

Section 2(3) of the Wills Act 7 of 1953: a retrospective and critical appraisal of some unresolved issues

LINDA SCHOEMAN-MALAN,* FRANÇOIS DU TOIT,[†] ANTON VAN DER LINDE[‡] AND JAMES FABER[§]

This article traces the history of s 2(3) of the Wills Act 7 of 1953 – the Act’s so-called ‘condonation provision’. It examines the reasons for the legislature’s introduction of a rescue provision in regard to formally irregular wills and amendments of wills, and surveys the manner in which South African courts have engaged with testamentary condonation to date. The article pays particular attention to three matters regarding s 2(3) that still pose challenges to courts in their engagement with testamentary rescue: the precise ambit of the condonation provision’s document requirement; some difficulties associated with the subsection’s intention requirement; and the question whether the subsection demands substantial compliance with execution and/or amendment formalities before condonation can occur. The authors submit that these unresolved matters require further legislative attention.

I INTRODUCTION

The Wills Act,¹ according to its long title, consolidated the law regarding the execution of wills in South Africa. The Act abolished the diverse prescripts in respect of formalities for the execution and amendment of wills that theretofore were in force in South Africa’s provinces, and replaced them with a set of uniform prescripts that apply throughout the Republic.² Consequently, the various will forms that applied in the provinces were replaced by a single will form – a written and signed document in the form of the so-called ‘underhand will’ modelled on the corresponding will form of the English Wills Act of 1837.³

* LLB LLD (UP), Professor of Law, University of Pretoria.

[†] LLB LLM LLD (Stell), Professor of Law, University of the Western Cape.

[‡] LLB LLM LLD (UP), Professor of Law, University of Pretoria.

[§] LLB LLM (UFS), Lecturer in Law, University of the Free State.

¹ Act 7 of 1953 (hereinafter referred to as the Wills Act). The Wills Act commenced on 1 January 1954. See NJ van der Merwe & CJ Rowland *Die Suid-Afrikaanse Erfreg* 6 ed (1990) 120–149 for an exposition on the position prior to 1954.

² The Wills Act applied also in respect of the former South-West Africa (now Namibia): see Van der Merwe & Rowland (n 1) 150; MM Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* 2 ed (2001) 50. The Wills Act was not conceived as a codification of testate succession law: see B Beinart ‘Testamentary form and capacity and the Wills Act’ (1953) 70 *SALJ* 159; JC Sonnekus ‘Voorgestelde statutêre wysigings van die erfreg’ 1992 *TSAR* 159.

³ Van der Merwe & Rowland (n 1) 177; Corbett, Hofmeyr & Kahn (n 2) 2; F du Toit ‘Succession law in South Africa: a historical perspective’ in KGC Reid, MJ de Waal &

The Wills Act, its consolidative and systematic approach to testamentary formalities notwithstanding, posed a number of interpretation and application challenges in regard to the execution and amendment of wills.⁴ Legislative amendments sought to clarify some of the Act's words and phrases, but interpretation and application problems persisted.⁵ Unsurprisingly, legal scholars and practitioners called for reform. Ellison Kahn famously highlighted the Wills Act's shortcomings regarding the formal aspects of wills in his contribution to a *Festschrift* for Paul van Warmelo by claiming that the South African law on testamentary formalities had 'gone bananas'.⁶ These appeals prompted the South African Law Commission⁷ to include a programme on succession law as part of its activities in 1975 and 1976. The Commission released a Working Paper on testamentary formalities in 1986,⁸ followed by a final Report on the review of the law of succession in 1991.⁹ SALC (1991) occasioned the enactment of the Law of Succession Amendment Act.¹⁰ This Act incorporated most of the Commission's recommendations contained in a Draft Bill included in SALC (1991), and it imported a number of novel provisions, including a so-called 'condonation provision', into the Wills Act.

R Zimmermann (eds) *Exploring the Law of Succession – Studies National, Historical and Comparative* (2007) 67. The soldier's will was an exception to this single will form: see E Kahn 'The will that won't – formalities gone bananas' in J van der Westhuizen (ed) *Huldigingsbundel Paul van Warmelo* (1984) 128–142.

⁴ See eg *Ex parte Goldman and Kalmer NNO* 1965 (1) SA 464 (W) (interpretation of 'sign' and 'signature' in terms of s 2(1)(a)(iv) and 2(1)(a)(v)); *Radley en 'n Ander v Stopforth en 'n Ander* 1977 (2) SA 516 (A) (ruling on the content and time of placement of a certificate in terms of s 2(1)(a)(v)); *Dempers and Others v The Master and Others* 1977 (4) SA 44 (SWA) (determination whether the attesting witnesses' initials constituted signatures in terms of s 2(1)(a)(iii)); *Tshabalala v Tshabalala* 1980 (1) SA 134 (O) (ruling on the placement of the certifying officer's signature in terms of s 2(1)(a)(v)); *Mellvill and Another NNO v The Master and Others* 1984 (3) SA 387 (C) (determination whether initials of the testator and attesting witnesses constituted signatures in terms of s 2(1)(a)(iv)); *Gantsho v Gantsho and Others* 1986 (2) SA 321 (T) (ruling on the placement of the certificate in terms of s 2(1)(a)(v)); *Jeffrey v The Master and Others* 1990 (4) SA 759 (D) (determination on the capacity of the certifying officer in terms of s 2(1)(a)(v)); *Ex parte Jackson NO: In re Estate Miller* 1991 (2) SA 586 (W) (determination whether initials of the testator and attesting witnesses constituted signatures in terms of s 2(1)(a)(iv)); *Liebenberg v The Master* 1992 (3) SA 57 (D) (ruling on the placement of the attesting witnesses' signatures); *Harpur NO v Govindamall and Another* 1993 (4) SA 751 (A) (determination whether initials of attesting witnesses constituted signatures in terms of s 2(1)(a)(iii) and 2(1)(a)(iv)).

⁵ Corbett, Hofmeyr & Kahn (n 2) 51. The Wills Act was amended prior to 1992 by the Wills Amendment Act 48 of 1958; the General Law Amendment Act 80 of 1964; and the Wills Amendment Act 41 of 1965.

⁶ Kahn (n 3) 130.

⁷ The Commission's current appellation is the South African Law Reform Commission.

⁸ South African Law Commission Working Paper 14 (Project 22) *Review of the Law of Succession: Testamentary Formalities* (1986) (hereinafter referred to as SALC (1986)).

⁹ South African Law Commission (Project 22) *Report on Review of the Law of Succession* (1991) (hereinafter referred to as SALC (1991)).

¹⁰ Act 43 of 1992 (hereinafter referred to as the Amendment Act). The Amendment Act commenced on 1 October 1992; Proc 113 GG 14312 of 24 September 1992.

The interpretation and application of s 2(3) – the Wills Act’s condonation provision in regard to formally irregular wills – have been contentious. A number of uncertainties with regard to this provision have been addressed judicially, but some unresolved issues remain. 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 of the struggles associated with judicial attempts to give practical effect to statutory law reform.

This article traces some of the milestones in the legislature’s enactment of, and the courts’ engagement with, the Wills Act’s condonation provision. Parts II and III of the article sketch the historical background to the subsection’s introduction, and outline issues of interpretation and application regarding the subsection that have by and large been settled by South African courts. Part IV analyses some unresolved matters regarding s 2(3), and the authors argue, in the article’s Part V, that South African testate succession law will benefit from a redesigned condonation provision in order to meet optimally the challenges posed by formalism in the law of wills.

II OVERVIEW AND HISTORICAL BACKGROUND

(1) *Formalities and formalism in the South African law of wills*

The Wills Act decrees that no will made or amended on or after 1 January 1954 shall have been validly executed or amended unless compliance with the formalities stated in s 2(1)(a) and s 2(1)(b) thereof has occurred. These formalities entail, in short, that the testator or an amanuensis as well as at least two competent witnesses must have signed the will or amendment; and that the will or amendment must have been certified by a commissioner of oaths in the event that the will or amendment was signed by the testator with a mark or, alternatively, if it was signed by an amanuensis.

The aforementioned formalities secure the validity of testators’ final dispositions; they contribute to the prevention of fraud during and after execution or amendment; they ensure that testamentary dispositions are made freely and voluntarily; they serve to identify the document and testator; and they prevent uncertainty and speculation.¹¹ Notwithstanding these commendable objectives sought to be achieved through wills’ formal regularity, a survey of pre-1992 South African judgments reveals that strict legislative and judicial insistence on wills’ formal regularity frequently occasioned the frustration of testators’ wishes.

¹¹ *Oldfield v The Master* 1971 (3) SA 445 (N) 449D–E; *The Leprosy Mission and Others v The Master of the Supreme Court* 1972 (4) SA 173 (C) 184H–185A; *Arendse v The Master and Others* 1973 (3) SA 333 (C) 337G–H and 357E–F.

(a) *Testamentary formalism in the pre-1992 era*

The American scholar John Langbein, in his seminal article on substantial compliance in the law of wills, remarked that the prominence of formalities in the law of wills is not peculiar; what is peculiar is judicial insistence that any defect in complying with such formalities automatically and inevitably voids a will.¹² Langbein's statement rings true in respect of South African judgments on formally irregular wills, particularly of judgments handed down during the 1970s and early 1980s. Regrettably, these judgments lacked consistency as courts resisted, to varying degrees, the temptation to strain the language of the Wills Act in order to provide relief in cases where, despite clear testamentary intent, wills were formally defective.¹³ Courts dealt casuistically with instances of formally non-compliant wills, which approach occasioned difficulties regarding virtually every word and phrase in s 2(1)(a) and s 2(1)(b) of the Wills Act. Evidently, South African courts, at times reluctantly, preferred to maintain the Wills Act's prescriptions on formal compliance rather than give effect to testators' clear and unambiguous testamentary intentions.¹⁴ For example, in *Leprosy Mission v The Master*,¹⁵ a case in which different witnesses signed different pages of a will, Corbett J, in holding the will to be invalid, remarked:

I recognise that this is a hard case in the sense that on the evidence of the various witnesses there does not appear to be any doubt that the document in question genuinely represents the last will of the testatrix and in that invalidity will result in worthy beneficiaries being deprived of substantial bequests. Nevertheless, there are important questions of legislative policy and principle at stake which transcend the equities of the particular case.¹⁶

Similarly, in *Kidwell v The Master and Another*,¹⁷ a case in which a testator failed to sign a will's final page at the conclusion of its written part but appended his signature at the bottom of the page, Kannemeyer J, in ruling that the will was invalid for want of compliance with s 2(1)(a)(i) of the Wills Act, said:

The conclusion to which I have come is unfortunate . . . and may frustrate the testator's intention. This is the result of a failure to observe a statutory requirement for the validity of wills which is peremptory.¹⁸

¹² JH Langbein 'Substantial compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489 at 498.

¹³ Corbett, Hofmeyr & Kahn (n 2) 58.

¹⁴ Corbett, Hofmeyr & Kahn (n 2) 58. See also *Ex parte Naidu and Another* 1958 (1) SA 719 (D) 723B–D.

¹⁵ *Leprosy Mission v The Master* (n 11).

¹⁶ 184H. See also *Stemmet v Die Meester* 1957 (3) SA 404 (C) 412A–B.

¹⁷ *Kidwell v The Master* 1983 (1) SA 509 (E).

¹⁸ 514F.

The above statements by Corbett J and Kannemeyer J express the tension between formalism in the law of wills, on the one hand, and testate succession's primary goal of giving effect to testators' last wishes, on the other hand. The sheer volume of cases, particularly during the 1970s and early 1980s, in which courts ruled that wills were void for want of compliance with some of the Wills Act's formality prescripts on execution or amendment, coupled with judicial recognition that voiding wills on formal grounds occasions the frustration of testamentary intent, led the South African Law Commission to investigate possible solutions or remedies.

(b) *The Law Commission's work on testamentary formalities*

The Law Commission's approach was to achieve a balance between testamentary formalities' burdensome nature, on the one hand,¹⁹ and the role that such formalities play to ensure the authenticity of wills, on the other hand.²⁰ The Commission recommended a two-pronged solution to address the difficulties occasioned by formalism in South Africa's law of wills: (i) the Wills Act's then-applicable prescripts on execution and amendment formalities had to be varied slightly, and (ii) a power to excuse formal non-compliance had to be bestowed on courts to remedy the harsh consequences of such non-compliance.²¹

The Commission attended particularly to the desirability of setting threshold requirements as qualifiers for a judicial power to dispense with wills' formal non-compliance. It recommended the existence of a written document as the only threshold requirement.²² Consequently, substantial compliance with formalities, including the requirement that the document at hand must have been signed by the would-be testator, did not feature in the Commission's recommendations on a judicial condonation power.²³

The Commission concluded that, in addition to minor changes to the Wills Act's then-applicable prescripts on execution and amendment formalities,²⁴ a condonation power had to be allotted that would permit courts to look beyond non-compliance with such prescripts in order to preserve expressions of testamentary intent.²⁵ The Commission recommended specifically that such a power had to operate unencumbered by a rule that requires substantial compliance with the Wills Act's prescripts on

¹⁹ SALC (1986) para 4.5; SALC (1991) para 2.6; Corbett, Hofmeyr & Kahn (n 2) 50.

²⁰ SALC (1986) para 4.5.

²¹ SALC (1991) para 2.121. See also *Ex parte Williams: In re Williams' Estate* 2000 (4) SA 168 (T) 171C–172D.

²² SALC (1986) paras 7.48 and 7.50.

²³ SALC (1991) para 2.20; Corbett, Hofmeyr & Kahn (n 2) 64.

²⁴ See SALC (1991) para 7.2 for a summary.

²⁵ SALC (1991) para 2.1.

execution and/or amendment formalities – courts had to be empowered to rescue formally non-compliant documents regardless of the extent of the non-compliance.²⁶

(c) *Subsequent legislative developments*

The Commission formulated clause 3(f) of a proposed Draft Bill included in SALC (1991) to read:

If a court is satisfied that a document or an alteration thereto by a person who has died since the drafting or execution thereof was intended to be his will or an alteration to his will, the court shall order the Master to accept that document or that document as amended for purposes of the Administration of Estates Act, 1965 . . . as a will notwithstanding the fact that it does not comply with the formalities of a will or the alteration of a will as prescribed in this section.²⁷

This recommendation formed the basis for the wording of the Law of Succession Amendment Bill's²⁸ condonation provision. South African succession law scholars generally welcomed the Amendment Bill, including its condonation provision, but some criticised the condonation provision for being too vague and for holding the potential of opening litigation floodgates.²⁹ The Law of Succession Amendment Bill was tabled and discussed in Parliament on 18 March 1992.³⁰ The Amendment Act was promulgated on 1 October 1992. This Act³¹ imported s 2(3) – the condonation provision – into the Wills Act.

III THE WILLS ACT'S CONDONATION PROVISION

The wording of the Amendment Act's condonation provision differed in two respects from that of the corresponding provision contained in SALC (1991)'s proposed Draft Bill. The differences in wording between the Bill, on the one hand, and the Amendment Act, on the other hand, were, and in some respects still are, a source of uncertainty regarding the interpretation and application of the condonation provision. The differences are:

- in the Amendment Act the words 'drafted or executed' were inserted as qualifiers where the word 'document' first appears in the provision – these qualifiers did not appear in the Draft Bill; and

²⁶ Para 2.29.

²⁷ 134.

²⁸ Bill B8–92.

²⁹ See eg Sonnekus 'Voorgestelde statutêre wysigings van die erfreg' (n 2); L Schoeman 'Enkele opmerkings oor die wysiging en herroeping van testamente na aanleiding van die Regskommissie se Verslag – Wenslikheid al dan nie' (1988) 21 *De Jure* 141; MC Schoeman 'Testamente en regterlike diskresies' (1992) 25 *De Jure* 423.

³⁰ *Hansard*, Wednesday 18 March 1992 at 2245.

³¹ Through s 3(g).

- in the Amendment Act the word ‘all’ was inserted as a qualifier where the words ‘the formalities’ appear in the provision – this qualifier did not appear in the Draft Bill.

In the result, s 2(3) of the Wills Act reads:

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 No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

A court is empowered to issue a condonation order in terms of the foregoing subsection only if the requirements stipulated therein have been met. Three requirements are set for the condonation of a formally irregular will or amendment:

- a (written) document must serve before the court;
- such document or amendment must have been drafted or executed by a person who died subsequently (the deceased); and
- the deceased must have intended such document as a will or an amendment of a will.

A number of initial questions and uncertainties regarding the interpretation and application of the condonation provision have been judicially addressed. Principal among these are that:

- section 2(3) has not done away with the prescribed execution and amendment formalities – these remain in place, are still mandatory, and must be complied with in order to ensure the validity of wills and amendments; only in certain instances of formal non-compliance will s 2(3) rescue testators’ expressions of intent in formally irregular wills;³²
- section 2(3) is cast in peremptory terms and does not permit the exercise of judicial discretion – if the requirements stipulated in the subsection have been met, a court must issue the condonation order to the Master and cannot in its discretion decide not to rescue the document at hand; conversely, if such requirements have not been met, a court cannot issue a condonation order;³³

³² *Logue and Another v The Master and Others* 1995 (1) SA 199 (N) 203F; *Ex parte Maurice* 1995 (2) SA 713 (C) 716H; *Anderson and Wagner NNO and Another v The Master and Others* 1996 (3) SA 779 (C) 785B.

³³ *Logue v The Master* (n 32) 203G–H; *Back and Others NNO v Master of the Supreme Court* [1996] 2 All SA 161 (C) 169d; *Van der Merwe v The Master and Another* 2010 (6) SA 544 (SCA) para 14.

- the qualifier ‘drafted . . . by a person who has died since the drafting . . . thereof’ to the word ‘document’ where the latter word first appears in s 2(3) must be interpreted literally to require personal drafting of the document by the person who subsequently died; consequently, an unexecuted document prepared by another for such a person is incapable of condonation;³⁴ and
- the aforementioned personal drafting of a document by the deceased is not restricted to the production of a personally handwritten document but also incorporates other acts of personal creation such as typing or dictation.³⁵

Notwithstanding judicial resolution of the aforementioned matters, some unresolved issues regarding the Wills Act’s condonation provision persist.

IV A CRITICAL APPRAISAL OF SOME UNRESOLVED ISSUES REGARDING THE WILLS ACT’S CONDONATION PROVISION

(1) *The document conundrum*

South African law demands that testamentary dispositions be expressed in writing and contained in documentary form. Testamentary wishes can be expressed in either handwritten or typewritten form for the purpose of document creation.³⁶ In the modern age computer-generated printed documents also suffice for this purpose.³⁷ The Electronic Communications and Transactions Act³⁸ establishes a regulatory framework in respect of electronic documents and data transmissions, but the Act excludes wills specifically from its regulatory ambit.³⁹ Consequently, a will cannot be executed electronically. In the result, any document purporting to be a

³⁴ *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA) para 20. In *Bekker’s* case the Supreme Court of Appeal disregarded the arguments advanced earlier in, among others, *Back v Master of the Supreme Court* (n 33) 170e–174e in support of condonation of an unexecuted document that the deceased did not draft personally. These arguments included that modern-day computerised technology obviates hand-drafted documents and that would-be testators are unlikely to attempt personal drafting of their wills when attorneys and banks provide professional services to such end. The authoritative finding on personal drafting in *Bekker* did not, however, negate curious judgments on this issue in the Supreme Court of Appeal case’s aftermath. Eg, *Longfellow v BOE Trust Ltd NO and Others* (WCHC) unreported case no 13591/08 (28 April 2010), a case that concerned an unexecuted document that was drafted by the husband of the deceased, was decided without reference to s 2(3)’s requirement that the document must have been drafted or executed by the deceased – the court addressed the subsection’s intention requirement only.

³⁵ *Bekker v Naude* (n 34) para 8.

³⁶ *GJ Lawrence v Executors of Estate of A Lawrence* 1904 NLR 80 82.

³⁷ MJ de Waal & MC Schoeman–Malan *Law of Succession* 4 ed (2008) 54–55. See MC Schoeman–Malan ‘Kondonasie vir die opstel en verlyding van ’n testament ingevolge artikel 2(3) van die Wet op Testamente 7 van 1953’ (2003) 36 *De Jure* 414 at 420–422 for a discussion on the writing requirement in regard to s 2(3) of the Wills Act.

³⁸ Act 25 of 2002. The Act commenced on 30 August 2002.

³⁹ Section 4(3) read with Schedule 1 and s 4(4) read with Schedule 2.

will must be of the paper variety for the purpose of compliance with the Wills Act's prescripts on formalities.

How does South African law's foregoing standpoint on the documentary form in which wills must be cast influence s 2(3)'s requirement that a document must serve before the court in a condonation application? Commentators agree generally that verbal statements are incapable of condonation – a document of the paper variety appears to be a minimum requirement also for the purpose of s 2(3).⁴⁰ However, the Wills Act contains no definitions of the noun 'document' or of the verbs 'draft' and 'execute' to cast more light on the legislature's use of these words in s 2(3). Binns-Ward J opined in *Ex parte Porter and Another*⁴¹ that, in the absence of statutory definitions, these words must be given 'their ordinary meaning, determined with proper regard to their contextual employment.'⁴²

Admittedly, the absence of a statutory definition of the word 'document' for the purpose of s 2(3) did not occasion difficulties in the immediate aftermath of the subsection's inception because all the documents presented for condonation at that time were of the paper variety. In *MacDonald and Others v The Master and Others*,⁴³ however, an unsigned electronic document stored on the deceased's office computer was the subject of a condonation application. Hattingh J appeared to open the door to the condonation of an electronic document in this case when he referred in passing to the deceased's will as 'a document that was stored in his computer',⁴⁴ but in the end the judge declared the document attached to the notice of motion – a hard copy print-out of the computer document – as the deceased's last will. The Supreme Court of Appeal followed suit in *Van der Merwe's case*⁴⁵ where the document at hand initially existed electronically as an email attachment that was forwarded to the recipient but that the deceased never executed. In this case Navsa JA echoed Hattingh J's earlier observation in *MacDonald* when the former stated that the emailed document 'still exists on the deceased's computer.'⁴⁶ The court nevertheless upheld the appeal against the lower court's refusal to issue a condonation order, and Navsa JA ordered that the

⁴⁰ Schoeman-Malan 'Kondonasie vir die opstel en verlyding van 'n testament ingevolge artikel 2(3) van die Wet op Testamente 7 van 1953' (n 37) 420; MC Wood-Bodley 'More on section 2(3) and 2A of the Wills Act 1953' (1997) 114 *SALJ* 455 458. Indeed, in *Webster v The Master and Others* 1996 (1) SA 34 (D) 41F Magid J opined that only *handwritten* documents can be condoned: 'What the Legislature had in mind in my view was the circumstance that the intention of a testator as demonstrated in writing in his own hand should not be frustrated'.

⁴¹ *Ex parte Porter* 2010 (5) SA 546 (WCC).

⁴² Para 7.

⁴³ *MacDonald v The Master* 2002 (5) SA 64 (O).

⁴⁴ 711–J.

⁴⁵ *Van der Merwe v The Master* (n 33).

⁴⁶ Para 17.

Master must accept the document annexed to the notice of motion – a hard copy print-out of the emailed document – as the deceased’s last will.

On the facts of the *MacDonald* and *Van der Merwe* cases it made little difference to the success of the condonation procedure that the documents in issue did not exist in hard copy format during the respective drafters’ lifetimes – the electronic documents in these cases were readily convertible into the paper documents that served before the respective courts. Would a similar result follow with regard to, for example, an electronic document that cannot, for whatever reason, be converted into hard copy format?⁴⁷ Is writing that occurred on a medium other than paper (for example, drawn in sand⁴⁸ or etched out on a bedside table) capable of condonation? Should the word ‘document’ in s 2(3) be subjected to an equally restrictive interpretation as the Supreme Court of Appeal imposed in *Bekker’s* case⁴⁹ on its qualifier ‘drafted’?⁵⁰ Answers to these questions shall not be attempted in this article,⁵¹ but it is submitted that the manner in which South African courts dealt with paper documents that have been submitted for condonation to date indicates a need for greater delineation of s 2(3)’s document requirement.

In *Ex parte Porter*,⁵² for example, the court refused condonation in respect of an unexecuted print-out of an emailed draft codicil, the original of which was validly executed but lost subsequent to execution. Binns-Ward J ruled that s 2(3) could not be invoked in this case because the document that the testator executed was the document he intended to be the codicil, whereas the document that served before the court in the condonation application was ‘only a template of the one that was executed.’⁵³ Binns-Ward J opined further that the appropriate relief in a case such as the one before him is to be found in the common law through an order that the Master must accept a reconstructed copy of the lost

⁴⁷ See generally JT Faber & PJ Rabie ‘Van tikmasjien tot rekenaar: ’n ondersoek na die ontwikkeling van die Suid-Afrikaanse erfreg in die tegnologiese era’ 2005 *TSAR* 773.

⁴⁸ See JC Sonnekus ‘Kondoneringsbevoegdheid van hof by vormgebrekkige testamente’ 1995 *TSAR* 359.

⁴⁹ *Bekker v Naude* (n 34). See also AR van Staden & C Rautenbach ‘Enkele gedagtes oor die behoefte aan en toekoms van elektroniese testamente’ (2006) 39 *De Jure* 586; J Jamneck ‘Testeerbevoegdheid, *animus, testandi*, testeervryheid, bedoeling en die “bedoeling” ingevolge artikel 2(3) van die Wet op Testamente (2)’ (2009) 72 *THRHR* 116; S Papadopolous ‘Electronic wills with an aura of authenticity: *Van der Merwe v Master of the High Court and Another*’ (2012) 24 *SA Merc LJ* 93.

⁵⁰ See Part III above.

⁵¹ It is interesting to note that Australian wills acts that bestow dispensing powers generally contain fairly detailed definitions of the kinds of documented final wishes that are capable of judicial rescue. These include anything on which writing appears; anything containing marks, figures, symbols or perforations carrying a meaning; anything from which sounds, images or writings can be reproduced; as well as maps, drawings and photographs: see eg s 32(1) of the Western Australia Wills Act 1970; s 10 of the Northern Territory Wills Act 2000.

⁵² *Ex parte Porter* (n 41).

⁵³ Para 8.

codicil.⁵⁴ However, in *Hassan and Others v Mentor NO and Another*⁵⁵ Davis AJ, in a condonation application⁵⁶ regarding a will that was duly executed but subsequently lost,⁵⁷ declared a copy of the lost document as the deceased's will and directed the devolution of his estate in terms thereof.⁵⁸ Davis AJ's ruling in *Hassan* appears at odds with that of Binns-Ward J because, as the latter pointed out in *Porter*, the word 'document' in s 2(3) must not be taken to refer to 'any document which exactly replicated the text of the intended testamentary instrument' but refers rather to 'the narrower concept of the actual piece of paper in issue.'⁵⁹ It is arguable, therefore, that acceptance of a reconstructed copy of the lost will under the common law would have been the appropriate relief in *Hassan's* case, and it is submitted respectfully that Davis AJ's *modus operandi* of accepting such a copy in a condonation application 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.

Condonation judgments are characterised, furthermore, by judicial inconsistency regarding the extent to which a document's format, appearance and language influence a court's estimation of a deceased's intention that the document be a will or amended will as required by s 2(3). In *Van Wetten and Another v Bosch and Others*⁶⁰ Lewis JA laid down the test to determine the deceased's intention regarding a document that is the subject of a condonation application: the question is not what the document at hand means, but whether the deceased intended it to be a will; this inquiry necessitates an examination of the document itself and of the document in the context of the surrounding circumstances.⁶¹ 'Surrounding circumstances' for this purpose encompass all relevant factors, including evidence as to statements made by the deceased during his or her lifetime.⁶² It follows that the strict rules regarding the interpretation of wills do not apply to a condonation inquiry.⁶³ However, the test laid down in *Van Wetten's* case has yielded divergent outcomes when applied in subsequent cases.

In *Taylor and Others v Taylor and Others*,⁶⁴ for example, the question arose whether the deceased intended a so-called 'wish list' (drafted by him

⁵⁴ Para 12.

⁵⁵ *Hassan v Mentor* (GPPHC) unreported case no 22960/11 (24 April 2012).

⁵⁶ Para 5.

⁵⁷ Para 4.1.

⁵⁸ Para 14.2.

⁵⁹ (n 41) para 11.

⁶⁰ *Van Wetten v Bosch* 2004 (1) SA 348 (SCA).

⁶¹ Para 16.

⁶² Para 26.

⁶³ Paras 15–16.

⁶⁴ *Taylor v Taylor* 2012 (3) SA 219 (ECP).

and bearing his signature but not containing the signatures of attesting witnesses) to function as an amendment to his existing will and, therefore, whether this document was condonable. Griffiths J refused condonation on the ground, among others, that the testator had not formed the intention required by s 2(3) in regard to the document.⁶⁵ The judge, in arriving at this conclusion, examined the deceased's use of language in the document (for example, his use of directory terms such as 'my wishes' and 'it is suggested'⁶⁶) and concluded that the wish list's language did not support an averment that the deceased intended thereby to amend his will; instead the language used pointed to the deceased's intention of having his existing will stand as is.⁶⁷ Griffiths J also noted the deceased's familiarity with testamentary execution formalities in light of the fact that he had previously executed a will – the deceased would (or should) have known that directions contained in the partially executed wish list were void for want of formal regularity.⁶⁸ In the earlier case of *Smith v Parsons NO and Others*⁶⁹ Luthuli AJ refused condonation of a suicide note on similar grounds, namely that the document's format and structure were 'not the type . . . normally found in testamentary documents';⁷⁰ moreover, the note's wording was 'more in the nature of an explanation than a testamentary direction.'⁷¹ Luthuli AJ also relied on the deceased's knowledge of testamentary execution formalities in support of the decision to deny condonation.⁷² However, the Supreme Court of Appeal in *Smith's* case⁷³ came to exactly the opposite conclusion when it found that the deceased's intention to amend his existing will was conveyed clearly and unambiguously by the instructions contained in the suicide note.⁷⁴ It is indeed startling that two courts had regard to the same document and came to such divergent findings thereon.

Moshidi J muddied the waters even further in *Mabika and Others v Mabika and Another*⁷⁵ when he condoned a partially signed application form that contained instructions for the drafting of a will. The application form affirmed expressly that the will-to-be-drafted would be valid only upon proper execution thereof.⁷⁶ Moshidi J, undaunted by the document's appearance and general purview, invoked equitable considerations

⁶⁵ Paras 13–16.

⁶⁶ Para 13.

⁶⁷ Para 13.

⁶⁸ Para 19.

⁶⁹ *Smith v Parsons* 2009 (3) SA 519 (D).

⁷⁰ Paras 22–23.

⁷¹ Para 23.

⁷² Para 23.

⁷³ *Smith v Parsons NO and Others* 2010 (4) SA 378 (SCA).

⁷⁴ Para 15.

⁷⁵ *Mabika v Mabika* (GPJHC) unreported case no 10308/11 (8 September 2011).

⁷⁶ Para 11.

in support of the decision to issue a condonation order.⁷⁷ It is certainly arguable that the document in this case was not intended as a will, but merely as instructions for the drafting of a will and that, accordingly, *Mabika's* case was wrongly decided.⁷⁸ It is submitted, therefore, that judgments such as *Hassan v Mentor*, *Mabika v Mabika* and even that of the Supreme Court of Appeal in *Smith v Parsons*, despite being cases that dealt primarily with s 2(3)'s intention requirement, contributed indirectly to the conundrum regarding the interpretation and application of s 2(3)'s document requirement.

In light of the foregoing, it is submitted that the introduction of a statutory definition of 'document' for the purpose of the condonation provision along the lines of the definitions contained in corresponding Australian statutes⁷⁹ will go some way to resolve s 2(3)'s document conundrum. The judicial treatment of the condonation provision's intention requirement with regard to an array of paper documents, all be it unsatisfactory at times, nevertheless supports the standpoint that, until such time as the legislature addresses the matter, the preferred view is that the form and general purview of a document should not be insurmountable obstacles to condonation, provided that such document's testamentary nature has been established and the deceased's intention in regard thereto has been ascertained.⁸⁰

(2) *The intention complexity*

Early condonation judgments posited the deceased's intention that the formally defective document or amendment at hand be a will or an amendment to a will as the subsection's cardinal principle.⁸¹ It is arguable, however, that the Supreme Court of Appeal's literal interpretation of the subsection's phrase 'drafted . . . by a person who has died since the drafting . . . thereof' in *Bekker's* case⁸² resulted in the subsection's focus on testamentary intent being scaled down to a requirement on par with its

⁷⁷ Para 15.

⁷⁸ See also A van der Linde '*Longfellow v BOE Trust Ltd NO* (13591/2008) [2010] ZAWCHC 117; *Mabika v Mabika* [2011] ZAGPJHC 109; *Taylor v Taylor* [2011] ZAECPEHC 48 – Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law' (2012) 45 *De Jure* 412.

⁷⁹ See n 51. See also N Peart 'Testamentary formalities in Australia and New Zealand' in KGC Reid, MJ de Waal & R Zimmermann (eds) *Comparative Succession Law: Testamentary Formalities* vol 1 (2011) 351.

⁸⁰ See further Part IV (2) (b) below.

⁸¹ See eg *Back v Master of the Supreme Court* (n 33) 173h–174c and 174f–i; *Ex parte Williams: In re Williams' Estate* (n 21) 178F–H; *Ex parte Laxton* 1998 (3) SA 238 (N) 241–242 in confirmation of *Back*; *Ex parte De Swardt and Another NNO* 1998 (2) SA 204 (C) 207E–G; *Ndebele and Others NNO v The Master and Another* 2001 (2) SA 102 (C) paras 22 and 29; *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N) 647C–F.

⁸² *Bekker v Naude* (n 34). See Part III above.

other requirements.⁸³ Nevertheless, the deceased's intention that the document at hand must be a will or an amendment of a will has proven the most contentious of s 2(3)'s requirements in recent times.⁸⁴ Despite the Supreme Court of Appeal having laid down valuable guidelines on the matter, the discussion on aspects of the condonation provision's intention requirement that follows reveals inconsistencies in courts' engagement with this requirement, and shows that the law regarding this requirement is far from settled.

(a) *The intention requirement and the Wills Act's prescript on testamentary capacity*

Case law reveals that the testamentary capacity⁸⁵ of deceased persons is occasionally challenged in condonation applications. Thirion J formulated the apposite approach to the placement of the burden of proof in such matters in *Harlow v Becker NO and Others*:⁸⁶

[The] *onus* rests on the party who seeks an order in terms of s 2(3) of the Wills Act 7 of 1953 to satisfy the Court that the person who drafted or executed the document intended it to be his will. On discharge of that *onus* the party who contests the validity of the document as a will on the ground that the person who executed it did not have the requisite testamentary capacity then bears the *onus* to prove the absence of testamentary capacity on the part of such person.⁸⁷

However, in *De Reszke v Maras and Others*⁸⁸ the court, without reference to this standpoint, raised the two issues in the reverse order.⁸⁹ Although the *De Reszke* court in the end ruled on condonation without making a finding on testamentary capacity, De Waal rightly criticised the judgment for first citing contradictory psychiatric reports and speculating

⁸³ See Faber & Rabie (n 47) 200 and 202 who opine that the intention of the deceased is not of greater importance than the requirement that the deceased must have drafted or executed the document. The intention of the deceased becomes significant only once it has been determined that the document was personally drafted or, alternatively, executed by the deceased. See, however, the court's curious *modus operandi* in the *Longfellow* case (n 34).

⁸⁴ F du Toit 'Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?' in AL Verbeke, JM Scherpe & C Declerck et al (eds) *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* vol 1 (2012) 513 at 527.

⁸⁵ In terms of s 4 of the Wills Act every person of the age of sixteen years or more may make a will unless, at the time of making a will, he or she is mentally incapable of appreciating the nature and effect of his or her act, and the burden of proof that he or she was mentally incapable at that time shall rest on the person alleging the same.

⁸⁶ *Harlow v Becker* 1998 (4) SA 639 (D). See also *Thirion v Die Meester en Andere* 2001 (4) SA 1078 (T).

⁸⁷ *Harlow v Becker* (n 86) 647C–D.

⁸⁸ *De Reszke v Maras* 2003 (6) SA 676 (C).

⁸⁹ 681D–J.

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.⁹⁰ However, Comrie J again clouded the issue when the matter in *De Reszke's* case went on appeal to a full bench of the High Court:⁹¹

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.⁹²

Jamneck⁹³ opined rightly that the second issue identified by Comrie J is irrelevant in a condonation application because s 2(3) requires merely for the deceased (whilst alive) to have drafted or executed the document at hand as well as to have had the intention for it to be a will: such an objective investigation into the deceased's intention regarding the document does not involve an inquiry on whether the deceased possessed the capacity to form the requisite intention. Moreover, the judgment in *Longfellow's* case⁹⁴ does not reveal that testamentary undue influence (of the deceased by the applicant in a condonation application) was pleaded, yet the court advanced undue influence as an alternative ground for its rejection of the disputed document's validity. If the court did so *ex mero motu*, its approach cannot be supported in light of the legal position enunciated in *Harlow v Becker* and the aforementioned scholarly criticism of the *De Reszke* judgments. It is submitted, therefore, that courts may not raise *ex mero motu* the issue of testamentary capacity in condonation applications if this issue was not pleaded. A testator is, after all, presumed to have had the requisite testamentary capacity at the time of a will's execution⁹⁵ and s 4 of the Wills Act places the burden to allege and to prove the contrary on the party who challenges a will's validity.⁹⁶ The deceased's testamentary capacity is, in the absence of such an allegation, not germane to a condonation application.

(b) *The nature of, and approach to, the required intention*

Case law on s 2(3) supports the contention that the subsection's intention requirement demands that the deceased must have intended the actual

⁹⁰ MJ de Waal 'The court's power of condonation in respect of the execution and revocation of wills: Unfortunate new elements of uncertainty' (2004) 121 *SALJ* 529 at 531.

⁹¹ *De Reszke v Maras and Others* 2006 (1) SA 401 (C).

⁹² Para 25.

⁹³ J Jamneck 'Artikel 2(3) van die Wet op Testament: 'n Praktiese probleem by litigasie' (2008) 11 *PER* 90 at 94–95.

⁹⁴ *Longfellow v BOE Trust* (n 34).

⁹⁵ DSP Cronjé & Anneliese Roos *Casebook on the Law of Succession* 4 ed (2002) 155.

⁹⁶ See n 85 above.

document that serves before the court as a will or an amendment of a will.⁹⁷ Such intention must have existed at the time the document at hand was made;⁹⁸ moreover, this intention must not be subject to change except by a new will or codicil.⁹⁹ The judgments in *Ex parte Maurice*,¹⁰⁰ *Letsekga v The Master and Others*¹⁰¹ and *Anderson and Wagner v The Master*,¹⁰² among others, confirm that the deceased must have contemplated the disputed document itself as a will, and not merely as a draft, concept, template, or instructions for a will: a document that expresses simply a deceased's distribution intentions is not condonable.¹⁰³

De Waal¹⁰⁴ pointed out that the golden thread running through the cases on the interpretation of s 2(3) is judicial insistence that the testator's intention regarding the disputed document's status as a will or an amendment of a will must be carefully scrutinised. Judicial demands that, generally speaking, s 2(3) must be strictly interpreted, support this view.¹⁰⁵ In *Henwick v The Master and Another*,¹⁰⁶ for example, Foxcroft J said:

It is a matter of common knowledge that what the Legislature sought to achieve by introducing s 2(3) into the Wills Act was the implementation of a testator's genuine intention. While the Court may in special cases push technical formalities to one side, it should not adopt a more relaxed approach to the real question, namely the testator's intention. It seems to me that when one is in a sense disregarding technical requirements intended to prevent fraud, it becomes at least as necessary as ever to apply caution when determining the intention of a testator . . .¹⁰⁷

This 'strict approach' notwithstanding, it is vital, as contended earlier,¹⁰⁸ that due regard is given to the testator's intention regarding the wording contained in the document, and not merely to the document's form or appearance. In *Van Wetten's* case,¹⁰⁹ for example, condonation

⁹⁷ See eg *Anderson and Wagner v The Master* (n 32) 784G. See also generally *Van Wetten v Bosch* (n 60); *Smith v Parsons* (n 69); *De Reszke v Maras and Others* 2006 (2) SA 277 (SCA).

⁹⁸ *Van Wetten v Bosch* (n 60) para 21.

⁹⁹ *Anderson and Wagner v The Master* (n 32) 784G–785A; M C Wood-Bodley 'Formalities for a will' in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* (2010) 78.

¹⁰⁰ *Ex parte Maurice* (n 32).

¹⁰¹ *Letsekga v The Master* 1995 (4) SA 731 (W).

¹⁰² *Anderson and Wagner v The Master* (n 32).

¹⁰³ In *Letsekga's* case (n 101) 735F–G Navsa J said that 'the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.' Thring J opined in *Anderson and Wagner v The Master* (n 32) 786A–C that Navsa J meant a 'final instruction to the world at large' rather than 'final instruction to his attorney or other advisor to draft a will or amendment.'

¹⁰⁴ De Waal (n 90) 533.

¹⁰⁵ See eg *Anderson and Wagner v The Master* (n 32) 785G.

¹⁰⁶ *Henwick v The Master* 1997 (2) SA 326 (C).

¹⁰⁷ 3341–J.

¹⁰⁸ See Part IV (1) above.

¹⁰⁹ *Van Wetten v Bosch* (n 60).

was granted in respect of a letter addressed to the deceased's attorney that contained instructions for the drafting of a will. A consideration determinative to this outcome was that the deceased left the letter in the possession of a friend with instructions that the letter was to be handed to the attorney only if something should happen to the deceased. The court interpreted this directive as a reference to the deceased's death – since it would be futile to give instructions for the drafting of a will after one's death, the court concluded that the letter itself was intended to function as the final expression of the deceased's wishes, notwithstanding the fact that it was not cast in typical testamentary form. However, in *De Reszke*¹¹⁰ Comrie J cautioned:

[T]he appearance of the document goes to evidentiary weight, and cogent evidence would be required to persuade a court that an educated person who signs a document which does not in substance appear to be a will nonetheless intended it to be such.¹¹¹

As argued earlier,¹¹² the Supreme Court of Appeal's judgment in *Smith v Parsons*¹¹³ appears somewhat at odds with Comrie J's view. In *Smith*'s case the court condoned a letter written by the deceased to his partner before he committed suicide. Notwithstanding the informal wording, structure and format of the document as well as the deceased's prior knowledge of execution formalities – considerations that were determinative to the court *a quo*'s decision in *Smith* not to grant condonation – the Supreme Court of Appeal insisted that the deceased indeed intended the suicide note to amend his existing will. In light of the opposite outcomes in the two *Smith* judgments, it is certainly debateable whether the factual circumstances in this case were sufficient to constitute the 'cogent evidence' regarding the deceased's intention on which Comrie J insisted in *De Reszke*.

*Mabika's case*¹¹⁴ compounded the condonation provision's intention complexity. *In casu* Moshidi J was confronted with the question whether a partially signed application form, in accordance with which a commercial bank would prepare a last will, was condonable. The judge decided that the deceased indeed intended the document as her will; moreover, that it would be greatly unjust not to condone the document.¹¹⁵ It was argued earlier that this decision is criticisable,¹¹⁶ and it is submitted that at least two further grounds can be added to the earlier criticism. First, the

¹¹⁰ *De Reszke v Maras* (n 91).

¹¹¹ 408A.

¹¹² See Part IV (1) above.

¹¹³ *Smith v Parsons* (n 73).

¹¹⁴ *Mabika v Mabika* (n 75).

¹¹⁵ Para 15.

¹¹⁶ See Part IV (1) above.

‘finality’ that the *Van Wetten* case ostensibly demands regarding the deceased’s intention in respect of the document at hand was not present on the facts of *Mabika’s* case. After all, the document that served before the court was an application for the drafting of a will that contained mere instructions – the arrangement with the bank was that the deceased would return to the bank to sign the actual will.¹¹⁷ Secondly, although the facts and circumstances of each case are important to the intention inquiry, legal certainty may not be compromised to meet the real or perceived equity-demands of individual cases. Indeed, Thring J stated succinctly in *Anderson and Wagner v The Master*:¹¹⁸

These considerations all lead me to conclude that section 2(3) of the Act must be strictly, rather than liberally, interpreted. Whilst the pursuit of equity (sometimes erroneously confused by laymen with ‘justice’) and the elimination of hardships are consummations devoutly to be wished, their attainment can often not be justified if it entails the sacrifice of certainty and legal principle.¹¹⁹

In *Potgieter and Another v Potgieter NO and Others*¹²⁰ the Supreme Court of Appeal recently took a stern view on the place and role of values such as reasonableness, fairness and justice, often advanced by litigants as manifestations of constitutionally founded public policy yardsticks, in the private law domain. Brand JA supported the view that South African law does not endorse the notion that judges can decide private law matters by invoking reasonableness and fairness as freestanding norms, because such will occasion intolerable legal uncertainty and will undermine the rule of law.¹²¹

Development of the law regarding s 2(3)’s intention requirement on a case-by-case basis, determined in each instance by the facts and circumstances at hand, was, arguably, predictable from the subsection’s inception. Nevertheless, South African courts have established some generally accepted guidelines on the matter, and courts should not, as it is respectfully submitted Moshidi J did in *Mabika’s* case, disregard these and, in so doing, undermine a principled approach to the condonation provision’s prescripts.

(c) *When must the required intention be present?*

Lewis JA laid down the principle in *Van Wetten’s* case¹²² that the deceased’s intention must be determined at the time of writing (making) the

¹¹⁷ *Mabika v Mabika* (n 75) para 11.

¹¹⁸ *Anderson and Wagner v The Master* (n 32).

¹¹⁹ 785G.

¹²⁰ *Potgieter v Potgieter* 2012 (1) SA 637 (SCA).

¹²¹ Para 34.

¹²² *Van Wetten v Bosch* (n 60).

document in question. Evidence as to subsequent conduct on the deceased's part is relevant only insofar as it casts light on what was on the deceased's mind at the time of making the document.¹²³ The view that evidence regarding a subsequent change in intention is irrelevant and inadmissible appears somewhat at odds with a remark made by Olivier JA in *Bekker's* case.¹²⁴ The judge alluded to the fact that, but for the negative answer to the preliminary question on s 2(3)'s drafting requirement in that case, the case's outcome would have turned on the issue whether the deceased intended a bank-drafted document as his will.¹²⁵ This statement permits the interpretation that the court was open to considering a subsequent change of intention on the deceased's part. It is certainly arguable that the failure of the deceased in *Bekker's* case to have the document in issue properly executed for a period spanning just over five years prior to his death may point to the fact that the deceased did not want it to serve as his last will.¹²⁶ It is submitted, therefore, that, notwithstanding the Supreme Court of Appeal's pronouncement in the *Van Wetten* and *De Reszke* cases on the time at which the deceased must have formed the intention required by the condonation provision, the aforementioned *obiter* remark by the same court in *Bekker's* case underlines the viewpoint that s 2(3)'s directive on intention is far from straightforward – it is indeed a complex requirement.

(3) *The substantial compliance obfuscation*

Section 2(3)'s directive regarding condonation of a document 'although it does not comply with all the formalities for execution or amendment' has been contentious from the subsection's inception. Does the legislature's departure from the Draft Bill contained in SALC (1991) through its insertion of the word 'all' in s 2(3)¹²⁷ demand that the document at hand must comply with at least some of the execution or amendment formalities, and, if so, is a substantial compliance threshold set for documents presented for condonation?

¹²³ Para 21. See also *Schnetler NO v Meester van die Hooggeregshof en Andere* 1999 (4) SA 1250 (C). In *De Reszke v Maras* (n 97) para 11 the court confirmed that the requisite intention must have existed concurrently with the drafting or execution of the document. If that intention was not present at that time, the document will not become a will by a mere subsequent oral declaration without any further action (such as the signing thereof).

¹²⁴ *Bekker v Naude* (n 34).

¹²⁵ Para 7.

¹²⁶ Du Toit 'Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?' (n 84) 528. See also J Sonnekus 'Kondonering van vormgebrekkige testament? Vergeet dit!' (2003) 14 *Stellenbosch LR* 337 at 339. See M Wood-Bodley 'Tertius Bosch's final over: *Van Wetten v Bosch* (2005) 122 *SALJ* 52 at 56 for recommendations in this regard.

¹²⁷ See Part III above.

Langbein showed that the basic question posed under the substantial compliance approach in the law of wills is whether the non-complying document expresses the deceased's testamentary intent, and whether its form approximates sufficiently to legislative prescripts to enable a court to conclude that it serves the purposes of the Wills Act.¹²⁸ Langbein pointed out that the substantial compliance approach designates some statutory prescripts on formal compliance as so fundamental that not meeting them will defeat any attempted rescue of the non-compliant document; these include, generally, placement of the testator's signature on a will,¹²⁹ the requirement that a will be in writing,¹³⁰ as well as a will's attestation (however, partial attestation and defects in the ceremonies surrounding attestation are generally remediable under the substantial compliance approach).¹³¹

The substantial compliance approach has received legislative recognition in some jurisdictions. For example, the Québec Civil Code prescribes that a holograph will or a will made in the presence of witnesses that does not meet all formal requirements is nevertheless valid if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.¹³² The use of the word 'all' in the Québec Civil Code's aforementioned prescript is distinctively similar to the use thereof in s 2(3) of the Wills Act. Unsurprisingly, therefore, some early judgments on the condonation provision exhibited a distinct substantial compliance flavour.

In *Horn en Andere v Horn en 'n Ander*,¹³³ a judgment reported in Afrikaans, Flemming AJP posed the question whether the word 'all' in s 2(3) necessitates 'substansiële nakoming van die vormvereistes' (substantial compliance with the formalities) or 'n herkenbare poging om aan die Wet te voldoen' (a recognisable attempt to comply with the Act).¹³⁴ The judge suggested a positive answer to this question – in his opinion a negative answer would render s 2(1) of the Wills Act redundant.¹³⁵ Similarly, Magid J declared in *Webster's* case¹³⁶ that 'it could not have been the intention of the Legislature to validate a document which does not

¹²⁸ Langbein 'Substantial compliance with the Wills Act' (n 12) 489.

¹²⁹ 518.

¹³⁰ 518–519.

¹³¹ 521–522.

¹³² Québec Civil Code [1991, c 64, art 714].

¹³³ *Horn v Horn* 1995 (1) SA 48 (W).

¹³⁴ 49F.

¹³⁵ 49G.

¹³⁶ *Webster v The Master* (n 40).

comply with any of the formalities of s 2(1) of the Act'.¹³⁷ In the *Back* case,¹³⁸ on the other hand, Van Zyl J opined that the word 'all' in s 2(3) is unnecessary and superfluous; moreover, that the subsection contains no indication that the legislature contemplated condonation only when partial or attempted compliance with formalities occurred.¹³⁹ Van Zyl J's reasoning in *Back* corresponds with the recommendation in SALC (1991) that a court's power of condonation should not be constrained by a rule that requires substantial compliance with formalities;¹⁴⁰ moreover, that the only threshold requirement with which the document in a condonation application needs to comply is that of a written document.¹⁴¹ Unsurprisingly, therefore, Van Zyl J's reasoning in *Back* was received favourably by commentators.¹⁴²

The question whether s 2(3) demands substantial compliance with execution or amendment formalities for the purpose of condonation disappeared by and large from judicial discourse in *Back*'s aftermath, and courts readily condoned documents that did not comply with any of the prescribed formalities. Courts founded their decisions to this effect on compliance with s 2(3)'s other requirements insofar as these unexecuted documents were found to have been intended as wills or amendments of wills, and were either drafted personally or, if prepared by others, approved by the persons who subsequently died.¹⁴³ The Supreme Court of Appeal ostensibly brought finality to the matter when, in *Bekker v Naude*,¹⁴⁴ Olivier JA opted for a literal interpretation of the word 'drafted' in s 2(3) and held that an unexecuted document can be condoned only if it was created by the deceased personally.¹⁴⁵ *Bekker*'s case implies, therefore, that if the document in question was not drafted by the deceased personally, the deceased must have executed the document in order for it to be capable of rescue under the condonation provision. Wood-Bod-

¹³⁷ 42F. See also *Olivier v Die Meester en Andere: In re Boedel Wyle Olivier* 1997 (1) SA 836 (T) 843H–I; J Jamneck 'Die invloed van artikel 2(3) van die Wet op Testamente 7 van 1953 op die erkende beginsels van rektifikasie en interpretasie van testamente' (1994) 57 *THRHR* 596 at 598.

¹³⁸ *Back v Master of the Supreme Court* (n 33).

¹³⁹ 170a–d. See also *Stolz ID v The Master* 1994 (2) PH G2 (E) where Kroon J opined that 'all' in s 2(3) must be taken to mean 'any' so that recourse to the subsection is possible in instances of non-compliance with all, any, or simply one of the formalities.

¹⁴⁰ See Part II (1) (b) above.

¹⁴¹ See Part II (1) (b) above.

¹⁴² Eg, MC Wood-Bodley 'The "rescue provisions" of the Wills Act 1953 (as amended)' (1997) 114 *SALJ* 1 at 8. See also E Knoetze, 'Kondonerings van 'n gebrekkige sertifikaat ingevolge artikel 2(1)(a)(v) van die Wet op Testamente: *O'Connor v The Master* 1999 4 SA 614 (NKA)' 2000 *TSAR* 383.

¹⁴³ Eg, *Ex parte Laxton* (n 81); *Ndebele v The Master* (n 81); *Thirion v Die Meester* (n 86); *MacDonald v The Master* (n 43).

¹⁴⁴ *Bekker v Naude* (n 34).

¹⁴⁵ Para 20.

ley¹⁴⁶ deduced from *Bekker* that the phrase ‘although it does not comply with all the formalities’ serves as qualification of the word ‘execute’ in s 2(3) and that, accordingly, s 2(3) may be used irrespective of whether only one, some, or all of the apposite formal requirements were not complied with.

This ostensibly straightforward state of affairs notwithstanding, some obfuscation regarding the substantial compliance question persisted after the *Bekker* judgment. For example, Moosa J opined in *De Reszke v Maras*:¹⁴⁷

‘Executed’ is not defined for the purpose of s 2(3), but the formalities required for the proper execution of a will are set out under s 2(1). A document for purpose of s 2(3) is not properly executed if it does not comply with the requirements of s 2(1).¹⁴⁸

De Waal, who shares Wood-Bodley’s aforementioned view on the relationship between ‘execute’ and the qualifying phrase ‘although it does not comply with all the formalities’ as these appear in s 2(3), argued that Moosa J’s standpoint in *De Reszke* complicated matters unnecessarily. According to De Waal, ‘executed’ in the context of s 2(3) does not bear reference to compliance with s 2(1)’s prescripts but rather means that the deceased must have signed the document at hand, either with a regular signature, with initials, or, possibly, with a mark, as contemplated in s 1 of the Wills Act.¹⁴⁹ Nevertheless, in *Bekker v Naude*’s aftermath Roos¹⁵⁰ cautioned that, given Olivier JA’s literal interpretation of ‘drafted’ in *Bekker*, it cannot be precluded that courts may in future hold that the legislature’s insertion of the word ‘all’ in s 2(3) is meaningful and necessitates compliance with at least some of the Wills Act’s prescribed formalities. Of course, the signing of the document in question by the person who subsequently died immediately comes to mind as a minimum-compliance requirement in this regard.

However, subsequent judicial observations ostensibly put paid to this contention. In *Smith v Parsons*¹⁵¹ Seriti AJA, in issuing a condonation order in respect of a suicide note that contained testamentary directions

¹⁴⁶ MC Wood-Bodley ‘Did you say “asinine” milord? – *Bekker v Naude* 2003 5 SA 173 (SCA)’ (2004) 25 *Obiter* 222 at 228.

¹⁴⁷ *De Reszke v Maras* (n 88).

¹⁴⁸ Para 12. It must be noted that, although *De Reszke* was reported after *Bekker*, the judgment was in fact handed down prior to *Bekker*.

¹⁴⁹ De Waal ‘The court’s power of condonation in respect of the execution and revocation of wills: Unfortunate new elements of uncertainty’ (n 90) 532. See also Wood-Bodley ‘Did you say “asinine” milord?’ (n 146) 229.

¹⁵⁰ A Roos ‘Die Hoogste Hof van Appèl beslis oor artikel 2(3) van die Wet op Testamente: *Bekker v Naude* 2003 5 SA 173 (HHA); *Van Wetten v Bosch* 2004 1 SA 348 (HHA)’ (2005) 68 *THRHR* 132 at 142.

¹⁵¹ *Smith v Parsons* (n 73).

and was signed by the deceased with his shortened first name, opined that ‘a formal signature is not required to meet the requirements of s 2(3) of the Wills Act.’¹⁵² Navsa JA went even further in *Van der Merwe v The Master*¹⁵³ when, in ordering the condonation of an unexecuted emailed document, he stated that ‘[a] lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3).’¹⁵⁴ Admittedly, the documents at hand in the *Smith* and *Van der Merwe* cases were both drafted personally by the persons who subsequently died, thus meeting the s 2(3) drafting requirement. Nevertheless, these remarks from Supreme Court of Appeal judges appear to shut firmly the door on any call for substantial compliance under s 2(3) of the Wills Act.

Does the aforementioned turn away from substantial compliance imply that the extent of compliance with prescribed formalities is wholly irrelevant to the condonation inquiry? It is submitted that this question must be answered in the negative. Navsa JA fortified this view in *Van der Merwe*’s case when he opined that ‘the greater the non-compliance with the prescribed formalities, the more it would take to satisfy a court that the document in question was intended to be the deceased’s will.’¹⁵⁵ At least, therefore, substantial compliance, whether demanded by s 2(3) or not, serves to inform courts’ findings on the subsection’s intention requirement.

V CONCLUSION

This article’s assessment of judicial engagement with the Wills Act’s condonation provision revealed that s 2(3) did not escape the interpretation and application ailments that it was designed to cure in regard to s 2(1)(a) and s 2(1)(b) of the Act. Particularly the Supreme Court of Appeal assumed, at least at times, a conservative stance towards the condonation provision. Lower courts, on the other hand, occasionally veered in the opposite direction and pushed the boundaries of the judicial rescue of wills. 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 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

¹⁵² Para 18.

¹⁵³ (n 33).

¹⁵⁴ Para 16.

¹⁵⁵ Para 16.

following matters will enhance and, arguably, simplify the utility of the Wills Act's rescue provision:

- (a) The word 'document' in s 2(3) will benefit from legislative delineation, particularly to clarify the interrelationship, if any, between this 'document', on the one hand, and 'testamentary writing' as provided for in s 1 of the Wills Act, on the other hand. It must be noted that SALC (1991) recommended that documents must be contained in 'writing' for the purpose of judicial rescue, and, therefore, excluded videotaped or recorded final wishes from the ambit of a condonation provision.¹⁵⁶ An electronic document that is not convertible to a hard copy paper version will, by analogy, also not be condonable. The Australian experience¹⁵⁷ suggests, however, that the medium in which testamentary wishes are contained (whether in the form of a paper document or not) is not necessarily determinative to successful judicial rescue. Legislative consideration of a definition that brings non-paper documents within the condonation provision's ambit will align judicial rescue of testamentary wishes with technological advancement. If this suggestion is too ambitious, it is submitted that, at least, the legislature should consider the introduction of a qualifier to the word 'document' in s 2(3) to the effect that last wishes contained in any document that constitutes a testamentary writing (for example a map or sketch-plan,¹⁵⁸ even one that does not contain any written words) as contemplated in s 1 of the Wills Act are condonable.¹⁵⁹
- (b) Once documentary status (in whatever form) has been established, the question arises whether the deceased drafted or executed the document at hand. As far as drafting of the document is concerned, *Bekker's case*¹⁶⁰ serves as authority for the standpoint that the deceased must have done so personally – if the document in question was not drafted by the deceased personally, the deceased must have executed the document in order for it to be capable of rescue under the condonation provision.¹⁶¹ Personal drafting is not restricted to the production of a personally handwritten document but incorporates also other acts of personal creation such as typing or dictation.¹⁶² However, the words 'drafted or executed' did not appear in the Draft Bill proposed in SALC (1991) and were inserted

¹⁵⁶ SALC (1991) paras 2.166–2.167.

¹⁵⁷ See n 51.

¹⁵⁸ See eg *Oosthuizen v Die Weesheer* 1974 (2) SA 434 (O).

¹⁵⁹ Schoeman-Malan 'Kondonasie vir die opstel en verlyding van 'n testament ingevolge artikel 2(3) van die Wet op Testamente 7 van 1953' (n 37) 420.

¹⁶⁰ *Bekker v Naude* (n 34).

¹⁶¹ See Part III above.

¹⁶² *Bekker v Naude* (n 34) para 8.

in the Amendment Act as qualifiers where the word ‘document’ first appears in the condonation provision. The reason for such inclusion is not altogether clear, nor is the precise ambit of personal drafting as contemplated in *Bekker’s* case. It is submitted that, notwithstanding the reasons advanced in *Bekker* for requiring personal drafting of an unexecuted document in order to secure condonation, the better view, for the reasons advanced in, among others, *Back v Master of the Supreme Court*,¹⁶³ is that it should be immaterial whether or not the deceased drafted such a document him- or herself. It is submitted that s 2(3) will benefit from a reconsideration of legislative insistence on a personally drafted unexecuted document.

- (c) The condonation provision’s requirement that the deceased must have intended the document at hand as his or her will or an amendment to his or her will remains contentious, more so because the intention requirement is intertwined with the subsection’s other requirements. It is submitted, therefore, that courts must achieve an appropriate balance between the prevailing (predominantly) conservative approach to the question as to what constitutes a document for the purpose of the condonation provision, on the one hand, and due regard to the deceased’s intention regarding the wording contained in the document, on the other hand. The Supreme Court of Appeal placed particular emphasis on the latter in *Smith v Parsons*,¹⁶⁴ among others, but, in so doing, may unwittingly have paved the way for the questionable decision in *Mabika’s* case¹⁶⁵ where, it is submitted, the court misconstrued the deceased’s intention on the facts at hand. Moreover, courts must engage circumspectly, yet consistently, with considerations such as a deceased’s astuteness with regard to legal matters in general, and knowledge of testamentary formalities in particular. Judicial treatment of these considerations to date lacks the consistency that one would expect of courts seeking to configure the condonation provision for optimal effectiveness. It is submitted further that courts must desist from invoking *ex mero motu* testamentary capacity in s 2(3) applications, as well as relying on equitable considerations at the expense of legal certainty in determining the outcomes of such applications. Such practices undermine a principled approach to testamentary condonation in South Africa.

¹⁶³ *Back v Master of the Supreme Court* (n 33). See also M Paleker ‘*Bekker v Naude en Andere*: the Supreme Court of Appeal settles the meaning of “drafted” in section 2(3) of the Wills Act, but creates a potential constitutional problem’ (2004) 127 *SALJ* 27.

¹⁶⁴ *Smith v Parsons* (n 73).

¹⁶⁵ *Mabika v Mabika* (n 75).

- (d) It is submitted, finally, that the dearth of judicial attention, after the judgment in the *Back* case,¹⁶⁶ to the question whether s 2(3) demands substantial compliance with execution or amendment formalities justifies the conclusion that substantial compliance should not operate as a threshold requirement for condonation – clearly South African courts do not view it as an additional requirement to the three requirements laid down expressly by the subsection.¹⁶⁷ This submission renders Van Zyl J’s objection in the *Back* case to the legislature’s inclusion of the word ‘all’ in s 2(3) more acute: the word is unnecessary and superfluous; moreover, the subsection’s historical development provides insufficient support for the legislature’s decision to include the word ‘all’ in the subsection. It is submitted, therefore, that the word ‘all’ should be removed from the Wills Act’s condonation provision.

Section 2(3) of the Wills Act opened the litigation floodgates with dozens of High Court and Supreme Court of Appeal judgments on the subsection having been handed down over the past twenty years. Regrettably, these judgments were not always consistent and principled in regard to the interpretation and application of the condonation provision. This resulted in s 2(3) yielding jurisprudence to an extent akin to the body of law on s 2(1) of the Wills Act. Moreover, the flood of cases on condonation emphasises the unfortunate delays in the winding up of deceased estates occasioned by the courts’ struggles with the interpretation and application of the condonation provision. The purpose of s 2(3) remains to ward off excessive formalism in the South African law of wills through effecting testamentary wishes despite the formally irregular documents in which such wishes were cast. It is submitted that, with this laudable objective in mind, the time is ripe for a reconsideration of the wording of the condonation provision in order to ensure that the common-law maxim *voluntas testatoris servanda est* is achieved optimally under the Wills Act’s condonation dispensation. To this end a redrafted condonation provision must, at least, provide apposite definitions of ‘document’, ‘drafted’ and ‘executed’ for the purpose of testamentary condonation; create greater clarity on the interrelationship between particularly the subsection’s document requirement and its directive regarding the deceased’s intention in respect of such document; and provide certainty on whether substantial compliance with formalities is indeed a requirement for condonation – if not, the word ‘all’ should be deleted from the subsection.

¹⁶⁶ *Back v Master of the Supreme Court* (n 33).

¹⁶⁷ See Part III above on these requirements.