

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

1 Introduction

Every year, section 2(3) of the Wills Act produces its eagerly anticipated share of applications for condonation of non-compliance with the formalities for a valid will. Section 2(3) reads as follows:

If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 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).

For the court to condone a will that is formally defective, three requirements must be satisfied: (a) There must be a document; (b) that has been drafted or executed by a person who has died since the drafting or execution thereof; (c) with the intention that the document must be that person's will. Despite valuable guidelines presented by the Supreme Court of Appeal (*Bekker v Naude* 2003 5 SA 173 (SCA); *Van Wetten v Bosch* 2004 1 SA 348 (SCA); *De Reszke v Maras* 2006 2 SA 277 (SCA); *Smith v Parsons* [2010] 4 All SA 74 (SCA); *Van der Merwe v Meester van die Hooggereghshof* [2010] ZASCA 99), recent case law indicates that there is uncertainty in the application of section 2(3), especially with regard to the "intention" requirement. In three recent cases, the courts addressed the question whether (three) different kinds of documents were intended by the respective deceased to be their last wills. The case of *Longfellow*, involved a so-called "CNA precedent" (completed by someone other than the deceased); *Mabika*, pertained to an "Application (form)" for the drafting of a will, while *Taylor*, dealt with a document referred to as a "wish list". This contribution discusses these and other aspects pertaining to section 2(3).

2 Longfellow v BOE Trust Ltd

2 1 Facts

The applicant (second husband) married the deceased (wife) in 1995. No children were born from the marriage. However, prior to her marriage to the applicant, the deceased was married to the second respondent (first husband). They had two children (parr 1-5). In 1989, while married to her first husband, the deceased executed a will in which she left her entire estate to him. The deceased was diagnosed with brain cancer in April 2007. She underwent surgery, during which surgeons removed most of the tumour, but in August 2007, the deceased suffered a stroke and was again diagnosed with cancer of the brain. The testatrix was discharged and sent home, since there was nothing that could be done for her. The applicant realised she was dying and set in motion the circumstances that led to the drafting of the CNA precedent. He started to enquire what to do to have a will drawn up. Attempts to get help from Standard Bank failed. In his affidavit the applicant stated (par 10):

I then decided to buy a will from CNA. The same day I bought one. I said to the Testator that I had a will. At the time, it was blank. I said that I was going to fill it in to reflect that I would inherit the state, that I would be the executor, that the Old Mutual policy would be shared equally by the Third and Fourth Respondents and that she would revoke all previous wills. The Testator agreed to this. The testator could not write ... She stated that I should read it [the will] to her. I did so and she confirmed it was fine ...

The applicant had arranged for employees of Standard Bank to witness the draft document. On 7 September 2007, two employees of Standard Bank arrived at the couple's home in order to witness the draft document as arranged with the applicant. These employees informed the applicant that he would not be able to inherit in terms of a will that he had drafted and left without formalising the draft document. The deceased died on 21 September 2007 without signing the draft document. The applicant discovered the 1989 will, referred to above, amongst the deceased's belongings. As mentioned, the second respondent was the sole heir in terms of the 1989 will (parr 6-9).

Two persons, namely the deceased's nurse (Wilks) and the deceased's colleague (Nel), were present when the applicant completed the draft document. Their version(s) of the conversation(s) between applicant and respondent differ slightly from each other and that of the applicant (For a discussion of these differences see parr 11-18). Furthermore, the applicant mentioned that it was the deceased's wish for him to give a 25% share to each of her children, should the house be sold upon the death of applicant (par 19). This was not reflected in the draft document. The deceased also requested the applicant to look after her daughter (the 3rd respondent). He refused outright, because of severe tension and an apparent bad relationship between them. He was also only willing to look after her grandson, provided he was not accompanied by his mother. The applicant sought an order in terms of section 2(3), as well as section 4A(1), of the Wills Act (that he be declared competent to receive benefits despite the fact that he drafted the document).

2 2 Judgment

The court was not, on a balance of probabilities, satisfied that the deceased intended the document to be her last will. This was so in view of the circumstances that led the applicant to start his enquiries, in order to ascertain how he could have the deceased's will drawn up. He never stated that the deceased requested him to make any enquiry (par 24). Due to his poor relationship with third respondent (deceased's daughter), the court could not accept that the deceased would expect the applicant, after he had inherited her half share of immovable property, to leave a 25% share thereof to the third respondent. The court concluded as follows (parr 28-29):

The draft document reflects, in my view, the applicant's will and not the deceased's. He says as much in his founding papers.

'I then realised that the Testator was dying, ... I started to enquire ... I ... decided to buy a will from CNA... I said I was going to fill it in to reflect that I would inherit the estate, ...' (Own emphasis)

2 3 Discussion

2 3 1 “Drafted or executed by a person who has died since the drafting or execution thereof” (Second Requirement in Terms of Section 2(3))

The second requirement in section 2(3), besides there having to be a “document”, is that the document should have been “drafted or executed by a person who has died since the drafting or execution thereof”. Strangely enough, nothing is said in the judgment by the court about this requirement and whether it was met. The court only addressed the third requirement, namely, the intention for the document to be a will. In casu, the document was not drafted by the deceased. The CNA precedent of a will was filled in and completed by the applicant. In *Bekker v Naude* 2003 5 SA 173 (SCA), the Supreme Court of Appeal drew a distinction between a document that the testator “drafted” himself and one that he “had caused to be drafted” by someone else (in view of s 2A Wills Act). According to the court, there must have been a “personal” relationship between the testator (deceased) and the document, in the sense that he/she had drafted it personally (par 20). This interpretation, according to the court (par 16) provides and guarantees a degree of reliability, because it requires personal conduct by the deceased. It also reduces the chances of fraud and false statements, which the testator could not contest after his death. It was, however, *obiter* found that if a person *dictates* a document, it is as good as if a person has drafted the document personally (par 8). In *Longfellow*, the deceased did not personally write, type or dictate the content herself. The applicant completed the blank spaces. He told her he was going to fill it in to reflect that he would inherit the estate, that he would be the executor, that an Old Mutual Policy would be shared by the daughters and that she (testatrix) would revoke all previous wills. The document was read back to her and she agreed to its contents. This action can not be construed in a way to indicate that the deceased dictated her will to the drafter. The case could have been decided on this point alone, without debating the third “intention” requirement. Furthermore, reconciling oneself with a document and approving of its content, is not sufficient to comply with the requirement of “personal drafting” (*Bekker v Naude* 2003 5 SA 173 (SCA); contra earlier *Back v The Master* [1996] 2 ALL SA 161 (C)).

2 3 2 “Intended to be his/her will”: Interaction Between the Intention to Make a Will (section 2(3)), Mental Capacity to Make a Will (s 4) and Free Testamentary Expression

As mentioned above, the third requirement should have been addressed only once the first two requirements had been met. Let’s, however, assume for a moment that personal drafting was not required by the courts. Courts (see *Harlow v Becker* 1998 4 SA 639 (D)) and authors (see Jamneck “Artikel 2(3) van die Wet op Testamente: ’n Praktiese probleem by litigasie 2008 PER 90) have indicated the importance of differentiating between the intention to make a will, to which section 2(3) refers (*Harlow* 645J) and the mental capacity to make a will in terms of section 4.

Section 2(3) requires that the person who has executed or drafted the document, must have intended it to be his/her will. However, in terms of both common law and the Wills Act, the mental capacity to make a valid will embraces more than a mere intention on the part of the testator for the document to be a will (*Harlow* 643F-G, 644A-C, 647B-C).

The onus rests on the party who seeks an order in terms of section 2(3), to satisfy the court that the person who drafted or executed the document intended it to be his will (*Harlow* 647C-D). On discharge of that duty, the party who contests the validity of a will, on the ground of the person who made it not having the requisite testamentary capacity, then bears the onus of proving the absence of such testamentary capacity. The same situation (sequence) applies, if it is alleged that the testator lacked the necessary free testamentary expression required (*Jamneck* 2008 PER 90). Any impairment of the testators' freedom of expression at the time of making a will may (also) result in the will being invalid. (In *Thirion v Die Meester* 2001 4 SA 1078 (T) the court had to devote attention to the interaction between an application in terms of section 2(3) and an application of the annulment of the will on the ground of undue influence.)

In *Longfellow*, one finds the interesting outcome that the court decided that the document reflected the applicant's (husband's) will and not that of the deceased and that she therefore did not intend it to be her will. Such a statement is normally associated with "undue influence", resulting in the impairment of the free testamentary expression of the testator. In the well-known case of *Spies v Smith* 1957 (1) SA 539 (A), undue influence (in testamentary context) was defined as:

... it thus appears that a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated by reason of their effect to the exercise of coercion or fraud to make a bequest which he would not otherwise have made and which therefore expresses another person's will rather than his own, in such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition ["wilsonderskuiwing"] and the will is thus not upheld.

With regard to *Longfellow* under discussion, one must guard against the possible impression that "undue influence", or a "displacement of intention", can form the basis for a finding that the intention requirement in section 2(3) was not met. The court could have decided that it was not satisfied, on a balance of probabilities, that she intended the document to be her will, due to the fact that the applicant refused to take care of the 3rd respondent and her son. Under those circumstances she would perhaps have changed her mind and left her share to her children. By doing that she would have ensured that the children were taken care of. In addition, she only passed away two weeks later. If she was adamant that the document should be her will, she could have obtained legal advice on how to have the document signed on her behalf. She had an earlier will (1989) and certainly realised that certain requirements needed to be complied with, including her signing the document. She never again discussed the "unsatisfactory position" that

she would probably die without a will, with either her husband, nurse, colleague or children. She probably realised that her first will of 1989 would be her last will and testament and that her first husband, who was the sole beneficiary, would see to it that her daughter and grandson were taken care of.

The difficulties that faced the court in *Longfellow* in deciding on the intention requirement (even though it was not even necessary) (ironically) illustrate precisely why the Supreme Court of Appeal in *Bekker*, stated that the requirement of “personal drafting” reduces the chances of fraud, false statements, the possibility that the document does not reflect the intention of the testator, or, for that matter, undue influence. This, to a large extent, indicates that, despite criticism, the Court in *Bekker*, was correct in insisting on personal drafting as a requirement for an order in terms of section 2(3).

2 3 3 “Undue influence”

The court, *ex abundanti cautela*, stated (par 29): “*Even if I am wrong, in the circumstances of this matter, the applicant unduly influenced the deceased*” (own emphasis).

The court, however, did not even refer to *Spies*, neither for the definition of undue influence, nor for the factors the courts generally consider in determining whether there was undue influence or not. For its statement above, the court gave the following reasons (par 29):

- (1) Wilks had administered morphine to the deceased because she was in so much pain;
- (2) the deceased knew she was terminally ill;
- (3) the applicant had already refused the request to look after the third respondent/grandson; and
- (4) the applicant indicated to the deceased that he ‘was going to fill it in to reflect that [he] would inherit the estate’.

It is debatable whether these factors constitute a finding of undue influence. The couple were (seemingly) happily married for twelve years. The deceased acknowledged that the applicant had put “so much into their house”. There were two witnesses present. Two weeks lapsed between the completion of the CNA precedent and the death of the deceased. The applicant did not insist on her signing the CNA precedent. He refused at the outset to take care of her daughter. He didn’t make inheriting her share a precondition for taking care of the third respondent or her child. She (deceased) had ample opportunity to change her mind and to discuss it with the nurse/colleague, which she did not do. The mere fact that there was a special relationship (husband/wife) is not sufficient indication of undue influence. The applicant called in independent help in the form of Standard Bank. Only when they did not respond, did he buy a CNA precedent. To now suggest “undue influence” on the applicant’s part, seems somewhat harsh, unfair (towards a seemingly loving husband) and inconsistent with what is normally regarded as constituting undue influence.

3 *Mabika v Mabika*

3.1 Facts

In *Mabika*, the applicants, *inter alia*, sought an order for certain documents *executed* (see discussion below) by the deceased to be declared her will for purposes of the Administration of Estates Act 66 of 1965. Secondly, they sought an order for the first respondent to forfeit his share of the house (the deceased and first respondent were married in community of property). For purposes of this discussion, one needs to provide a detailed exposition of the surrounding circumstances (background) and other facts in order to understand and analyse the judgment. (The court, *inter alia*, stated in par 15: “Under these circumstances it will be greatly unjust not to accept Annexure ‘SM2’ as the deceased’s final will”).

The deceased and the first respondent (the respondent) married in community of property on 15 October 1997. At the time, the first and the second applicants had already been born. The respondent is not their biological father, although he adopted them as his children, and allowed them to use his surname (par 1). During 1998, the deceased, through her employer, Metrorail, purchased immovable property over which a mortgage bond was registered in favour of ABSA Bank. The immovable property was registered in the names of the deceased and the respondent by virtue of their marriage in community of property. The deceased was liable for the monthly bond repayments which were deducted from her salary (par 2). The respondent was unemployed from 2006, which apparently led to the breakdown of his marriage relationship with the deceased. The respondent left the common home, pursuant to an assault perpetrated on the deceased and never returned. During December 2006, the deceased obtained an interim protection order in terms of section 5(2) of the Domestic Violence Act 116 of 1998 against the respondent. The respondent was interdicted from assaulting the deceased. The deceased was intent on dissolving the marriage, but was threatened with death by the respondent (par 3). During 2007, the deceased was hospitalised (for approximately one year), as a result of continuous assaults on her by the first respondent. She suffered from a brain tumour and bipolar depression. After the nursing staff had summoned the respondent and told him of the deceased’s condition, he enquired from the hospital staff whether the deceased was not dead yet (par 4). The deceased was again hospitalised during November 2010. At all times of her hospitalisation, the respondent showed no interest in her health and well-being or that of the applicants. He did not visit the deceased in hospital and instead wished for her demise (par 5). He violated a maintenance order obtained by the deceased against him for her family and he stayed elsewhere with various girlfriends. In December 2010, he telephoned his son, the third applicant, and informed him that he had a new lover, to whom he was getting married. This was at a time when the deceased was terminally ill. The deceased, after the admission to hospital on 16 December 2010, remained hospitalised until her death on 24 January 2011.

Prior to her death, during September 2010, whilst not in hospital, the deceased approached her bankers, First National Bank (FNB), where she “executed” Annexure “SM2”, an instruction to draft her will. The document, on an FNB logo, consists of some five pages. It is entitled, “Application for the Drafting of a Will”. The deceased supplied all her personal details, financial position and marital status. Under the heading “Children” the deceased inserted the names of all four applicants. Under the column “Special Needs”, the deceased wrote, “Miss Sindisiwe Mabika ID Number 850918 0837 08 2 will be the children’s guardian if I pass away”. Again under the heading, “Guardians”, the deceased inserted the name of Miss Sindisiwe Mabika and her identity number. The deceased proceeded to appoint FNB Trust Services as trustees. On page 4 of Annexure “SM2”, and under the heading “Terms and Conditions”, the following printed words appear:

First National Bank Trust Services and Firstrand Bank Holding Ltd (the ‘Company’) will endeavour to prepare the ‘Last Will and Testament’ compatible with the client’s instructions as indicated on this application form.

Paragraph 1 under the “Terms and Conditions”, stated that the application was completed, based on information provided by the client. Paragraph 5 thereof provided that: “The Will is only valid once the completed document has been signed in terms of s (2)(a)(i) of the Wills Act of 1953, as amended.” The deceased inserted her full names and identity number and also signed the “Terms and Conditions” on page 4. On the last page, page 5, the deceased completed and signed a debit order in favour of FNB, in respect of the fee payable for the drafting of the will. The debit order, the amount, the bank and branch, the account holder and the date (1/9/2010), were completed by the deceased in her own handwriting. On a document entitled “Client Information”, Annexure “SM4”, the deceased completed the information therein required. At the end of the document, and in the handwriting of the deceased, appears the following note:

If I pass away my child Miss Sindisiwe Mabika will arrange for my burial, I want the children to own the property and not to be sold as a family property. The other policies and investments to be shared equally 24 percent each.

The deceased was interviewed by FNB Financial Planner, Mr Mkatshwa, who attached his confirmatory affidavits to the founding papers. He confirmed that at the time of the interview, the deceased fully comprehended the nature and effect of her actions, was capable of understanding the nature and extent of her properties and liabilities, and was capable of forming the requisite intention of bequeathing each of the shares granted to the individual beneficiaries. After the interview, the arrangement with Mkatshwa was that the deceased would return to the bank to sign the will. However, in the meantime the deceased became sick, underwent chemotherapy, and was hospitalised (par 11). She apparently died before any draft “will” was drawn up by FNB in accordance with the instructions.

The legal question the court had to answer, was whether it was satisfied that Annexure “SM2” (strangely enough nothing is said about Annexure “SM4”) executed by the deceased was intended to be her will (par 14). The court, *inter alia*, referred to the cases of *Ex parte Maurice* 1995 (2) SA 713 (C) and *Van Wetten v Bosch* 2004 (1) SA 348 (SCA). Both dealt with “instructions to draft a will”, but under different surrounding circumstances. The court, especially, referred to *Van Wetten* (par 16) where the court (in *Van Wetten*) concluded as follows:

In my view, however, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

3 2 Judgment

The court (*in casu*) decided as follows (par 15):

- (a) The deceased clearly intended the document to be her final will, but did not survive to sign it. This is so despite the fact that the document is styled ‘Application for the Drafting of a Will’. It contained full personal details, which the deceased intended to appear in her will.
- (b) The deceased and the respondent, due to his cruelty towards her, were estranged. They were on the verge of a divorce, but for her illness and eventual death. They had not lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also very afraid of the respondent. That is why she never ventured to mention the word ‘divorce’ to him. Under these circumstances, it will be greatly unjust not to accept Annexure ‘SM2’ as the deceased’s final will, and the first respondent will unfairly benefit from her estate when it is clear that such was not her intention (par 15).
- (c) The decision that the respondent should forfeit his share of the immovable property, although drastic in nature, was justified in the circumstances of this matter.

3 3 Discussion

3 3 1 “Intended to be his will”

One immediately wonders why the bank did not prepare a draft will in the period 1 September 2010, to the date of death on 24 January 2011 and arrange for formal execution by the deceased. There is also no indication whether the deceased made any enquiries in this regard during this period. The cases of *Maurice* and *Van Wetten*, involved letters by the testators containing instructions with regard to the devolution of their estates. In *Maurice*, the court found that the testator must have intended the (specific) disputed document itself to be his will. The court can thus not condone a document “which simply expressed the testator’s wishes, for the distribution of his estate” as a will (par 15). (See also *Letsekga v The Master* 1995 4 SA 731 (W); *Anderson and Wagner v The*

Master 1996 3 SA 779 (C); *Smith v Parsons* [2010] ZASCA 39). In *Van Wetten*, the court accepted this principle laid down in *Maurice*, but found that the disputed document (also a letter) was indeed intended to be the testator's final will, based on the facts and surrounding circumstances (par 16, 19). The mere fact that the document was in the form of a letter, did not mean that it could not be a will.

However, in the case of *Mabika*, the court, had to decide for the first time whether an "Application For the Drafting of a Will", (in accordance with which FNB would have prepared a "Last Will and Testament" compatible with the client's instructions) was intended to be a will (p 14 of Annexure "SM2"). Can this document, "SM2", be said to have been intended by the testator as her *final will*, or did she only intend it to be the *instructions* for drafting a final will? What is to be made of the earlier statement in *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N), to the effect that testators are notoriously fickle and that the possibility always exists that their wishes may change in the interval between the giving of instructions and the final approval of what has been drafted? (646D-647F). Does the fact that it can be said to be "greatly unjust" – if Annexure "SM2" was not condoned – have any role to play? The question in terms of section 2(3) to be answered though, was whether the "instructions" were intended to be her *final will*.

In the ongoing debate whether "constitutional values enshrined in the Constitution and notions such as "fairness, justice and reasonableness" (imported in the notion of "public policy"), can be applied to contract law and possible other spheres of private law, the Supreme Court of Appeal recently in *Potgieter v Potgieter* [2011] ZASCA 181, confirmed the view of the court in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA). Although abstract values such as reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations (see also *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC)). In *Potgieter* the court also emphatically stated (par 34): "It follows, in my view, that the supposed principle of contract law perceived by the court a quo *cannot be extended to other parts of the [private] law*" (own emphasis).

The court in *Potgieter* (par 34) submitted that the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as "reasonable" and "fair", is essentially that it will give rise to intolerable legal uncertainty. Reasonable people, including judges, may often differ on what is "equitable" and "fair". The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. The criterion will thus no longer be the law, but the judge (*Preller v Jordaan* 1956 1 SA 483 (A) 500). Furthermore, with reference to Harms DP, in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 486 (SCA), the court in *Potgieter*, agreed that a constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary, or subject to value judgments, may be

destructive of the rule of law (par 36). Based on the discussion above, it is doubtful whether the court in *Mabika* could, based on the circumstances, find it to be “greatly unjust” not to accept the document as her last will, as well as the fact that her husband will now “unfairly” benefit, when it is clear that such was not her intention. It is not clear from the judgment where these notions come from. In *Maurice* the court emphasised that the court will not condone a document which simply expressed the testator’s wishes for the distribution of his estate (716J). This is, unfortunately, not dealt with by the court in *Mabika*.

3 3 2 “Document drafted or executed by a person who has since died”: Difference Between “drafted” and “executed”

Another question that can be asked was whether Annexure “SM2” was indeed “executed” by the testatrix as was indicated by the court (par 14). With reference to *Van der Merwe v Master of the High Court* [2011] All SA 298 (SCA) par 16, the court remarked that the 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) (par 13). Under such circumstances, however, one would then be working with a document “drafted” by a person who has since died. It seems the court, *in casu*, regarded the document as a (partially) executed document, because it was completed in her own handwriting (par 13). A (“partial”) execution in terms of s 2(3) (for the purposes of distinguishing it from “drafting”), should mean that the process of compliance with the formal requirements in section 2(1)(a) has been embarked upon. Should the document *in casu* not have been described as a document “drafted” by the testatrix, rather than one “executed” by her? (De Waal & Schoeman-Malan *Law of Succession* (2008) 73).

3 3 3 Forfeiture of Respondent’s Share

With regard to the issue of the forfeiture of the respondent’s share, the court only said that “although drastic in nature, [it] will be justified in the circumstances of this matter.” No authority, however, is provided for this statement (par 15). In *Leeb v Leeb* [1991] 2 All SA 88 (N), it was decided that the court could declare the murderer’s benefit from the joint estate forfeit on the basis of considerations of public policy. Since the respondent *in casu* was not the “murderer” of the deceased, the forfeiture order by the court can be seen as a new development, which will undoubtedly form the subject of further interesting academic debate. (This case note is, however, more concerned with the intention requirement in s 2(3) and will not pursue this aspect any further).

4 Taylor v Taylor

4 1 Facts

In *Taylor*, the applicants applied for a certain document referred to as a “wish list”, to be accepted as an amendment to a last will and testament. The key question in this application was whether or not the deceased, when he drafted the “wish list”, intended it to be an amendment of his existing will as contemplated by s 2(3) of the Wills Act. In determining

whether or not the deceased had such intent at the time he drafted this document, the court, with reference to *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) par 15-16, indicated that the court is not bound to apply the established principles of documentary interpretation, but to examine the content of the document itself and the document in the context of the surrounding circumstances which prevailed when it was executed (par 6).

The deceased died on 24 October 2006. Approximately one year before his death, he became aware that he was suffering from terminal lung cancer and this knowledge spurred him to undertake certain estate planning exercises. Seven months prior to his death, on 23 March 2006, he executed a last will in terms of which he bequeathed his fixed properties to his children (applicants), and his personal effects and residue to the first respondent (wife). On 6 September 2006, the deceased drafted a so-called “wish list”, with regard to the distribution of some of the movable assets and the use of the fixed property after his death. It was signed by him and dated.

4 2 Judgment

The court concluded that, when analysing the document itself, the relevant surrounding and background circumstances of which the court was aware should be taken into account (par 12). While some of the pertinent facts are mentioned here, this brief discussion does not lend itself to a detailed discussion of all the facts. The facts, background and surrounding circumstances were decisive to the final outcome, with regard to the deceased’s “intention”. The following facts were emphasised (par 12): The deceased knew he had cancer one year before his death; he went on to regulate his affairs as best he could and he conducted an estate planning exercise; he executed a will; and on 6 September 2006 he executed the “wish list” at a time he was contemplating his death. With these facts in mind, the court examined the language of the document itself (par 13). The two bold headings referred to “my wishes” regarding, in the first instance, the fixed property and, in the second instance, his personal effects and the residue of his estate. Throughout the document are statements such as “it is my wish”; “the two flats can be rented”; “It is suggested that”. When dealing with the cash, shares or overseas investment, the deceased changed the language slightly by stating that these items “should be divided among my three children.” However, this sentence (also) came under the general heading “My wishes regarding my personal effects and the residue of my estate”; and in the court’s view was therefore to be governed thereby. Shortly thereafter the deceased stated “in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process.” The court, in view of this, stated as follows (par 15):

... the language employed by the deceased in this document does not demonstrate an intention on the part of the deceased to amend his last will and testament. On the contrary, what it would appear to indicate is that the deceased intended that his last will and testament should stand but that it

was his desire, notwithstanding the bequests made therein, that his family should stand together when it came to the administration of the estate and the distribution of the assets and that they should be distributed equitably amongst all the parties involved. In this regard, it seems to me, he had faith in both his children (first to third applicants) and his wife, (first respondent) to, notwithstanding the bequests made in his will, distribute his personal effects and the residue of his estate fairly and equitably and in accordance with his wishes as expressed in the wish list which was executed subsequent to his will. In addition, the words quoted above “in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process.”, by no means evince an intention on the part of the deceased to amend the will and tend rather to support the view that he trusted his family with the task of distribution (own emphasis).

The following circumstances and facts were highlighted by the court (par 19-21): The deceased realised he had to regulate his affairs; he knew formalities were required for a will to be valid, he intended for the parties to work together; although his death was imminent he still had sufficient time to have the document formally executed. The case differs from *Smith v Parsons* 2010 (4) SA 378 (SCA) and *Van Wetten*, where the respective deceased either committed, or contemplated suicide. These were compelling factors in favour of them intending it to be a will or an amendment (par 20). The application was, accordingly, dismissed.

4 3 Discussion

An interesting aspect is that both the applicants (children), as well as respondent (wife), could potentially have benefitted, and on the other hand, have lost full claim to some of the assets, through the granting of the section 2(5) order. According to the “wish list”, it was the deceased’s wish that although the house was bequeathed to the children, the wife should have been allowed to continue living in the house (this was not mentioned in the will). However, if the application was granted, she would have lost her full claim to the personal effects (as was stated in the will). An aspect the court, in my opinion, failed to address, was the sentence: “My personal effects and the residue of my estate have been bequeathed to my wife *for the sake of simplicity*” (own emphasis). What did the deceased mean/intend with this phrase? Can it not be argued that he indeed intended the “wish list” to be read as “supplement” to the will? In other words, he didn’t want to deal with the exact detail of how he wanted each and every single movable asset to be distributed in his will (but rather through a “wish list”)? Such an argument does not seem to be valid. If he wanted the list to be read with the will, he would have referred to the list in his will. It was, furthermore, only prepared some six months after the will. The format, structure, content and unambiguous wording of the document is also indicative of his intention. In *Taylor*, the deceased did not indicate that he wanted the document to be seen as an amendment, supplement or replacement of his existing will. This also supports the court’s argument (par 15).

5 Conclusion

The intention requirement in section 2(3) has occasioned a number of conflicting judgments to date. There seems to be no agreement on precisely where the emphasis should be placed with regard to the testator's intention. In *Ex parte Maurice* 1995 2 SA 713 (C), the court found, for example, that the disputed document itself must have been intended by the testator to be his will. The court can thus not condone a document "which simply expressed the testator's wishes for the distribution of his estate" as a will. A similar approach was followed in *Anderson and Wagner NNO v The Master* 1996 3 SA 779 (C) (see also *Letsekga v The Master* 1995 4 SA 731 (W)). In *Smith v Parsons* and *Van Wetten v Bosch*, the court found that the respective deceased had the intention of committing suicide, or contemplating suicide, when they drafted the respective documents concerned. This was a compelling factor in favour of them intending such documents to be, in the one instance, a final will, and in the other, an amendment of an earlier will.

Even though the eventual outcome in *Longfellow* is supported, the case should have been decided on the second requirement being absent. The document was not drafted or executed by a person who has since died. In view of *Maurice*, *Anderson and Wagner*, *Letsekga* and *Van Wetten*, it is suggested that *Mabika* was wrongly decided. The document itself was intended to be instructions for the drafting of a will. It was not intended to be her last will as required by section 2(3) and supported by the mentioned cases. Even though it was envisaged (see Keightley "Law of Succession" 2003 *Annual Survey of SA Law*) that the law in this regard (intention requirement) would continue to develop on a case-by-case basis, dependent on the facts and circumstances, rather than on settled principles, the well established and by now generally accepted principles set down by the courts above, should not lightly be discarded. The judgment in *Taylor*, on the other hand, contains a recognition of the abovementioned principles, while the court convincingly (on the facts), concluded that the document was not intended to be an amendment. This is in line with established principles laid down in *Letsekga* and *Anderson/Wagner* cases. The judgment in *Taylor* is supported.

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