Electronic Wills - South Africa

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Are Electronic Wills valid and enforceable in South Africa: The Courts Power to Condone Electronic Data Wills

The new age of technology has exponentially grown and allows for the transmission of various data messages from personal computers to portable devices such as hand held palmtops, cell phones and other electronic peripherals. It has become apparent through the recent years that there has been an increase in private and commercial activity on both the Internet and other telecommunication platforms. Legal practitioners are compelled to take cognizance of these developments and evaluate the use of data transmission for legally recognized acts, such as in this article the execution of valid wills.

Although South Africa has legislation governing electronic data transmissions called the Electronic Communication Transaction Act (ECT), one must note that the usage of data messages as a method of executing a valid will is strictly prohibited by section (4) 4 of the ECT. The Wills Act, furthermore prescribes in section 2(1)(a), that a will must be (1) in writing, (2) signed, (3) attested by 2 (two) competent witnesses and (4) every page must be initialed by the testator. As one can see from the above mandatory statutory requirements of an underhand will, the use of an E-mail does not satisfy the said requirements as partial compliance would render the will void as initio.

The legal problems created by this scenario must be viewed with careful circumspection. With regard to the writing requirement, both section 3 of the Interpretation Act, as well as section 12 of the ECT are very clear and state that, "Information in not without legal force merely because it is wholly or partially contained in a data message." This also applies to the signature and initialing requirement as contained in section 13 of the ECT, which recognizes the use of electronic data messages as valid signatures. As for the requirement of 2 (two) competent witness who must attest the said document, we will encounter a legal difficulty, as it will be difficult to determine the witness's identities. One must however, note section 3 of the ECT (its interpretation clause) which does not exclude any statutory or common law from being applied to, recognizing or accommodating electronic transaction.

This brings us to the important Court decision and legal precedent of the case of Macdonald v The Master where the Court held, a Court may condone a "draft will" in the form of an electronically stored document, which was stored on a computer hard-disk in terms of section 2(3) of the Wills Act, if not all statutory requirements have been satisfied and admit such as valid proof of an existing will.
The deceased committed suicide on or about 14 December 2000 and left in his own handwriting four notes dated 13th December 2000 on a bedside table next to the bed on which he was lying. On of the notes read as follows: "I, Malcom Scott MacDonald, ID 5609065240106, do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal ". The following day the notes containing the passwords to the electronic files referred to where handed to IBM employees who accessed the file contents and printed its contents which purported to be his last will and testament was then handed it his widow. The file was then deleted. The master then refused to accept it as it

did not comply with the formalities as set out in section 2(1)(a).

Witnesses from IBM testified in Court that at the deceased was a senior IT specialist in the employ of IBM and that only he had access to the particulars computer that contained the provisions of his intended to be will. The Court in its ratio dicidendi stated that,

"With insertion of section 2(3) in the Wills Act 7 of 1953, the legislature, whilst providing for formalities to ensure authenticity of wills and to eliminate false or forges will intended that failure to comply with formalities should not frustrate or defeat the genuine intention of a testator . The flexibility evident in section 2(3) does not release a would-be t testator from the formalities in terms of section 2(1). Any Will must still conform with the formatives failing which it will have to be proved that: (a) the document was drafted by the deceased (b) the deceased had died since the drafting of the document and (c) the document was intended by the deceased to be his or her last will. "

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

In deciding in favour of the liberal approach the Court held that:

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

Lastly the court had to establish whether the said draft will was the testator's last will and testament. The Court applied the flowing reasoning I deciding the question in the affirmative:

"… the Court should be satisfied, on a balance of probabilities is that the person who executed the document intended the document to e his will … All the evidence as well as the nature and contents of the documents themselves, clearly indicate that the documents were intended to be the testator's last will and testament … these documents were not a preliminary sketch or notes or discussion … but clearly a final draft of the will and testament."

The Court held that on a balance of probabilities the applicant had proved that the said data message contained her late husband's last will and testament based on the three-pronged test embodied in section 2(3) of the Wills act.. The Court however went further and warned that the Courts power as stipulated in section 2(3) of the Wills Act is a discretionary power that must be used sparingly and must not be seen as legal precedent for valid electronic wills.

When the Court exercises its power to condone non-compliance with statutory formalities it must always look at each facts of each case in the MacDonald decision the Court held the following factors to be of importance:

" (a) the documents are a clear indication of the deceased's intention tat they should be regarded as his last will and testament.

(b) the documents are not a not a preliminary sketch or notes for discussion with an attorneys or anyone else to draft a will but his final wishes.

(c) there is no element or suspicion of fraud attached to the document and their reproduction.

(d) there is no suspicion that there could have been any tempering with the computer of the documents

(e) not only did the documents exist on the computer, but there was indeed a clear reference by the testator to the these specific documents in his notes.

(f) there was a clear indication by the deceased where this document could be found on the computer.

(g) only the deceased had access, by way of secret pssword to put the documents on the computer.

(h) only the deceased could have typed the document.

(i) they could only be extracted upon the instruction of the deceased in his own handwriting and only with the deceased's own secret code."

In short, there is no legal certainty in South as to how and where data messages can be used for the purposes of conveying ones last wishes and final testament. However, I submit that to be on the safe side and to avoid unnecessary litigation, which can cost loved ones thousands of Rands, one ought not to use data messages for the execution of wills. Only in specific and unique cases will one be compelled to provide such evidentiary material as stipulated in the MacDonald case, if no valid will exist. When looking at the overall picture it is my view that, the Macdonald decision ought to be extended not only to "draft wills" but as well as "wills executed electronically" with the intent of being a testators last and final testament.

It is my submission that technology has evolved so quickly, that the legislature ought to amend the ECT as well as the Wills Act to cater for Electronic Wills, as this is direction, which is prescribed by our modern times and seems to be accepted by most modern nations. This approach seems to be the correct approach as the law cannot possibly try and prevent the development of technological advances, which also would apply to deeds of sale, and other formally prescribed documents. Furthermore I humbly submit that, should the necessity arise to execute an "electronic will" before the legislature fills the lacunae created by electronic devices one must attempt to satisfy all the prescribed requirements as stipulated by the Wills Act, so that the MacDonald decision can find application thereto.

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