

When will a document intended to be a will, be recognised by our courts as a valid will?

In terms of Section 2(3) of the Wills Act, 7 of 1953 the Court must order the Master of the High Court to accept a document, drafted by a person, who died since the drafting of the document, if that person intended that document to be his will despite the fact that the document does not comply with all the formalities for the execution of a will referred to in sub section 2(1) of the said Act.

In the case of *Van Wetten and Another v Bosch and Others* (2003) SCA the Supreme Court of Appeal had to decide whether the deceased, Tertius Bosch, had intended a document that he had drafted, prior to his death, to be his will in accordance with requirement in Section 2(3) of the Wills Act.

In an appeal against a decision in the Durban and Coastal Local Division the first appellant, Ms. Van Wetten (sister of the deceased), sought an order in terms of Section 2(3) that the document written by the deceased, be recognized by the Master of the High Court, Natal as one intended to be the deceased's will. The deceased and his wife executed a joint will in 1995, but 18 months after the death of the deceased, Ms. Van Wetten launched proceedings for the acceptance by the Master of the contested will.

Ms. Van Wetten apparently found the contested will in a cabinet in Bosch's home shortly after his death, but only brought it to the attention of the widow and the executor at some later stage.

The principal issue, however, was what the intention of the deceased had been, in drafting the relevant document.

The contested will was in one of several envelopes which had been left in an outer, sealed envelope, addressed and handed to a friend of the deceased towards the end of 1997. The envelope was addressed to the attorney of the deceased.

The court held that in terms of Section 2(3) of the Will's Act, 7 of 1953 the court had to direct the Master to accept the document in issue as a will once it

was determined that the document had been drafted by a person who had subsequently died and that the deceased had intended the document to be his will.

The real question was whether the deceased had intended the document to be his will. That enquiry of necessity entailed an examination of the document itself and also of the document in the context of the surrounding circumstances. The court held that the words of the contested will were not the words of the person who gave instructions for the drafting of a will, but they were the words of a person who had made a decision to which immediate effect was to be given. The very words used by the deceased were thus also decisive of the question before the court, i.e. the deceased had intended the document to be his will. After considering the relevant facts of the case, the court came to the conclusion that the contested will had been intended by the deceased to be his will.

The court held, despite the fact that the document did not comply with all the formalities for the execution of a will, that the contested will was indeed intended to be the will of the deceased and directed the Master to deal with it in terms of section 2(3) of the Will's Act. The appeal accordingly succeeded.

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