Electronic wills – beyond the Macdonald v the Master decision

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Background:

The Electronic Communication Transaction Act, Act 25 of 2002, (the ECT) which governs electronic communications in South Africa, specifically excludes four different instances where an electronic writing or signature would not be valid.

The four excluded acts are:

- concluding an agreement for the Alienation (disposal) of immovable property as provided for in the Alienation of Land Act;
- concluding an agreement for a long-term of immovable property in excess of 20 years as provided for in the Alienation of Land Act;
- the execution of a bill of exchange as defined in the Bills of Exchange Act;
- the execution, retention and presentation of a will or codicil as defined in the Wills Act.

The Wills Act, further prescribes, in s2(1)(a), that a will must be:

- written;
- signed;
- witnessed by two (two) competent witnesses; and
- every page must be initialed by the testator.

However, note the decision of Mac Donald v The Master4 where the court held that 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 s2(3) of the Wills Act. If all the statutory requirements have not been satisfied. This may be admitted as valid proof of an existing will. The court used its power to condone a document intended to be a will in terms of s2(3) of the Wills Act to use a computer print out as an indication of the testators last wishes.

Hendrik Van der Merwe v Master of the High Court5.

The appellant, Hendrik van der Merwe, and the deceased first met in 1969 when they were both resident and employed in Heidelberg, Gauteng. Later they both moved to Johannesburg. In 1977 the appellant moved to Cape Town but returned to Johannesburg six years later. In 1992, the appellant returned to Cape Town where he resides to this day. From the time that the appellant and the deceased had first met a friendship began to develop and continued to strengthen, notwithstanding the later geographical distance between them.6 Their relationship was such that their respective parents became friends. The appellant and the deceased regularly travelled overseas together on holidays and visited each other. They kept in regular telephone contact and had no secrets from each other. The appellant described the friendship in his affidavit to court as: "On in die verhouding van die vriende vertrouens en vertroue, wat geen secrete vir mekaar gehad het nie."7

In 2007 the appellant and the deceased discussed the future. The deceased intended to retire in 2008 and was keen to make important decisions in relation to his retirement. During these discussions the two friends decided that they would each execute a will in terms of which the other would be the sole beneficiary of his deceased estate. Both were unmarried and neither had descendants or immediate families to whom they could bequeath their estates— the deceased's parents had by then died. Following on these discussions, and in accordance with their agreement, the deceased sent the appellant an e-mail on July 26 2007 (the document at the centre of this case) which reads:

"TESTAMENT"

Ek, die ondergetekeerde,

JOHN HENRY MUNNIK VAN SCHALKWYK (ID No. 48032850600386)

Tans woonagte te EENHEID NO 29 BERGBRON VILLAS, WHITERIDGE UITBREIDING 9, ROODEPOORT hierdie volgende alle vorige testament, kinders en ander testamenten en aktes deur my genaak en verklaar die volgende my testament te wees.

Snail

Matanzima
A. Ek bemark my boekel, wat roerende en vaste eiendomme insluit aan:
HENDRIK VAN DER MERWE – ID NO. 480218-052-086. NO 1
LAETITIA STRAAT CHRISTA BELVILLE 7530
B. Ek benoe ABSA TRUST BEPERK as alleskouer van my boekel en ek
stel hulle vy van die verpligting om sekuriteit aan die Meester van die
Hoogeregterskoor te verlaat.
C. ABSA TRUST BEPERK word verder genaag om volgens dié dieres
gebruik om die iets van die advertentie van die sekerheidsmaatskappy en so gevol-
glik gee eis om op enige vergoeding van sodanige dieres te lewer.
D. My swartlike-oorkoort moet hand werk word na Syd Afrika (indien
nodig). Myn troetielsie (indien enige bestaan op hierdie tydperk) moet aan
die staf gestel word deur m n gekwalifiseerde Veerar,
4. en dan saam met my swartlike-oorkoort vers word. Die as bemark
geword in dieselfde graaf waar my ouers begrawe is toe: BENONI-begraafplaats,
Afdeling DR3 – Graf No’s 681/2.
Gedateer
Op hierdie dag van
in die teenwoordigheid van die ondergetekende belangloze getuie, almal
tertysferd teenwoordig.
AS GETUIE:
1.
2.
TESTEUR
2.

After sending this e-mail, the deceased contacted the apppellant tele-
phonically to ask if it met with his approval. During August 2007 and in
agreement with the referred to the appellant reciprocal. He
approached an attorney and instructed him to draft a will in similar terms.
On August 17 2007 the apppellant signed the will prepared for him by his
attorney. The deceased was aware of this fact.14
The deceased retired on March 20 2008, and died less than a month thereafter
on April 12, without having executed the document sent by e-
mail to the appellant — he did not comply with any of the formalities pre-
scribed by s2(1)(a) of the Act. According to the apppellant, the deceased gave
no indication at all before his death that he wanted to revisit their mutual
document. The appellant is the only beneficiary of the deceased’s pension fund
which, the former submitted, indicates that the latter had not changed his
mind. At the time of his death the e-mail was still stored on the deceased’s
computer. The appellant specialised that the deceased had not taken the time
to sign the document because he had not contemplated his early demise.15
The Master of the High Court refused to accept the “draft will” as the
valid will particularly since the deceased had executed a valid will on
September 14 2004. The court a quo agreed with the Master and refused to
conclude the will.
The Court, on Appeal, had to consider the formalities required in the
execution of a will where a draft will was not signed by the Testator, as set
out in s2(1) of the Act.
The relevant parts of s2(1)(a) provide:
(a) no will executed on or after the first day of January, 1954, shall be valid unless
(i) the will is signed at the end thereof by the testator or by some other
person in his presence and by his direction; and
(ii) such signature is made by the testator or by such other person or is
acknowledged by the testator and, if made by such other person, also by
such other person, in the presence of two or more competent witnesses
present at the same time; and
(iii) such witnesses attest and sign the will in the presence of the testator and
of each other and, if the will is signed by such other person, in the
presence also of such other person; and
(iv) if the will consists of more than one page, each page other than the page
on which it ends, is also so signed by the testator or by such other person
anywhere on the page; and . . .
On the other hand, s2(3) sets out the power of a court in relation to a
will or amendment thereof which does not comply with the prescribed
formalities. It reads:
"If a court is satisfied that a document or the amendment of a document drafted
or executed by a person who has died since the drafting or execution thereof,
was intended to be his will or an amendment of his will, the court shall order the
Master to accept that document, or that document as amended, for the pur-
poses of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will,
although it does not comply with all the formalities for the execution or amend-
ment of wills referred to in subsection (1)."
It is clear that the formalities prescribed by s2(1) and s2(2) in relation to
the execution of a will, and amendments thereto, are to ensure authenticity
and to guard against false or forged wills. The court, in finding that the draft
electronic will is a valid will considered that:
- By enacting s2(3) of the Act, the legislature was intent on ensuring that
failure to comply with the formalities prescribed by the Act should not
frustrate or defeat the genuine intention of testators.
- It has rightly and repeatedly been said that once a court is satisfied that
the document concerned meets the requirements of the subsection it has
no discretion whether or not to grant an order as envisaged therein.
- The provisions of s2(3) are peremptory once the jurisdictional require-
ments have been satisfied. The first question that the court had to con-
sider is whether the document in question was drafted or executed by
the deceased. In this case the answer was in the affirmative. Following this
it was whether the deceased intended it to be his will.
In Letseka v the Master & others 1995 (4) SA 731 (W), the following
was stated at 735F-G:
"The wording of s2(3) of the Act is clear: the document, whether it purports to
be a will or an amendment of a will, must have been intended to be the will or the
amendment, as the case may be, of the testator or the testator must have intended the
particular document to constitute his final instruction with regard to the disposal of his estate."
A lack of a signature has never been held to be a complete bar to a docu-
ment being declared to be a will in terms of s2(3). In Letseka, decided in the
division from which this appeal emanated, the lack of a signature was not
held to be a bar to an order in terms of s2(3) of the Act. Ex parte Maurice 1995
(2) SA 713 (C), decided in the same year as Letseka, was to the same effect.
In Thion v Die Meester & another 2001 (4) SA 1078 (T) an unsignd
document drafted by a person shortly before he committed suicide was held to
be a valid will and declared as such in terms of s2(3). In that case the
deceased had executed a prior will that had complied with all the prescribed
formalities. The very object of s2(3), as pointed out, is to ameliorate the
situation where formalities have not been complied with but where the true
intention of the drafter of a document is self-evident. •
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Costly to comply; even more if you don’t

LISA THORNTON

The Independent Communications Authority of South Africa (ICASA) recently published Draft Compliance Procedure Manual Regulations, in terms of the Electronic Communications Act (EC Act).

The Draft Regulations appeared in Government Gazette 33896 on December 20 2010. The purpose of the Draft Regulations as stated in s1 is to "assist licensees to demonstrate compliance with their obligations" and "assist the Authority to proactively monitor compliance."

Regulatory Compliance Requirements

Most licensees are aware of their annual obligations to pay licence fees and contribute to the Universal Service and Access Fund. However, many (especially smaller) licensees are not aware that they must submit interconnection agreements and tariffs to ICASA. Licensees are also obligated to submit numbering audit data on an annual basis, to develop a Code of Practice, and to file annual reports detailing progress towards making services available and accessible to persons with disabilities. Some licensees, as well as consumers, are also unaware that ICASA has set out minimum standards with regard to service availability, installations and activations as well as the resolution of complaints.

In addition, there are obligations placed on EC Act licensees and licence exempt service providers in the Regulation of Interception of Communications and Provision of Communication-Related Information Act and the Electronic Communications and Transactions Act.

Proposed New Regulatory Compliance Requirements

In addition to these existing regulatory compliance requirements, the Draft Compliance Procedure Manual Regulations (Draft Regulations) will require the submission of licence and licensee details annually. This is in addition to the requirement that licensees submit written notice if the name, contact details, shareholding, or the addresses of the licensee changes within seven days of the change.

The Draft Regulations also will require the submission of quarterly reports detailing compliance with ICASA’s E-rate regulations. The E-rate regulations require all electronic communications network service and electronic communications service licensees to provide Internet services to schools at a 50% discount.

The E-rate regulations themselves require licensees to keep records of the following documents for a period of not less than three years.

- signed contracts
- internet service provider bills to schools
- details of services and locations at which they are provided
- the effective date of services provided
- resumption date should the service be cancelled

The Draft Regulations also will require the annual filing of sectoral planning data, including the number of subscribers, retail revenue, numbers of subscribers ported out and ported in, and the geographic and population network coverage for each different type of network deployed.

The Draft Regulations also will require the filing of biannual complaints reports reporting statistics on resolved complaints and in respect of complaints that are pending or that have been escalated, the following details.

- details of complainant
- brief description of complaint
- date of receipt of complaint
- date of response to complaint
- brief description of response

The Cost of Compliance

If the Draft Compliance Procedure Manual Regulations are promulgated, licensees will have to file no less than eight separate reports with ICASA.