BEKKER v NAUDE: THE SUPREME COURT OF APPEAL SETTLES THE MEANING OF 'DRAFTED' IN SECTION 2(3) OF THE WILLS ACT, BUT CREATES A POTENTIAL CONSTITUTIONAL PROBLEM

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In *Bekker v Naude en andere* 2003 (5) SA 173 (SCA) the Supreme Court of Appeal ended the long raging debate in our courts regarding the meaning of the word 'drafted' in s 2(3) of the Wills Act 7 of 1953. In this note I shall trace the events leading up to the court's decision and discuss certain constitutional issues raised by the judgment.

THE ISSUE IN CONTEXT

Section 2(3), which permits a court to condone a will that does not comply with the formalities for validity as prescribed by s 2(1) of the Wills Act, provides:

> 'If a court is satisfied that a document . . . *drafted or executed by a person who has died* since the drafting or execution thereof, *was intended to be his will* . . . the court shall order the Master to accept that document . . . for the purposes of the Administration of Estates Act . . . as a will, *although it does not comply with all the formalities* for the execution . . . of wills referred to in subsection (1).' (My emphasis.)

Clearly, for s 2(3) to apply, three requirements must be met:

(a) the testator must have *drafted* or *executed* a document that purports to be his will;
(b) the testator must have *died* since the drafting or execution of the document in question; and
(c) the court must be satisfied that the testator *intended* for the improperly or unexecuted document to be his will.

Whereas requirements (b) and (c) have not been contentious in our courts, requirement (a) has been. The dispute has centred on the meaning to be given to the word 'drafted'. To appreciate the dilemma that our courts have faced when it comes to applying requirement (a), one has to distinguish between two scenarios:

- The testator instructs a third party (an attorney, financial adviser, or friend) to draft a will for him. The testator takes less than perfect steps to execute the will. I shall refer to this as the 'first scenario'.
- The testator instructs a third party (an attorney, financial adviser, or friend) to draft a will for him. Before the testator takes any steps to execute the will, he dies. I shall refer to this as the 'second scenario'.

Our courts have had no problem applying the provisions of s 2(3) to the first scenario. In the first scenario the word 'drafted' is not relevant, for in those cases the courts are faced with a document that was at least 'executed' by the testator (albeit defectively). As long as the court is satisfied that the testator had

taken some steps to execute the document and that the testator had since died, the question of intention becomes the paramount consideration.

The second scenario is, however, problematic. The question has surfaced time and again whether *a wholly unexecuted document* (purporting to be a will) that was *not written by the testator personally* but *written by a third party* could be regarded as having been 'drafted' for the purposes of s 2(3). The courts have been divided into two camps: those opting for a strict interpretation of the word 'drafted', and those favouring a wide interpretation.

According to the strict interpretation, a document falling into the *second scenario* cannot be considered 'drafted' as the testator has not drafted it *personally.* Cases following the strict interpretation have emphasized the literal meaning of the provision to arrive at their conclusion (see *Webster v The Master* 1996 (1) SA 34 (D) at 41B–F; *Anderson and Wagner NNO v The Master* 1996 (3) SA 779 (C) at 784F–785H; *Olivier v Die Meester: In re Boedel Wyle Olivier* 1997 (1) SA 836 (T) at 844A–E; *Henwick v The Master* 1997 (2) SA 326 (C) at 334C–335E; *Ex parte de Swardt* 1998 (2) SA 204 (C) at 207B–F).

The wide interpretation, on the other hand, permits s 2(3) to be applied to the second scenario and thus does not require the testator to draft a will personally. Courts following the wide interpretation have relied mainly on policy arguments to support their opinion (see *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C) at 167f–175d; *Ex parte Laxton* 1998 (3) SA 238 (N) at 241E–244F; *Ex parte Williams: In re Williams' Estate* 2000 (4) SA 168 (T) at 172F–178J; *Ndebele and others NNO v The Master* 2001 (2) SA 102 (C) paras 20–29; *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N) at 646B–647G; *MacDonald v The Master* 2002 (5) SA 64 (O) at 71C–I).

It must be noted that a Full Bench of the Transvaal Provincial Division upheld the wide interpretation in *Ex parte Williams: In re Williams' Estate* (supra). In that case, the court held *Anderson and Wagner NNO v The Master* (supra), *Webster v The Master* (supra), *Olivier v Die Meester: In re Boedel wyle Olivier* (supra) to be obiter in so far as those cases interpreted 'drafted' narrowly.

THE FACTS

The facts of *Bekker v Naude* (supra) are set out in considerable detail in the decision of the court a quo, which was reported at 2002 (1) SA 264 (W). The applicant and her husband (the deceased) orally instructed a bank official to draft a joint will for them. The will was duly completed in standard form and sent to the couple for their approval. On the evidence of the applicant, they were satisfied that the will reflected their testamentary intention, but for no apparent reason they failed to execute the will. The deceased died unexpectedly in 1998, leaving two wills: the unexecuted joint will, and a will that was executed in 1983 when the deceased was still married to his former wife. In terms of the unexecuted will the applicant stood to inherit as the deceased's surviving spouse, whereas, in terms of the 1983 will, his former spouse stood to inherit to the exclusion of the applicant.

THE DECISION OF THE COURT A QUO

In the Witwatersrand Local Division, Marais J held that the word 'drafted' in s 2(3) of the Wills Act had to be interpreted strictly. For a will to be considered 'drafted', the testator had either to:

- write the will personally, whether in his own handwriting or by electronic means; or
- *dictate the actual words* of the document to a third party, who had to set *those very words* into a written form (at 268H–269B).

Since the deceased in *Bekker* had not personally written his will nor dictated the terms of the will as contemplated above, the court found that the will was not 'drafted' and hence s 2(3) could not be employed to condone the unexecuted joint will (at 269H).

In support of its reasoning the court relied on the wording of s 2A of the Wills Act. Section 2A, which deals with revocation of wills, provides as follows:

> 'If a court is satisfied that a testator has
> (a) made a written indication on his will or before his death *caused such indication to be made*;
> (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or
> (c) drafted another document or before his death *caused such document to be drafted*,
> by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.' (My emphasis.)

Looking at the wording of s 2A, the court held that that the legislature had quite clearly intended to draw a distinction between what may be termed an active act of drafting and a passive act of drafting (at 274F–H). Had the legislature intended for the word 'drafted' in s 2(3) to include passive acts of drafting, where the personal involvement of the testator was not required, the legislature would have adopted wording more in line with s 2A, which talks about a testator '[causing] a document *to be* drafted'. On this line of reasoning the court found that the word 'drafted' had to be strictly construed to encompass those instances where the testator personally drafts the will, i e actively participates in the drafting process (at 276D–F).

CRITICISMS OF THE DECISION OF THE COURT A QUO

The Witwatersrand Local Division was criticized for adopting an 'overly technical approach' by emphasizing the words used by the legislature instead of reflecting on the purpose behind s 2(3), which was to give expression to the last wishes of the testator. By treating the 'drafted' requirement as a precondition for the application of the provision the court failed to 'focus attention on the third requirement and to ask whether, on the facts before it, there was sufficient evidence to satisfy the court that the deceased intended the draft to be his will, despite the fact that it had been prepared five years before his death and that he had never bothered to sign it' (R Keightley 'Law of succession' 2001 *Annual Survey* 485 at 490–1).

The decision was also criticized for not following the rules of precedent. The court delivered its judgment in *Bekker* on 12 December 2002, some six

months after the Full Bench decision of the Transvaal Provincial Division in the case of *Williams* (supra). According to the rules of precedent, the court in *Bekker*, being a sister division of the Transvaal Provincial Division, should have followed the decision in *Williams*. From the case information in *Bekker* it seems that counsel had not drawn the court's attention to *Williams* (see E Knoetze 'Die onverlyde ''Bankopgestelde'' testament en kondonering ingevolge artikel 2(3) van die Wet op Testamente' (2001) 22 *Obiter* 481).

The court in *Williams* condoned as a will an unexecuted document that had been drafted by a financial advisor to the deceased. Like the bank official in *Bekker,* the financial advisor in *Williams* had drafted the will acting on the deceased's less than complete oral instructions. The court, on the evidence before it, accepted that, despite non execution of the document, the deceased had intended the document in question to be her will (at 180C).

On the question of the meaning of the word 'drafted' in s 2(3) the court in *Williams*, after surveying various High Court cases, accepted those decisions that took a wide interpretation. The court thought it unhelpful to refer to s 2A of the Wills Act to interpret 'drafted' in s 2(3) (at 177I–178H). The court considered it more appropriate to have regard to the mischief that the legislature sought to cure when it enacted the provision. To this effect the court held that '[t]he inference is inescapable that the Legislature by promulgating s 2(3) intended to ameliorate very real cases of injustice due to strict compliance with formalities . . . and to reaffirm the sanctity of the testator's last wishes' (at 172B–C).

The court also adopted a pragmatic approach when determining the intention of the legislature. The court held (at 177C–F):

> 'The Legislature will no doubt have realised as recently as 1992 that people will normally consult attorneys, banks or accountants, having a better grasp of the intricacies involved, who will then prepare draft wills for their perusal, approval and signature . . . There are many people who simply cannot do that because they are illiterate, blind, due to an affliction not able to write, or who have not got access to or do not know how to operate a typewriter or computer. Moreover, many people who can physically create a document are at the same time wholly incapable of creating anything that would operate as a valid will.'

THE DECISION OF THE SUPREME COURT OF APPEAL

When counsel advised the applicant in *Bekker* to take the matter on appeal, they must have been optimistic about their prospects of success. The decision of the court a quo was, first, incorrect for not following the precedent set in *Williams*. Secondly, by the time that the matter went on appeal the most recent judicial opinions emanating from other provincial divisions of the High Court also favoured the wide interpretation (see *Ramlal v Ramdhani's Estate* (supra); *MacDonald v The Master* (supra); *Ndebele v The Master* (supra)). Little did counsel know that the pendulum would swing the other way.

As if to reaffirm the precarious nature of litigation, the Supreme Court of Appeal endorsed the narrow interpretation when giving meaning to 'drafted' in s 2(3). The court reasoned as follows:

- The cardinal rule of statutory interpretation is that courts must give effect to the ordinary, grammatical meaning of words used by the legislature, unless it leads to some absurdity, inconsistency, hardship or anomaly, which from a consideration of the enactment as a whole, a court of law is satisfied that the legislature could not have intended.
- If one reads s 2(3) with s 2A (which was introduced into the Wills Act at the same time as s 2(3)), it is quite clear that the legislature had intended the word 'drafted' in s 2(3) of the Act to bear a meaning different from the phrase 'cause to be drafted' employed in s 2A. This was a clear indication that the legislature intended 'drafted' in s 2(3) to have a limited meaning, i e that the testator drafts the document purporting to be a will personally.
- While it is true that the legislature introduced s 2(3) to offer respite in cases where testators had not complied with formalities for wills, it was nevertheless mindful of the spectre of fraud. By requiring testators personally to draft their wills the legislature curtailed possibilities for fraud. To interpret 'drafted' widely would increase the chances for fraud. This could not have been what the legislature intended.
- When applying s 2(3), the intention requirement cannot be elevated to a primary consideration. In so far as some cases have emphasized intention in order to attach less importance to the other requirements (like the meaning of 'drafted') these cases were clearly wrong for there is nothing in the section that permits the courts to do so.
- The historical origin of s 2(3) was a further indication that the legislature had not intended for 'drafted' to be interpreted widely. The South African Law Commission in its Report: Project 22 *Revision of the Law of Succession* (1991) para 2.22 recommended only two requirements for a will to be condoned: first, that it had to be reduced to writing, and, secondly, that the testator intended it to be his or her will. To this extent, the Commission recommended that s 2(3) be worded as follows: 'If a court is satisfied that a document or an alteration thereto by a person who has died since the drafting or execution thereof was intended to be his will.'

The legislature rejected the proposed wording and reformulated the subsection to read: 'If a court is satisfied that a document or an amendment of a document *drafted or executed by a person* who has died since the drafting or execution thereof.' The revised version not only introduced the require ment of 'drafted or executed' but also indicates that the legislature had intended for there to be a personal connection between the testator and the document.

It seems — if one looks at the judgment of the Supreme Court of Appeal as a whole — that the court endorsed the reasoning of the court a quo regarding when a will is considered 'drafted' for the purposes of s 2(3).

EVALUATION OF THE DECISION OF THE SUPREME COURT OF APPEAL

Section 9(3) of the Constitution, the equality clause, enumerates a number of grounds of discrimination. The enumerated grounds are not a closed list. Consequently, the equality clause may be invoked to prevent unfair discrimination against people on grounds other than those specifically mentioned in s 9(3). It is submitted that s 2(3) of the Wills Act (as interpreted by the Supreme Court of Appeal) unfairly discriminates against physically challenged, blind and illiterate people.

Section 2(3) was enacted to remedy the harsh consequences of striking down wills for not adhering to the strict formalities in s 2(1) of the Wills Act. Against this background, physically challenged, blind and illiterate people will successfully be able to argue that s 2(3) discriminates against them by extending a benefit that they are less likely to be able to enjoy. For these people it is difficult and often impossible to draft a will personally or to dictate the exact terms of a will to a third party. Such persons need the assistance of legal advisors or other professional people to draft their wills for them. Indeed, it was precisely for the purpose of accommodating these categories of people that the court in *Williams* (supra) gave a wide interpretation to the term 'drafted'.

If a violation of s 9(3) were established, the state would have an opportunity to justify s 2(3) of the Wills Act under the general limitations clause. However, I do not see the limitations clause posing an obstacle to a successful constitu tional challenge. If the purpose of requiring a testator to draft a will personally is to safeguard the public against fraud, this purpose could be less restrictively achieved by amending s 2(3) so as to entrench a fraud enquiry, which could in turn be made subject to court approval.

It is noteworthy that in almost all of the cases where the wide interpretation of 'drafted' was accepted, the courts had in any event considered the question of fraud on an ad hoc basis by examining the evidence before them. This suggests that even without an entrenched fraud enquiry the courts are capable of protecting the interests of society. Further more, one must also bear in mind the anomaly to which the court in *Williams* alluded (at 177H):

> 'Insistence on the personal, physical approach is in any event no guarantee against fraud. It may be so in most cases where the document is written out in the testator's own hand. But what about the case where it is typewritten or produced on a computer?'

To my mind, therefore, fraud as a justification for a limitation on the right to equality is not a sufficiently cogent reason for s 2(3) to survive an equality challenge.

I find it strange that the Supreme Court of Appeal did not anticipate this possible constitutional argument. Even if counsel had not considered the constitutional implications of a narrow interpretation to the word 'drafted', it is submitted, the court should have done so on its own. Section 39(2) of the Constitution provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum

must promote the spirit and objects of the Bill of Rights'. In *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) the Constitutional Court held that a court is obliged to develop the common law in terms of s 39(2) irrespective of whether the parties requested the court to apply this provision (paras 36–7). It is submitted that s 39(2) similarly obliges the courts to 'promote the spirit, purport and objects of the Bill of Rights' mero motu when interpreting legislation. In *Bekker* both the Supreme Court of Appeal and the court a quo should have considered what effect a narrow interpretation of the word 'drafted' would have had on certain 'vulnerable' groups.

It is important for the courts to anticipate constitutional arguments when matters come before them. Such an approach prevents piecemeal litigation. If the Supreme Court of Appeal in *Bekker* had considered the constitutional issues and found that a literal interpretation of 'drafted' violated the right to equality, the court could have set matters right by *reading in* the words 'cause to be drafted' so as to extend the application of s 2(3), and consequently made the section compatible with the Bill of Rights (see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)).

THE WAY FORWARD

Since the Supreme Court of Appeal did not consider the constitutional implications of s 2(3) of the Wills Act, the losing litigants in *Bekker* may appeal the Court's decision on constitutional grounds to the Constitutional Court. Furthermore, it is open to any other litigant, in a future matter, who is adversely affected by the strict interpretation of 'drafted', to challenge s 2(3) on constitutional grounds.

Litigation aside, it is submitted that Parliament should, in any event, amend s 2(3) so as to extend the remedial effect of the section to blind, illiterate and physically challenged persons. It seems patently unfair for these people not to enjoy the remedial effect of the section especially when there are ways and means available to protect them against the possibility of fraud. To this extent, I propose that the section be amended as follows:

- The word 'drafted' in s 2(3) should be deleted and the phrase 'cause to be drafted' should be inserted. This will oblige the courts to adopt a wide interpretation of the provision. The amendment will also neutralize a possible constitutional challenge to the section.
- To protect the public against fraud that might be occasioned by inserting the phrase 'cause to be drafted', a fraud enquiry should be built into the provision. A party who wants a court to condone a will that had been drafted for the testator by a third party should bear the onus of proving the absence of fraud.