed the document in the presence of the secretary, she was convinced (and so was the court) that he had written the document in his own handwriting and that it was his signature on the document. The court should have taken into account, but did not, of the following aspects: the fact that the deceased died eight years after drafting the document; the fact that he was the executor in his father's estate and would, therefore, have been aware of the formalities for the execution of a will; the fact that the original document could not be found, and the fact that he warned his son that he would disinherit him for smoking.[150] Furthermore, the deceased might have had a change of heart with regard to the last aspect. In both cases the court found authority in *Van Wetten and Another v Bosch*.[151] In *Barnard's* case, the surrounding circumstances indicate that the intention of the deceased was, in fact, to execute a new will. Whether she had the required capacity to do so was not thoroughly examined and established by the court.

6. Conclusion

The purpose of this discussion is to illustrate how some judgements continue to consistently apply sec. 2(3) without distinguishing the real issues already identified and addressed by the Supreme Court of Appeal.[152] It is apparent that the court, in the two cases discussed, did not draw a parallel between the application of sec. 2(3) and the general formalities for the execution of wills in sec. 2(1). Such an approach by the courts will eventually result in sec. 2(3) becoming a piece of legislation that is not premised on the general principles of the law of succession. It seems that judgements by the High Court do not correspond with the guiding principles that can be gathered from the definitive judgements of the Supreme Court of Appeal and that precedent is referred to out of

147 De Waal 2011:1041; Wood-Bodley 2013:256.
148 *Barnard*:par. 18.
149 *Van Vuuren*:par. 11; *Barnard*:par. 23 has exactly the same words.
150 *Van Vuuren*:par. 8: "This court has to establish that the deceased had the requisite intention when drafting and signing the document that the document was his final will and testament."
151 *Van Wetten v Bosch*:par. 16.
152 Schoeman-Malan *et al.* 2014:88; Wood-Bodley 2015:734.

context.[153] It also seems that the scant reference to authority complicates matters. The judgement in *Van Vuuren* cannot be supported, as it displays a lack of insight into the basic principles of the condonation power. The idea of a tailor-made judgement cannot be countenanced. Faber and Du Toit have stated that the approach in *Van Vuuren* is unacceptable:[154]

> Die rede vir Pretorius R. se foutiewe toepassing van die kondonasiebepaling in die *Van Vuuren*-gewysde is klaarblyklik te vinde in die regter se verwarrende omgang met die tersaaklike dokument – die regter se woordgebruik op verskeie plekke in die uitspraak dui daarop dat die dokument wat oorspronklik deur die oorledene onderteken was die 'betwiste dokument' of die 'betwiste testament' sou wees. In die lig daarvan dat hierdie oorspronklike dokument verlore gegaan het en dit die faks-kopie was wat voor die hof gedien het, is dit seer sekerlik laasgenoemde, en nie eersgenoemde nie, wat die 'betwiste dokument' of die 'betwiste testament' was (of, meer korrek, die betwiste kopie of afskrif van die gewaande testament).[155]

The judgement in *Barnard* can be supported, in principle, although the court overlooked some contentious aspects. On the one hand, testamentary capacity has been confused with the intention to make a valid will testate;[156] on the other hand, the role of the Master of the High Court had not been clarified.[157]

It has occasionally been argued that the government should step in and redraft or amend sec. 2(3), in order to clarify the confusion caused by conflicting judgements on condonation.[158] Perhaps the time is ripe to go back to the drawing board to ensure that the formulation of the section corresponds with the original intention behind the reform.[159] The following plea for intervention by the legislature is repeated:[160]

> It is submitted that, in the result, the current state of judicial engagement with s 2(3) is unsatisfactory in some respects. It is acknowledged, moreover, that 'over-legislating' a condonation provision such as s 2(3) may have an unduly restrictive effect on the ambit of judicial manoeuvrability with regard to the rescue of

153 De Waal 2011:1039; Jamneck *et al.* 2012:71ff.; Schoeman-Malan *et al.* 2014:90; De Waal & Schoeman-Malan 2015:6.
154 Faber & Du Toit 2015:312.
155 For the requirement "specific document", see *De Reszke v Maras*:par. 18; De Waal & Schoeman-Malan 2015:76.
156 Schoeman-Malan *et al.* 2014:91-92. However, Comri J again clouded the issue when the matter in *De Reszke*'s case went on appeal to a full bench of the High Court: "As indicated earlier there are essentially two overlapping questions to be determined. The first is whether, when the deceased signed annexure A [the disputed document] … he intended that specific document to be his (new) will. The second issue is whether he was capable of such intention.".
157 Faber & Du Toit 2015:311.
158 Schoeman-Malan *et al.* 2014:103.
159 De Waal 2010:1182-1184; De Waal 2011:1042-1043.
160 Schoeman-Malan *et al.* 2014:103.

formally irregular wills. It is submitted, nevertheless, that, in light of this article's assessment of some unresolved issues with regard to s 2(3), legislative attention to the following matters will enhance and, arguably, simplify the utility of the Wills Act's rescue provision.[161]

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