Assisting an ailing testator to sign a will

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OPSOMMING

Bystand aan 'n verswakte testateur tydens die verlyding van 'n testament

Die verlyding van 'n testament is 'n belangrike stap wat 'n persoon gedurende sy leeftyd doen. Die testateur word gekonfronteer met sy eie sterflikheid en die verlyding van 'n testament vereis 'n opregte en ware weerspieëling van die testateur se bedoeling. Vir 'n testament om geldig te wees, moet die verlyding daarvan binne die breë raamwerk van die formaliteite soos voorgeskryf deur die Wet op Testamente geskied. Die doel van formaliteite is tweeledig: Aan die een kant bevestig die testateur die inhoud van sy testament (sy bedoeling) en, aan die ander kant, bevestig die getuies die handtekening van die testateur. Indien 'n testateur om watter rede ook al sodanig verswak is dat hy nie meer fisies sy testament kan teken nie, moet daar ingevolge die Wet op Testamente bystand aan die testateur verleen word deur onder andere 'n kommissaris van ede.

Na'n persoon se afsterwe verskuif die fokus vanaf die routydperk na die realiteit dat die afhandeling van die oorledene se boedel moet plaasvind. Indien 'n geldige testament gevind word, sal dit die verdeling van die boedel bepaal. 'n Dokument wat nie behoorlik verly is nie, is egter ongeldig en kan tot groot ongelukkigheid en familietwis lei. Daar het byvoorbeeld na die afsterwe van rugbyheld Joost van der Westhuizen, wie se gesondheid weens motorneuronsiekte erg agteruit gegaan het, 'n dispuut ontstaan oor die geldige verlyding van 'n dokument wat as sy testament voorgelê is.

Uit onlangse regspraak blyk dit dat waar 'n verswakte testateur 'n testament verly, die toepaslike formaliteite dikwels nie na behore nagekom word nie. Die regsaspekte wat in hierdie bydrae bespreek word sluit in: (a) die statutêre vereistes van die Wet op Testamente wat nagekom moet word wanneer 'n persoon wat nie in staat is om sy eie testament te teken nie, 'n testament wil verly; (b) die verskillende wyses vir die opstel ("drafting") en verlyding ("executing") van 'n testament deur 'n verswakte persoon; (c) die rol van die Meester van die Hooggeregshof by die aanvaarding of verwerping van 'n testament, en (d) die moontlike kondonering van 'n dokument ingevolge artikel 2(3) van die Wet op Testamente wat nie aan die vereistes vir ondertekening in artikel 2(1)(a)(v) voldoen nie.

1 INTRODUCTION

Executing a "will and testament" is an important step which a person takes during his or her lifetime.[1] When a testator becomes old, weak or frail he is confronted with his own mortality and with the likelihood of passing away.[2] It is

1 De Waal "Testamentary formalities in South Africa" *Comparative succession law: Testamentary formalities* (2011) 388–403; De Clercq *et al Deceased estates* (2018) 50; Morgan-Gould "Signing your will correctly" 3 February 2016 *The Gazette*. All references in this contribution to "he or his" include "she or her".

2 Corr and Corr "Living while your death is imminent", available at https://bit.ly/2ncyPnO (accessed on 26 February 2018).

important that when an ailing person wants to execute a will, his honest and truthful intention is secured by the act of will drafting.[3] For a will to be valid, the execution thereof should take place within the broad framework of the formalities prescribed by the Wills Act.[4] The Act requires attestation and the aim of the formalities is two-fold: On the one hand, the signature of the *testator confirms the content of his will* (his intention)[5] and, on the other hand, the signing by witnesses serves to confirm the signature of the testator.[6] When a person wants to execute a will in the normal course of activities, the formalities in section 2(1) should be complied with. However, when an ailing testator wants to execute a valid will but cannot personally sign the will, special care should be taken to comply with section 2(1)(a)(v) of the Wills Act which requires a commissioner of oaths to oversee the process of execution. The importance and need for formalities for the legal act of executing a will are explained as follows:[7]

> "The reason is not difficult to see. A will only takes effect, and usually only becomes known, once the testator has died, when he can no longer be questioned as to his intentions. The best evidence of content and authenticity having thus ceased to be available, legal systems resort to three types of form device in order to provide certainty about the testator's will: writing, reliance on witnesses, and the involvement of a neutral institution or officer, such as a court of law or a notary."[8]

After the passing of a person, the mourning period is often interrupted by the reality of the distribution of the deceased's estate having to take place and, for this to happen, it needs to be established whether the deceased left a properly executed "last will and testament".[9] If a valid will is found, it will determine the distribution of the estate. A document not properly executed is invalid and results in either a previously properly executed will directing the distribution of the estate, or the rules of intestate succession being applied.[10] Many wills fail and are declared invalid for lack of compliance with the prescribed formalities.[11]

3 Corbett *et al South African law of succession* (2001) 46 51; De Waal and Schoeman-Malan *Law of succession* (2015) 53ff; De Waal (fn 1) 388ff.

4 7 of 1953. Hereafter Wills Act.

5 Own emphasis. See De Waal (fn 1) 390; Jacobs and Lambrechts "Valid or not? General principles for challenging a will" 2013 *De Rebus* 30–32; Schoeman-Malan "Fraud and forgery of the testator's will or signature: The flight from formalities to no formalities" 2015 *TSAR* 125ff. See also *Thompson v Master Western Cape High Court* [2015] ZAWCHC 67.

6 Corbett et al (fn 3) 51 fn 16; De Waal (fn 1) 388–403; Reid et al (2011) 446. For English law, see Jenkins "How to witness a will" 29 November 2016, available at https://bit.ly/2LPFxyG (accessed on 18 July 2018).

7 See Reid *et al* (2011) 433.

8 In South Africa, one can execute a will without a notary being present but when a testator signs with a mark or someone signs on his behalf, the execution should be overseen by a commissioner of oaths.

9 See *Van der Westhuizen v The Master of the High Court Pretoria* unreported case no 59544/17 (GNP) (2018-11-12). Schoeman-Malan "Diverse probleme rondom die bestaan en geldigheid van 'n testament by die dood van die testateur (deel 1)" 2013 *De Jure* 413–431.

10 See *Molefi v Nhlapo* [2013] JOL 30227 (GSJ); King "Wills: Pitfalls to avoid" 20 July 2012 *Financial Planning* available at https://bit.ly/2Ob9Nk9 (accessed on 29 October 2017). See also Bassuday "Common mistakes to avoid when drafting a will" 16 Sept 2015 *FA News*; Bassuday, a legal manager at Standard Trust Limited, says that "even when a will is in place, common mistakes can render it invalid, which could place your estate, and your family, in turmoil".

11 See *Thompson* (fn 5); *Twine v Naidoo* [2017] ZAGPJHC 288; *Froud v Lewitt* [2009] ZAGPPHC 272. In the Australian case of *Calvert v Badenach* [2014] TASSC 61 Blow CJ

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Often family members and loved ones are distraught when they discover that they are left out of the deceased's will.[12] This may lead to family feuding which results in will-contest.[13] Some of the most common issues regarding the validity of wills,[14] especially when an ailing testator left a will that was "executed" shortly before his passing, are whether the testator had the necessary testamentary capacity,[15] or whether the will was properly executed and authenticated.[16] This appears to be the case after South African rugby hero, Joost van der Westhuizen,[17] passed away in February 2017 having lost his fight against motor-neuron disease.[18]

Several cases were reported recently where the signing of a will by an ailing testator and the compliance with formalities were questioned.[19] The legal aspects considered in this contribution are: (a) the statutory requirements of the

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once again placed the issue of will drafting under the magnifying glass. See also King (fn 10); Jacobs and Lambrechts (fn 5) 30–32.

12 See *Van Vuuren v The Master of the High Court* [2015] ZAGPPHC 67; *Barnard v Master of the High Court Pretoria* [2015] ZAGPPHC 393; *Naude v Naude* [2017] ZAECGHC 26. See *Van der Westhuizen* (fn 9). In the absence of a written judgement, the facts referred to in this article emanate from the founding papers filed on record. See also Venter "Amor will only get a TV set from #JoostVanderWesthuizen's Estate" 29 January 2018 *IOLnews*.

13 *Penwill v Penwill* [2016] ZAGPPHC 473; *Herman v Wiggill* [2015] ZAECELLC 12; Schoeman-Malan (fn 5) 125ff; King (fn 10). See also the cases mentioned in fn 11 and 12 *supra*; Taylor "Components of a will – Who may be a witness?" 26 July 2016, available at https://bit.ly/2LRw4Ha (accessed on 7 October 2016).

14 Van Deventer "The executor of estate and managing disputes between the heirs" 9 December 2016, available at https://bit.ly/2LOem7v (accessed on 29 October 2017).

15 For testamentary capacity see *Penwill* (fn 13); Schoeman-Malan "Testamentary capacity of cognitive-impaired elderly – When is old too old to execute a will?" 2015 *Obiter* 403ff; Schoeman-Malan "The requirements and test to assess testamentary capacity (1)" 2015 *THRHR* 606ff and "The requirements and test to assess testamentary capacity (2)" 2016 *THRHR* 69ff.

16 *Van Niekerk v Van Niekerk* [2016] ZAGPPHC 120 para 16; *Afrikaner v The Master of the High Court of Namibia* [2013] NAHCMD 224; De Waal and Schoeman-Malan (fn 3) 50; De Waal (fn 1) 392–400; Bassuday (fn 10); Wechsler "Witness requirements for a valid will" undated, available at http://www.thelaw.com (accessed on 20 September 2016).

17 Hereafter "Van der Westhuizen's case". See Venter (fn 12); Andersen "Joost's family end legal battle over unsigned will" 11 July 2017, available at https://bit.ly/2nbTf0f (accessed on 17 September 2017): "Due to his motor neuron disease, Joost was unable to physically sign the will himself."

18 See *Van der Westhuizen* (fn 9). In this case the court made an order without handing down a judgment containing the reasons for the order. The court granted an order in accordance with the relief sought in the notice of motion, excluding the prayer for condonation in terms of s 2(3) of the Wills Act. See also Ray "Obituary: Courageous Joost van der Westhuizen changed rugby" 6 February 2017 *TimesLive*; Hayward "South African great Joost van der Westhuizen: 'I can stay at home and die or live my life'" 13 November 2014 *The Telegraph*; Andersen (fn 17); Venter and Hancke "Joost's unsigned will causes legal drama!" 29 May 2017 *Netwerk24*; see also *Naude v Naude* (fn 12) *supra*.

19 *Thompson* (fn 5); *Pillay v Master of High Court Durban* [2017] ZAKZDHC 20; *Naude* (fn 12) para 125 where the testator allegedly signed a will when he was heavily intoxicated. See *Mlanda v Mhlaba* 2016 4 SA 311 (ECG) where the deceased signed the will by affixing what appears to be her thumbprint.

Wills Act[20] that must be adhered to when a testator is too frail to sign his own will;[21] (b) the importance of drafting and executing a will and the options available for a frail person to sign a will; (c) the role of the Master of the High Court in the acceptance or rejection of a will;[22] and (d) the possible condonation in terms of section 2(3) of the Wills Act of a document purported to be the will of a weakened person which does not comply with section 2(1) of the Wills Act.[23]

2 PROPERLY DRAFTED AND EXECUTED WILL

To *draft* a will the testator's intention and instructions must be captured in a document. To *execute* a will means that the testator authenticates the content of the document by attaching his signature and confirming his intention.[24] When a testator has difficulty to communicate or has physical limitations, the drafting and execution necessitate special attention. As in the English Wills Act of 1837, special provision is made in the Wills Act of 1953 for situations where a testator cannot physically sign his will.[25]

2 1 Drafting of a will

Although the "drafting and execution" can take place simultaneously, "drafting" is regarded as the process of *composing the will.*[26] The options for drafting a will are two-fold.[27] From a testator's point of view, a will can be drafted (and thereafter executed) either by the testator himself or on his behalf.[28] It is not recommended that an old or frail prospective testator does the drafting himself. If

20 S 2(1)(a)(v).

21 See Beyer "Preparing a will for a client with communication challenges" April 2012 *ISBA Trust and Estates.*

22 De Waal and Schoeman-Malan (fn 3) 66.

23 All three requirements have been analysed and discussed in great detail and confirmed by the Supreme Court of Appeal. See *Bekker v Naude* 2003 5 SA 173 (SCA); *De Reszke v Maras* 2006 2 SA 277 (SCA); *Van Wetten v Bosch* 2004 1 SA 348 (SCA); *Van der Merwe v The Master* 2010 6 SA 544 (SCA); *Smith v Parsons* 2010 4 SA 378 (SCA). See also 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. See also Van der Linde "Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law" 2012 *De Jure* 412ff; Schoeman-Malan *et al* "Section 2(3) of the Wills Act 7 of 1953: A retrospective and critical appraisal of some unresolved issues" 2014 *Acta Juridica* 80ff; Schoeman-Malan "Condonation confusion" 2017 *JJS* 77–99.

24 Own emphasis. *Van Niekerk* (fn 16); *Opperman v Opperman* [2016] ZAFSHC 26. Morgan-Gould (fn 1).

25 See s 2(1)(a)(v). Common law jurisdictions follow the English Wills Act. In terms of s 9 of the English Wills Act someone can also sign on behalf of the testator in England and Wales. See Kerridge "Testamentary formalities England and Wales" *Comparative succession law: Testamentary formalities* (2011) 306ff; Kerridge "Wills made in suspicious circumstances: The problem of the vulnerable testator" 2000 *Cambridge LJ* 310ff; Jones "Forgery: When is a will not a will?" 22 January 2014, available at https://bit.ly/2KtkH2B (accessed on 29 April 2014); Jenkins (fn 6). Also see the Australian case of *Calvert v Badenach* (fn 11).

26 See *Naude* (fn 12) para 16; *Calvert* (fn 11); De Waal and Schoeman-Malan (fn 3) 74.

27 De Clercq *et al* (fn 1) 50–51; Corr and Corr (fn 2); Van der Linde (fn 23).

28 *Pillay* (fn 19) para 6; Corbett *et al* (fn 3) 55; De Waal and Schoeman-Malan (fn 3) 74.

someone is not acquainted with the will-drafting process, a professional should rather be consulted.[29]

2 2 Execution of a will

Execution (as opposed to drafting) of a will has been described as follows:[30]

> "The execution of a will refers to the process through which a valid will, *which has been properly drafted and signed*, comes into existence. A document which has been created with the intention of drafting a will, but which does not comply with the necessary formalities, means that there *is not a properly executed will*."[31]

Execution entails the formal signing of the will. The required formalities prescribed in section 2(1) of the Wills Act that a testator and witnesses should comply with during the execution process, are typically considered as trite and rather straightforward. Despite this, will contests where these formalities are questioned often arise.[32]

It is important to note that it is usually not required that a person should be able to sign (execute) a will personally. In situations where a person with frailties wants to execute a will,[33] he should be assisted by a commissioner of oaths in a prescribed way during the execution process.[34]

2 3 Validating a will

In a nutshell, the requirements for the attestation (execution) of a will, require all persons involved in the authentication of a will,[35] to sign the will in one way or another in the presence of each other. This procedure is similar in all jurisdictions where an underhand will is allowed. The importance of complying with the formalities has often been emphasised as is evident below:[36]

> "Having slaved away your entire life to accumulate wealth, and having spent further time, energy and possibly money on drawing up a will for the purpose of distributing your riches unto those deemed most worthy, you will want to ensure

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29 *Twine* (fn 11) para 25; Taylor (fn 13). See also *Summerville v Walsh* [1998] NSWCA 222; *Calvert* (fn 11). In this case the 77-year-old, terminally ill testator gave instructions to draw up a will for him.

30 De Clercq *et al* (fn 1) 51.

31 Own emphasis.

32 See fn 10 12 23 24; Reid *et al* (2011) 457; De Waal (fn 1) 403; De Waal and Schoeman-Malan (fn 3) 54.

33 See s 2(1)(a)(v); *De Canha v De Canha* 2014 JDR 0048 (GNP) para 7. Venter and Hancke (fn 18) states that it was alleged that Van der Westhuizen was too frail to sign personally and therefore the attorney signed on his behalf. See also *Thompson* (fn 5); Bassuday (fn 10).

34 See discussion below. *Van der Westhuizen* (fn 9); s 2(1)(a)(v); see also *Afrikaner* (fn 16) para 6: "With the assistance of Mr Olivier, Mr Kheibeb affixed his thumbprint at the bottom of each page." *De Canha* (fn 33) para 7; *Harlow v Becker* 1998 4 SA 639 (D); De Waal and Schoeman-Malan (fn 3) 54; Hillman "Making your mark: Using a fingerprint when testator cannot sign the Will" 2 June 2014 and "A guiding hand: Assisting an ailing testator with signing their Will" 4 March 2010 *LexisNexis Legal Newsroom Estate and Elder Law*.

35 See *Van Niekerk* (fn 16); Corbett *et al* (fn 3) 55. See also Smith "Attestation of wills – An examination of some problem areas" (1969–1970) *Texas LJ* 125 who states that "the act of perceiving and knowing the performance of the various acts which are necessary to the legal execution of the will".

36 Cliffe, Dekker and Hofmeyr "Requirements for a valid will in South Africa" 10 October 2011, available at https://bit.ly/2veKTJG (accessed on 20 February 2018).

> that you have a valid Will and that your good intentions are not undone through carelessness or lack of knowledge."

Everyone involved in the execution process has a specific task to fulfil. (i) The *testator* should sign the document at the end thereof in any one of numerous possible ways,[37] *and* also sign anywhere on every page other than the page on which the will ends, in the presence of two or more competent witnesses present at the same time.[38] (ii) The *witnesses* should only verify the testator's signature and sign the will on the last page in the presence of the testator and each other.[39] (iii) When someone cannot communicate clearly or cannot personally sign a will, the person should be assisted by a *commissioner of oaths* who should be present throughout the whole execution process.[40] The latter should then attach a certificate and sign all other pages of the will.[41]

3 SIGNING OF A WILL BY AN AILING TESTATOR

3 1 General

In principle, it is desirable that all persons involved in the attestation process sign a will with "a signature or initials".[42] It is always preferable that a testator signs his name to the best of his ability regardless of whether it may be recognisable or not.[43] However, as seen above, an impairment to sign does not disqualify a person from executing a will.[44] Beyer posts the following warning to will-drawers who have to deal with clients with communication challenges:[45]

> "An estate planner must be vigilant to ascertain whether a client has a communication challenge. Some challenges will be readily apparent while others may be less noticeable. After detecting communication challenges, the attorney should take steps to be certain that the client's situation is not used to support a challenge to the will. By being alert to these issues and taking appropriate steps during will

37 See De Waal and Schoeman-Malan (fn 3) 59.

38 Own emphasis. See s 2(1)(a)(i)–(iii); De Waal and Schoeman-Malan (fn 3) 59.

39 Own emphasis. See s 2(1)(a)(iv); De Waal (fn 1) 382; Morgan-Gould (fn 1). See also the English case *Wharton v Bancroft* [2011] EWHC 3250 (Ch); Australian case *Summerville v Walsh* (fn 29).

40 Own emphasis. See *Van der Westhuizen* (fn 9); *Mlanda* (fn 19) para 10; Bassuday (fn 10); King (fn 10); *Summerville* (fn 29).

41 *Van der Westhuizen* (fn 9); De Waal and Schoeman-Malan (fn 3) 59. See also Aitken "Execution of wills – The solicitor's duty" 1999 *Law Institute J* 80–81.

42 In terms of s 1 of the Wills Act "sign" includes the making of initials. See also *Ricketts v Byrne* 2004 6 SA 474 (C); *Ferrington v Key* 2011 JDR 1332 (GNP); Cliffe *et al* (fn 36).

43 See *Ex parte Goldman and Kalmer* 1965 1 SA 464 (W); *Ferrington* (fn 42); *Mlanda* (fn 19) para 10; *Simon v Simon* Ind App (17-11-2011) no 29A05-1012 ES-760. See also Hillman (fn 34); Wechsler (fn 16); Sellers "Assisted and guided signatures" 1962 *J of Criminal L and Criminology* 245 247; Beyer (fn 21).

44 See also *Wharton* (fn 39) for a terminally sick testator and *Summerville* (fn 29) where the solicitor was negligent for failing to advise a critically ill client who could not use his hands that his will could be signed on his behalf. Popovic-Montag "When can a will be signed by someone other than the testator?" 10 August 2016 *Trust Experience*, available at https://bit.ly/2MfqXgc (accessed on 20 January 2018); Aitken (fn 41) 80–81; Beyer (fn 21).

45 See fn 21. See also Schoeman-Malan (fn 15) 403ff; Hudson and Silverman "Mall heirs battle over will" 10 February 2010 *Wall Street J*, available at https://on.wsj.com/2ABFoJY (accessed on 20 January 2018).

> preparation and execution, you can significantly increase the likelihood that your client's intent will be carried out."

A will-drawer should therefore take special measures when a person might be unable to physically sign a will due to an injury, a muscular or neurological disease or a lack of writing skills.[46] One such instance where the testatrix had difficulties in communicating is *Thompson v Master, Western Cape High Court*. The way she communicated was described as follows:[47]

> "This was by nodding her head, opening or closing an eye or grunting when spoken to. As at the time of the execution of the Codicil, the deceased's health had deteriorated to an extent that she could not sign her signature, could not speak properly and only communicated by opening or closing her eyes or grunting when spoken to."

3 2 Exception to requirement to physically sign

When a situation arises where a person cannot sign a will in one of the usual ways, provision is made for a testator to sign his will by either making a mark,[48] or by directing (and requesting) someone else to sign the will on his behalf.[49] Because the risk of forgery increases if a testator does not sign in the ordinary fashion,[50] a will signed by a mark or on behalf of the testator must be signed in the presence of a commissioner of oaths at the direction of the testator.[51] The witnesses must also be present and have to sign the will (after the attachment of the mark or signature of the *amanuensis*) in the presence of the testator and the commissioner of oaths.

The additional formalities are very specific.[52] When the section is analysed it becomes apparent that the requirements serve as a safety measure to prevent a will from being signed without the knowledge of the testator.[53] Over and above the commissioner of oaths being present when the signing takes place, he has to certify (i) that he has satisfied himself as to the identity of the testator; and

46 See *Van der Westhuizen* (fn 9); Venter and Hancke (fn 18); *Ricketts* (fn 42); *Pillay* (fn 19); *Mlanda* (fn 19) para 10 where s 2(1)(a)(v) was discussed; *Summerville* (fn 29); Aitken (fn 41) 80–81; Popovic-Montag (fn 44); Beyer (fn 21); Corbett *et al* (fn 3) 54; De Waal and Schoeman-Malan (fn 3) 59.

47 (Fn 5) para 9. See discussion of the case below. See also *Van der Westhuizen* (fn 9) where the testator made use of specialised modern equipment/technology with movement of his eyes (according to the application papers); Randolph (date unknown), available at https://bit.ly/2xRwCEu and *In the goods of James Clark deceased* 2 Curt 329.

48 *Ex parte Goldman* (fn 43); *Thompson* (fn 5); see *Mlanda* (fn 19) para 8; *Naude* (fn 12) para 101; Beyer (fn 21). In South African law a thumbprint is regarded as a mark. See *Ricketts* (fn 42); De Waal and Schoeman-Malan (fn 3) 61.

49 See King "Will signed on behalf of testator" 7 July 2011 *Law Gazette* (England); Aitken (fn 41) 80–81; Wechsler (fn 16). See also Oliver "Wills Act 1837" 3 May 2013 *Contesting a will, individuals and families. Wills and estate planning*, available at https://bit.ly/2sq0RAz (accessed on 22 February 2018).

50 Own emphasis. See *Karani v Karani* [2017] ZAGPJHC 318; *Pillay* (fn 19) para 17; *Mlanda* (fn 19) para 10 where s 2(1)(a)(v) was discussed: Taylor (fn 13); Schoeman-Malan (fn 5) 125ff; Popovic-Montag (fn 44); Wechsler (fn 16); Sellers (fn 43) 245 who discusses a signature in which abnormalities occur because the hand of the genuine writer has been assisted or guided may be erroneously attacked as forgery. See also *Ferrington* (fn 42).

51 Own emphasis. See *Pillay* (fn 19) para 17; *Mlanda* (fn 19); Jacobs and Lambrechts (fn 5) 30–32.

52 *Karani* (fn 51) para 12; *Mlanda* (fn 19) para 12: "The said form reiterates the wording of section 2(1)(a)(v)."

53 See fn 35. See also *De Canha* (fn 33); Hayward (fn 18).

(ii) that the will so signed is the will of the testator.[54] The commissioner should, as soon as possible, attach a certificate and *sign each* page of the will[55] anywhere on the page excluding the page on which the certificate appears. In addition to all being present, the commissioner should attach a certificate as required in section 2(1)(a)(v)(aa) as soon as possible. Section 2(1)(a)(v)(bb) requires that if the testator dies after the will has been signed but before the commissioner of oaths has applied the certificate, that it should be done as soon as possible thereafter.[56]

The requirements are clear. The commissioner oversees the testator's mark or the signature of the *amanuensis* and cannot act as a witness.[57]

3 3 Signing with mark or fingerprint

3 3 1 Signing with a mark

Signing a will with a mark is not unusual.[58] Typically, a mark is made by attaching the letter "X", but any sign could be used.[59] An X-mark made by a person in the place of a signature is described as follows:[60]

> "Due to illiteracy or disability, a person may be unable to append a full signature to a document as attestation that he or she has reviewed and approved its contents. In order to be legally valid, the X-mark signature must be witnessed."

Due to the obvious potential for fraud in circumstances such as these, doubts may arise about the validity and enforceability of documents signed with "X-mark signatures".[61] Consequently, additional requirements must be met and a commissioner of oaths has to validate the mark.[62]

3 3 2 Fingerprints

The signature of a person, in English law, is explained by Oliver as follows:[63]

54 De Waal and Schoeman-Malan (fn 3) 61; *Thompson* (fn 5) para 13. The court in *Pillay* (fn 19) para 9 ruled that this requirement was not complied with.

55 Own emphasis. *Pillay* (fn 19); De Waal (fn 1) 393.

56 See *O'Connor v The Master* 1999 4 SA 614 (NC); *Mankelengane v Simon* 2013 JDR 1851 (GSJ); King "Signing a will and section 9 of the Wills Act 1837" 26 April 2012 *Law Society Gazette*; Andersen (fn 17).

57 De Waal (fn 1) 392; De Waal and Schoeman-Malan (fn 3) 65; *Mankelengane* (fn 56); *De Canha* (fn 33) para 7. Randolph (fn 47): "In addition to this, the testator's lawyer [who drew up the will] may not sign on his behalf nor may he be the Commissioner of Oaths." See also discussion below and *Van der Westhuizen* (fn 9) where the commissioner of oaths, who appended the prescribed certificate, also signed the will on behalf of the testator.

58 *Mlanda* (fn 19); Sellers (fn 43) 245; Hillman (fn 34).

59 De Waal and Schoeman-Malan (fn 3) 59–61; *Ex parte Goldman* (fn 43); *Ricketts* (fn 42).

60 See Morgan-Gould (fn 1); Aitken (fn 41) 80–81; Beyer (fn 21); Hillman (fn 34). See Investopedia, available at https://bit.ly/2KsMVKL (accessed on 10 October 2017). See also *Bailey v Clark* 561 NE 2d 367 369 (Ill App Ct 1990) where a braille signature was recognised.

61 See Investopedia (fn 60); Mairs "Fingerprint signatures (A word of caution concerning their use)" 1936–1937 *J of Criminal L and Criminology* 409.

62 See *Ex parte Suknanan* 1959 2 SA 189 (N); *Ex parte Sookoo: In re Estate Dularie* 1960 4 SA 249 (D); *Mlanda* (fn 19); Schoeman-Malan (fn 5) 140.

63 Fn 49. See also fn 25. See also O'Brien "Challenging the formal validity of Wills" 7 June 2016 *Trusts and Probate Guide*; *Barrett v Bem* [2011] EWHC 1247 Ch. See also *Ricketts* (fn 42). Beyer (fn 21) explains that if the testator is illiterate and uses his thumbprint as his signature to execute the will, or if his ability to sign is impaired due to physical impossibilities (blind or paralysed), the will can still be executed subject to further requirements that must be met.

> "The testator's signature can be in any form as long as it signifies his intention. A scrawl or the testator's personal stamp or their initial seal have been recognised as being the testator's signature. More recently, the testator's thumb-print was recognised as his signature."

Corbett and others have a different point of view. They state in this regard:[64]

> "On the other hand, intention may not be decisive. The testator's intention to sign may not have been given effect to in that what is appended cannot be classed as a signature. What if the testator intends to sign his or her name but is too feeble and the signature is begun but not completed? . . . A fingerprint or thumbprint has been accepted as a mark."

If a fingerprint is regarded as a signature (and not a mark), it can be argued that there is no need for a commissioner of oaths to verify the signing. A fingerprint is viewed as more authentic than a cross.[65] In *Thompson v Master, Western Cape High Court* the testatrix was assisted to attach her fingerprint.[66] As far back as 1936–1937, Mairs explained the use of fingerprints in probate:[67]

> "Fingerprints serve as very valuable and accurate marks of identification, whether they be from a body living or dead . . . But when fingerprints are used as signatures the situation is vastly different, due to the inherent nature of a signature and the sharp contrast between the physical requirements incident to writing and those for registering a fingerprint."[68]

In a situation such as that of the late Joost van der Westhuizen, (where a commissioner signed the will on his behalf), he should rather have signed the document either by making a mark and, if it was not possible, by appending a fingerprint in the presence of two witnesses and the commissioner of oaths. The dispute about whether his will was properly signed and whether he had requested the attorney to sign on his behalf, could have been avoided.[69] It would at least have been easier to verify the originality of the fingerprint and therefore the content of the will.[70]

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64 (Fn 3) 52. Hillman (fn 34) also explains why the use of a fingerprint is regarded to be more suitable.

65 *Thompson* (fn 5) para 10. It transpired later in the evidence that the deceased had to be assisted to place her fingerprint on the codicil. See also *Afrikaner* (fn 16).

66 See *Ex parte Goldman* (fn 43); *De Canha* (fn 33) para 7. The deceased was physically disabled to sign and he placed his thumbprint at the bottom of the will. Mairs (fn 61) 409. See also *Mlanda* (fn 19) para 10; *Pillay* (fn 19); *M v Master of the High Court* [2014] ZAFSHC 141.

67 (Fn 61) 409.

68 *Herman* (fn 13) paras 5 82 where the testatrix suffered from terminal cancer which had affected her brain and had impaired her mental ability and her passing on was imminent. See also *Calvert* (fn 11); *Naidoo v Crowhurst* [2009] ZAWCHC 186 for a terminally sick cancer patient; *Matter of Albert* 23-04-2013 NYLJ 25 (Sur Ct Kings County) where the testator had been suffering from incapacitating cancer and was unable to write at the time of the execution and it was held that a signature by fingerprint is more "individual, reliable and effective than one made by a mere cross mark". See also Hillman (fn 34).

69 *Van der Westhuizen* (fn 9); Mairs (fn 61) 411: "Fingerprint signatures honestly used are ideal, as they function simultaneously both as a signature and as an identifying mark capable of accurate and relatively easy proof in court if necessity arises." See also *Mlanda* (fn 19) para 6.

70 See also *Afrikaner* (fn 16); Mairs (fn 61) 408 explains that a fingerprint can also be a forgery if attached after the death of a person.

4 PERSON WHO SIGNS ON BEHALF OF A TESTATOR

In an ideal world a testator would have the ability and strength to hold a pen and make his own signature or mark,[71] but if he is not able to do so, he could *direct someone else to sign on his behalf.*[72] Popovic-Montag advises as follows:[73]

> "[A] will may be signed by an agent, or a signature by *amanuensis*. It also raises the important question: in what circumstances would it be appropriate to have a third party sign a will on behalf of the testator? Signing a will via *amanuensis* is most appropriate where the testator lacks physical capacity to sign on his or her own behalf."

In South Africa reported cases deal with the requirements in section 2(1)(a)(v) where a will was signed with a mark, rather than on behalf of the testator. In the recent *Van der Westhuizen* case the disputed will was signed by the attorney (who was also the commissioner of oaths) on behalf of the testator.[74]

4 1 What amounts to direction by the testator?

The provision in section 2(1)(a)(v) is clear – if someone signs on behalf of a testator it must be at the direction of the testator. It is not exactly clear from case law what actions are considered as "directions" to sign on behalf of a person.[75] The English case of *Barrett v Bem* deals with circumstances where it was claimed that someone signed the will on behalf of a testator.[76] Evidence indicated that either the sister of the deceased, or her daughter, held the deceased's hand to steady it whilst he signed the 2004 will. In this regard, it was held:

> "[T]he court should not find that a will has been signed by a third party at the direction of the testator unless there is positive and discernible communication (which may be verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party."

"Direction" from the testator therefore requires a positive act from the testator's side. King states that "there must be something to make it clear to the attesting witnesses that the testator was adopting the third party's signature as his own".[77]

It appears from the founding affidavit in *Van der Westhuizen* that the testator gave directions by indicating instructions through modern technology as he was able to communicate by means of eye movements.

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71 See O'Brien (fn 63) for English law: "The Will is only validly signed in accordance with section 9 (a) if the Testator makes some positive and discernible physical contribution to the signing process." See also Oliver (fn 49); King (fn 56).

72 Own emphasis. See also *Oosthuizen v Sharp* 1935 WLD 22; *Ex parte Fourie's Estate* 1927 EDL 185; *Barrett v Bem* (fn 63); Steel "Wills validity – *Barrett v Bem* [2012] EWCA 52" 16 March 2012, available at https://bit.ly/2OH26Dm (accessed on 10 October 2017).

73 Fn 44; King (fn 10); Jacobs and Lambrechts (fn 5) 30–32; O'Brien (fn 63); King (fn 56). See also *Blom v Brown* [2011] ZASCA 54 para 22.

74 Fn 9. See also *Longfellow v BOE Trust Ltd* [2010] ZAWCHC 117 para 24 where a document was drafted on behalf of the testatrix; *Blom v Brown* (fn 73) para 23.

75 See De Waal and Schoeman-Malan (fn 3) 58–60. S 2(1)(b)(iv) also requires the testator's direction and presence for an amendment signed on behalf of the testator.

76 (Fn 63) per Lewison LJ para 36; King (fn 56).

77 Fn 56. King states: "The judge in a probate action is concerned in an inquisitorial capacity to seek the truth as to what is indeed the testator's true last testament, and accordingly is not bound by the manoeuvres of the parties." See also the old case *In the goods of James Clark deceased* (fn 47); *De Reszke v Maras* 2006 2 SA 277 (SCA).

4 2 Whose signature is required?

When someone is directed by a testator to sign a will on his behalf, the person who acts as the *amanuensis* apparently has a choice between using his own signature or to sign the testator's name.[78] In *In the goods of James Clark deceased*,[79] the testator was too weak to sign and asked a vicar to sign on his behalf. The vicar used his own signature and the question was asked whether the person who signs on behalf of the testator should sign the signature of the testator or any other signature. The court ruled that the signature of the *amanuensis* is regarded as sufficient:[80]

> "A signature will be effective even if the person signing on behalf of the Testator signs in his own name. In order for a Testator's direction to be valid it must be via positive communication (as opposed to mere acquiescence). Such a direction can be communicated verbally or non-verbally. When the Testator directs another person to sign the Will on his behalf and that person does so, in the presence of the two witnesses, he must indicate to the witnesses that the signature was placed there at his request."[81]

Any person who has testamentary capacity qualifies to sign on behalf of a testator.[82] The commissioner of oaths, however, is disqualified because he should oversee the process of execution. It appears from the supplementary heads of argument filed in *Van der Westhuizen* that it was submitted on behalf of the applicant that the commissioner of oaths is disqualified only from signing as a witness but is not prevented from also signing the will as *amanuensis*. [83] As a preventative measure against fraud, persons involved in the attestation cannot inherit under the will.[84]

4 3 Assisted or guided signatures

Apart from the situation where someone independently signs on behalf of the testator, it may happen that the testator is assisted to physically sign (guiding) himself. An assisted signature is one where the testator's hand is guided by a third party's hand in writing the name.[85] In some jurisdictions, the courts are

78 See *Oosthuizen* (fn 72); *Ex parte Fourie's Estate* (fn 72); Aitken (fn 41) 80–81. See also Mortensen "Solicitors' will-making duties" 2002 *Melbourne Univ LR* 60.

79 Fn 47; Randolph (fn 47).

80 See *Van der Westhuizen* (fn 9) where the person who signed on behalf of the testator used his own signature; O'Brien (fn 63). See also *Re Deeley & Green* [1930] 1 DLR 603 for an illiterate testator; *Mlanda* (fn 19) para 10; *Ex parte Suknanan* (fn 63); *Ex parte Sookoo* (fn 62).

81 See also O'Brien (fn 63). The question whether a signature is assisted or controlled does not turn on the extent of the aid, but rather whether the act of "signing was in any degree an act of the testator, acquiesced in and adopted by him".

82 See s 4 of the Wills Act.

83 As appears from the order made, the court apparently accepted this argument. See, however, *Mankelegane* (fn 56); De Waal and Schoeman-Malan (fn 3) 59; Jacobs and Lambrechts (fn 5) 30–32; Randolph (fn 47).

84 De Waal and Schoeman-Malan (fn 3) 121; *Ferrington v Key* (fn 42). Not one of these basic requirements appears to have been complied with when the document was signed on behalf of Van der Westhuizen. See also *De Canha* (fn 33); *Thompson* (fn 5).

85 Hillman (fn 34); *Matter of Kearney* 69 AD 481 74 NYS 1045 (2d Dept 1902) where the attorney guided the hand, without touching the pen. Sellers (fn 43) 245 explains that because of illness, illiteracy, weakness, poor eyesight or blindness, paralysis, extreme nervousness, injury, or decrepitude some persons may need assistance in writing their signatures.

likely to treat this as a proxy signature situation.[86] In these circumstances, the testator should be given an opportunity to read the document before someone helps him to sign or guide his signature. If he is unable to read it and the contents have not been explained to him, the document does not become a will.[87]

A guided signature can manifest either by someone assisting the testator, or where the testator was assisted only to the extent of having a pen placed in his hand, or where his hand was merely steadied by another person.[88] It can also be that the person assisting the testator dominated the hand of the writer throughout the act of writing. [89] In *Barrett v Bem* the will in dispute was purportedly made by the deceased three hours before his death.[90] The signature on the will did not remotely resemble that of the testator. It was also not regarded as a guided signature as it was far too fluent.[91] In the Indiana case of *Simon v Simon*[92] the deceased was not able to sign independently and his hand was held by the will-drawer.[93] Sellers states in this regard:[94]

> "Assistance may range all the way from merely steadying the hand to outright forceful guiding of the hand. The signature may be written while the genuine writer himself simply rests his hand on the hand or arm of the person doing the writing or grasps the end of the pen while the other person writes his name."

5 WILL DISPUTES AND SECTION 2(3) OF THE WILLS ACT

5 1 Will disputes

It seems as if will disputes are globally on the increase.[95] Oliver makes the following remarks:[96]

> "There is often confusion around contesting a will . . . This may result in what appears to be an odd distribution of the estate, but if it is in accordance with the deceased's wishes, a disappointed beneficiary may have difficulties in contesting a will. If, however, a will does not include the true intentions of the person making the will, or if the will has not been executed correctly, it may be invalid and can therefore be contested."

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86 The Illinois case *Pepe v Caputo* 97 N E 2d 260, 262 408 Ill 321, 325 (1951). This indicates that a testator must have knowledge of the contents of the document and intends those contents to be his will.

87 O'Brien (fn 63); King (2012); Sellers (fn 43) 245: "The question as to whether a signature is a genuine guided-hand signature or an outright forgery frequently poses an exceptionally difficult problem."

88 Fn 87; *Afrikaner* (fn 16).

89 See also *Afrikaner* (fn 16); *Matter of Kearney* (fn 85).

90 (Fn 63) per Lewison LJ para 36. See King (fn 56).

91 See King (fn 56): One of the witnesses said that the testator's sister, (the sole beneficiary) had helped him to sign and "between the two of them they signed the will".

92 Fn (43); Beyer (fn 21); Hillman (fn 34); Wechsler (fn 16).

93 The testator's wife said that her husband requested that someone guide his hand because he did not want to sign the document with an "X".

94 (Fn 43) 247. It was claimed that the testator was assisted in signing his will. The bitter battle over the estate of the late shopping mall tycoon ended with a confidential settlement. See also Hudson and Silverman (fn 44); Steel (fn 73); Hillman (fn 34).

95 For recent will disputes see the cases in fn 11 and 12; *Mankelegane* (fn 56); De Clercq *et al* (fn 1) 51; *Twine* (fn 11); *Karani* (fn 51) para 40; Banks "Will validity – *Re Wilson decd* (also known as *Turner v Phythian*) [2013] EWHC 499 (Ch)" 12 September 2013 *LawSkills Newsletter*.

96 Kerridge (fn 25) 310ff; Jones (fn 25); King (fn 10).

An unauthenticated mark or the signature of another person on a document, purported to be a will of the deceased, will most probably give rise to suspicion and will contest.[97] Recent case law has shown the *importance of complying* with the prescribed formalities in section 2(1)(a)(i)–(v) of the Wills Act.[98] If a person is weak, old or unable to write or sign a will, it is advisable to seek legal advice about relevant aspects of will drafting and execution. Not doing so can prove costly afterwards.[99]

Although it can be assumed that an attorney or professional will-drafter knows the basic principles of executing a will, it is unfortunately not always the position. In several recent cases, it was claimed that there was negligence on the part of the attorney or solicitor.[100] The court stated in this regard in *Froud v Lewitt*,[101] a case where an attorney drew the purported last will on behalf of the deceased:

> "He is a trained lawyer. If he realized that he was not adequate enough to deal with the 'will' (because he confesses to be a criminal lawyer) he could have approached a colleague who could have advised him accordingly."

5 2 Section 2(3)

If a will does not correctly comply with the prescribed formalities it is invalid.[102] Section 2(3) of the Wills Act makes provision for interested parties to seek relief.[103] Such relief can revolve around the non-compliance with *any of the detailed prescribed formalities*, including non-compliance with section 2(1)(a)(v). Over the last 25 years a large number of cases on the subject of non-compliance with formalities came before the courts. Each case is considered on its own merits.[104] In this discussion, the focus is only on non-compliance with section 2(1)(a)(v) *in the context of the signing of a will by, or on behalf of, an ailing testator.*[105]

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97 Schnetlers "Managing disputes over a deceased relative's estate" 1 November 2017, available at https://bit.ly/2LUnfMC (accessed on 21 February 2018); Van Deventer (fn 14).

98 Own emphasis. See also *Thompson* (fn 5); *Twine* (fn 11); *Froud* (fn 11); King (fn 10); *Pillay* (fn 19); *Mlanda* (fn 19) para 10; *Penwill* (fn 13); *Herman* (fn 13) para 82; De Waal and Schoeman-Malan (fn 3) 54. For a similar procedure in England and Wales see Kerridge (2011) 306ff; Oliver (fn 49).

99 Own emphasis. See *Pillay* (fn 19) para 10; *Karani* (fn 51); De Waal and Schoeman-Malan (fn 3) 55; Arde "What makes a will valid?" 2 December 2012 *Personal Finance*. See also O'Brien (fn 63); *Calvert* (fn 11).

100 This topic is not discussed in this contribution: See Knoetze and Mukheibir "Die deliktuele aanspreeklikheid van testamentopstellers" 2004 *Obiter* 128–137; *Steyn v Ronald Bobroff & Partners* [2012] ZASCA 184; Sheps "Landmines for lawyers when drafting wills" August 2011, available at https://bit.ly/2LPXZXX (accessed on 8 January 2018). See also *Ross v Caunters* [1979] 3 All ER 580; *White v Jones* [1995] 2 AC 207 269; *Calvert* (fn 11).

101 Fn 11.

102 *Van Vuuren* (fn 12); *Barnard* (fn 12); *Naude* (fn 12).

103 See *Pillay* (fn 19) para 12; *Thompson* (fn 5) para 10; De Waal and Schoeman-Malan (fn 3) 70–79. See also fn 23 24; Schoeman-Malan *et al* (fn 23) 80ff.

104 *Pillay* (fn 19) para 3; and the case law mentioned in fn 23 and 24. See also Schoeman-Malan *et al* (fn 23) 77–99.

105 Own emphasis. S 2(3) was dealt with in the notice of motion in *Van der Westhuizen* (fn 9). See also *Pillay* (fn 19) para 12; *Thompson* (fn 5) para 10; *Mlanda* (fn 19) para 10; *Hillman* (fn 34); *Aitken* (fn 41); *King* (fn 10).

In general, there are only two possible outcomes when any application for the condonation of a document is brought. The court can either find that the error in the execution process can be excused and that the document constitutes a will,[106] or the court can rule that the document does not fall within the ambit of section 2(3) of the Wills Act as a result of which the document cannot be accepted as a will.[107] It is generally accepted that the applicant has to prove that (i) there is a document, (ii) which had been drafted or executed by the deceased (iii) with the intention that the "document" should be regarded as the will of the testator.[108] The requirement that there must be a document is usually not problematic. As far as the requirement of "drafting (or executing)" is concerned, some case law requires personal drafting by the person who has died (the testator)[109] while in other cases this strict interpretation was not followed.[110] The latter point of view requires that the deceased should at least have had a personal connection with the will.[111] Most cases more recently discussed focussed on the third requirement of the testator's intention.[112]

5 2 1 Thompson v Master, Western Cape High Court[113]

In this case an aged and fragile woman was moved into a care facility as her condition had deteriorated.[114] Shortly before her passing, when she already had great difficulty communicating, it became apparent that she wanted to execute a will or codicil. Her brother was telephoned by the matron of the facility who told him that the deceased's condition had worsened considerably and that she was concerned that she would pass away without her wish having been realised.[115] The brother then decided to draft a codicil for the deceased himself. He asked his sister: "Do you want to leave all your worldly possessions to your brother Alana Thomas Thompson?"[116] She only responded in a grunting tone. The testatrix's fingerprint was attached to the will and it later transpired that the deceased had to be assisted to place her fingerprint on the codicil.[117] The matron and caretaker signed as witnesses. No certificate in terms of section 2(1)(a)(v) was attached to the signing by fingerprint.[118] The issue was whether the non-compliance of formalities could be condoned as contemplated in section 2(3) of the Wills Act.[119]

106 De Waal and Schoeman-Malan (fn 3) 96ff; fn 23 and 24 *supra*.
107 S 2A deals with revocation. See *Thompson* (fn 5) para 17; *O'Connor* (fn 56); Schoeman-Malan *et al* (fn 23) 80.
108 See *Bekker* (fn 23); Van der Linde (fn 23); Schoeman-Malan *et al* (fn 23) 100. See also Corbould "Unsigned wills – When intention is everything" 17 September 2012, available at https://bit.ly/2M3hj3h (accessed on 18 January 2018).
109 See fn 23.
110 See *Opperman* (fn 24); *Mankelengane* (fn 56); *Barnard* (fn 12); Schoeman-Malan *et al* (fn 23) 80ff.
111 *Van Vuuren* (fn 12); *Barnard* (fn 12).
112 See fn 23; *Opperman* (fn 24).
113 Fn 5.
114 Para 7.
115 Para 8.
116 See also *Naidoo* (fn 68) para 24; *Calvert* (fn 11).
117 A resident who was a retired attorney advised on the wording of the codicil.
118 Paras 11–13.
119 Para 5.

The first requirement was met as there was a document, but it was drafted by the brother of the deceased. In this regard, it was stated:[120]

> "In view of the circumstances prevailing at the time the Codicil was drafted, so I understood the argument, section 2(3) cannot be interpreted in a manner that excludes a person in the position of the deceased at the time the Codicil was drafted from the relief contemplated in section 2(3). Thus, her submission boils down thereto that in view of what could be described as exceptional circumstances at the time the codicil was drafted, a broad and flexible approach in interpreting section 2(3) should be preferred. *This is especially so because the deceased could hardly speak or write at the time the Codicil was drafted. In the circumstances of this matter, so I understood the argument, it cannot be said that the drafting requirement was not met.*"[121]

The court was not convinced that the *deceased intended this document* to be her will.[122] The court found that as far as the "intention" requirement was concerned, even if there were exceptional circumstances, "*such an approach would not breathe life into the document especially when it is not stated in the document in dispute that the deceased had intended thereby to revoke the earlier will*".[123] The court probably came to this conclusion due to the fact that the deceased was very weak and could not communicate properly.

5 2 2 Pillay v Master of High Court[124]

In this case, the testatrix "executed" a document purporting to be a will in 2006. The will was signed by the testatrix affixing her thumbprint on all pages above the word "testatrix". She passed away three years later.[125] The validity of the document was questioned.[126] A commissioner of oaths drew up the document in accordance with the instructions of the testatrix, and he and two witnesses signed each page of the document. He did not comply with the requirements of section 2(1)(a)(v) as he only filed his certificate years later.[127] The Master rejected the will of the deceased due to non-compliance with the Act.[128] A section 2(3) application was brought. The court was satisfied that there was a document, drafted by an official on the instructions of the deceased. The execution took place when the thumbprint was attached. The application was successful, the will was accepted by the court and the Master was ordered to accept the "will" for the purposes of the Administration of Estates Act.[129] The court ruled that it was indeed the testatrix's intention that the document should be her will.[130]

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120 (Fn 5) paras 14 16; *Opperman* (fn 24) para 12.
121 Own emphasis.
122 Own emphasis. See also fn 23 24.
123 Own emphasis.
124 Fn 19.
125 Para 4.
126 Para 6.
127 See s 2(1)(a)(v)(aa) and (bb).
128 Para 9. The commissioner failed to certify that he had satisfied himself as to the identity of the testatrix and that the will was the will of the testator.
129 66 of 1965.
130 Para 15. The testatrix died almost 25 months after the signing of her will. Mr Naidu pointed out that if the testatrix had been forced into signing a will, she had ample opportunity to draw up a new will or even a letter indicating the change of her intentions.

5 2 3 Mlanda v Mhlaba[131]

The testatrix, a former school teacher, signed the document by affixing what appears to be her thumbprint.[132] The testatrix was suffering from dementia. According to the applicant, she was also diagnosed as being aphasic and therefore was unable to understand or produce speech as a result of brain damage.[133] It was claimed that she died intestate because the "will" did not comply with the formalities for signing a will with a mark.[134] It was argued that the fact that the deceased, an educated person, signed the will by affixing her thumbprint, provides corroboration of the decline in the deceased's cognitive abilities. In this matter, the commissioner of oaths had merely stated on the certificate that "the testator signed in my presence and of two witnesses". The certificate did not comply with the requirement that the commissioner must also satisfy himself as to the identity of the testatrix.[135] The question whether the non-compliance with formalities could be condoned was never asked.

5 2 4 Van der Westhuizen v The Master

Van der Westhuizen passed away in 2017 after losing his battle against motor neuron disease. His estranged wife was in possession of a 2009 mutual will while his brother submitted a will dated 2015 to the Master. The Master had rejected the will on the basis of non-compliance with section 2(1)(a)(v).[136] Initially, it was thought that a section 2(3) application will be brought to condone non-compliance with the formalities but the first prayer was in fact a motion that the will itself is valid. However, the alternative relief sought in this case was that in the event of it being found that the formalities had not been complied with, the court should condone such non-compliance in terms of section 2(3). At the time of execution, the document was signed on behalf of the deceased by an attorney who also acted as commissioner of oaths. He signed all pages of the will and appended the required certificate in the presence of two witnesses as the testator could not do so due to physical weakness.[137]

The case was heard on 12 November 2018.[138] As the court found that the 2015 document constituted a validly executed will, it was not necessary to deal with the alternative relief sought. However, had the court found that the commissioner

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131 Fn 19.

132 Para 6. See also *Afrikaner* (fn 16).

133 Para 17. She was further not orientated to persons, places and time. See also para 3.

134 Para 9.

135 Para 13. In para 14 it was argued that as the commissioner was experienced and it could be implied from his reference to the "testator" that he had in fact done so.

136 See Anon "Joost and Amor: The chronicles" 26 September 2010 *Channel24*; Du Preez "When death intervenes" 2 April 2014 *Personal Finance IOLnews.*

137 It was already reported earlier that "Joost . . . can't eat, walk, bath" 23 May 2014 *Sport24.* Hamilton "Joost van der Westhuizen: 'I only want to live, I only want my children to be happy'" 15 September 2015 *ESPN* reports in September 2015 days after the will was executed: "Each word is an effort; with his speech slurred it is Pieter who interprets what his younger brother is saying. The small body sitting upright in the wheelchair belies the fearsome scrum-half he was, but there is still that glint of mischief in his eye." See also Ray (fn 18). Amor was of the opposite opinion – see Venter "Joost was ill, but he was still able to sign will, says Amor" 29 January 2018 *IOLnews.*

138 See *Van der Westhuizen* (fn 9). His estranged wife opposed the application. See Staff writer "More legal drama as Joost leaves will unsigned" 29 May 2017, available at https://bit.ly/2O8o1CE (accessed on 23 September 2017).

of oaths could not sign in both capacities, namely, as *amanuensis* and certifying commissioner of oaths, the application could only succeed if the applicant made out a case for condonation. The Master was ordered to accept the will as the last will of Van der Westhuizen. Judge Fabricius declared the will to be drafted and executed on the instructions of the deceased and therefore valid as the intended last will for purposes of the Administration of Estates Act. It is debatable whether, on a proper interpretation of section 2(1)(a)(v), the commissioner of oaths who appends the certificate can also sign the will on behalf of the testator.[139]

5 3 Conclusion

A clear distinction must be drawn between formalities for executing a will and the requirements for condonation.[140] Strict formalities must be complied with in terms of section 2(1) when an ailing testator cannot sign personally or physically. Section 2(3) does not deal with the execution of a will but with the situation where the will is not properly executed as prescribed in section 2(1). The courts tend to apply the formal requirements in section 2(1) more strictly than the more informal "process" applied when an application in terms of section 2(3) is brought and where the *intention of the testator* is key to a successful application.[141]

6 ROLE OF THE MASTER IN THE ACCEPTANCE OF A WILL

Although the Master of the High Court plays an important role in the administration of all estates, the Master's functions are limited as far as rejecting or accepting a will is concerned.[142] In South Africa all deaths are reported to the Master and all wills, or documents that purport to be wills, must be submitted to the Master together with the other reporting documents.[143] Section 8 of the Administration of Estates Act regulates the transmission or delivery of wills to the Master and the registration thereof.

The legitimacy of a will is not decided by the family or lawyer of the deceased. If there is a document submitted to the Master's offices that is on the face of it properly executed, the Master can provisionally accept it for purposes of administering the deceased's estate.[144] Acceptance and registration of a will by the Master does not make the "document a valid will".[145] The Master can also accept more than one submitted will. If a dispute arises between interested parties, the registered "will" can still be shown to be either invalid or to have been revoked.[146]

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139 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) 603F–604D. See fn 19 *supra*; Venter "Legal fight over #Joost's will on hold indefinitely" 8 December 2017 *IOLnews*. See De Waal and Schoeman-Malan (fn 3) 100–101; Arde (fn 99) *Personal Finance*; Taylor (fn 13).

140 Van der Linde (fn 23) 412ff; Schoeman-Malan *et al* fn (23) 100 80ff.

141 See also *Ricketts* (fn 42) as opposed to *Smith* (fn 23).

142 De Clercq *et al* (fn 1) 85; *Pillay* (fn 19) para 10.

143 See De Clercq *et al* (fn 1) 95–96 and ss 7–9 of the Administration of Estates Act.

144 De Clercq *et al* (fn 1) 97. In terms of s 8(4) of the Administration of Estates Act. See *Naude* (fn 12) para 13. See also *Afrikaner* (fn 16) para 13.

145 De Clercq *et al* (fn 1) 83.

146 *Smith v Sampson* [2013] ZAWCHC 11.

The Master will judge the validity of the document by assessing its compliance with the basic requirements.[147] The validity or otherwise of a document submitted to the Master can appear *ex facie* such document.[148] Due to the confidential nature of the execution process, it is not always apparent at first glance whether a document was properly executed or not.[149] Sometimes, through further enquiry or by mere chance, a will can prove to have been incorrectly executed. When there is a latent irregularity, it is not always possible to judge the validity of a will simply on the appearance thereof.[150] The Master does not have the authority to investigate the validity of a will. Only a court, having heard evidence, can do so.[151]

7 CONCLUSION

Markette sensibly states in an article "Facing the great inevitable" that "[d]eath is something we all must face – no exercise or diet regimen, no meditation techniques, no amount of money can avoid it. It is the great equalizer".[152] Death is inevitable and executing a will remains the only voice a person has once he had passed away.[153]

Most people are reluctant to execute a will and tend to shy away from the thought that death is certain.[154] It is mostly older, sick or frail people who realise that time is running out to execute a will. These people are usually vulnerable and often potentially subject to undue influence.[155] Next-of-kin should realise that when a valid will is found, it will determine the distribution of the estate. When the formalities for its execution were not followed the document is regarded as invalid.[156] Many wills fail and are declared invalid for lack of compliance with the prescribed formalities.[157]

It has become apparent from recently reported cases that the compliance with formalities for the execution of a will by an ailing testator is often challenged.[158] When an ailing testator wants to execute a will there are several options. If a person needs assistance in signing, a commissioner of oaths plays an important role. The Master of the High Court cannot accept a will not properly executed

147 *Pillay* (fn 19) para 19.

148 *M v Master* (fn 66) *ex facie* valid para 8. See also Schoeman-Malan (fn 5) 140.

149 *Lemmer v Master of the High Court, Cape Town* [2016] ZAWCHC 16.

150 *Mlanda* (fn 19) para 10. In the English case of *Re Whelen* [2015] EWHC 3301 a situation arose where both witnesses testified that the deceased was not present when they signed documents. See also *Naude* (fn 12) para 13: "It is clear from the authorities that a will which is complete and regular on the face of it is presumed to be valid until its invalidity has been established and the onus is on the person alleging invalidity to prove such an allegation."

151 De Waal and Schoeman-Malan (fn 3) 67; Banks (fn 98); *Mankelegane* (fn 56); *Pillay* (fn 19) para 14; *O'Connor* (fn 56).

152 Markette "Facing the great inevitable" undated, available at https://bit.ly/2O8sB3I (accessed on 3 March 2018).

153 De Waal (fn 1) 392–403; Reid *et al* (2011) 433.

154 King (fn 10).

155 Schoeman-Malan (fn 15) 503.

156 See fn 10.

157 See *Thompson* (fn 5); *Twine* (fn 11); *Froud* (fn 11); Jacobs and Lambrechts (fn 5) 30–32; *Calvert* (fn 11); and fn 25 for English law.

158 *Van der Westhuizen* (fn 9). See also fn 19.

and the possibility of condonation in terms of section 2(3) of the Wills Act is subject to proof of the intention of the testator.[159]

It remains important that when an ailing person wants to execute a will, a professional will-drawer should be consulted as laymen are not necessarily familiar with the formalities required in terms of in section 2(1)(a)(v).[160] Family or next-of-kin of an ailing person should take precautions when a loved one wants to execute a will. Although one can expect that an attorney knows the basic formalities for executing a will, it seems not always to be the case. The irony is that the non-compliance with the section is sometimes due to the fault of the person who is supposed to know how to draft and execute a will. Beyer explains that caution should be taken when drawing up a will for a person with disabilities:[161]

> "To prepare a will effectively for these clients, the estate planner must initially ascertain whether the client has a communication challenge and then take affirmative steps to make certain the challenge does not negatively impact the validity of the will. *Extra attention must be given to make certain the requirements of a valid will are satisfied and that individuals displeased with the will do not use the communication challenge as a foundation for claims of undue influence or fraud.* Even without other evidence, courts may subject the will of a communicationally [*sic*] challenged client to higher scrutiny."[162]

159 See fn 23.

160 *Pillay* (fn 19); *Mlanda* (fn 19) para 10; *Summerville* (fn 29); Aitken (fn 41) 80–81; Popovic-Montag (fn 44); Beyer (fn 21); Smith (fn 35); *Fischer v Howe* [2013] NSWSC 462.

161 Fn 21. He refers to *In re Estate of Shumway* 9 P 3d 1062 (Ariz 2000).

162 Own emphasis.