

## Testamentary rescue: An analysis of the intention requirement in Australia and South Africa

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*This article provides a legal-comparative perspective on the rescue of formally irregular wills through the exercise of judicial dispensing powers in Australia and the comparable exercise of a judicial condonation power in South Africa. The article analyses in particular the requirement that the deceased must have intended the informal instrument in question as his or her will – a requirement common to the Australian and South African testamentary rescue dispensations. The article contextualises the aforementioned analysis through a comparative examination of judicial engagement with testamentary rescue in three scenarios that frequently confront Australian and South African courts, namely, the rescue of (i) instructions for the preparation of wills; (ii) draft wills; and (iii) suicide letters.*

### I Introduction

All Australian jurisdictions sourced their statutory formalities for the making of wills from s 9 of the Wills Act 1837 (UK).<sup>1</sup> The statutory prescripts on the requirements for wills' formal validity are peremptory in all Australian jurisdictions.<sup>2</sup> These prescripts fulfil an array of functions, such as securing the authenticity of testators' dispositive intent; emphasising the solemnity of the testamentary act; and protecting testators against fraud and undue influence.<sup>3</sup> However, Australian courts' enforcement of these prescripts' strict observance negated testators' dispositive intent where the instruments embodying such intent were invalid for want of compliance with the requirements for wills' formal validity.<sup>4</sup> Consequently, all Australian jurisdictions enacted dispensing powers that enable courts to dispense with aspects of wills' formal validity in order to remedy the nullification of testamentary intent in instances of formally irregular and, therefore, invalid wills.<sup>5</sup>

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1 A G Lang, 'Formality v Intention — Wills in an Australian Supermarket' (1985) 15 *MULR* 82 at 85.

2 R F Croucher and P Vines, *Succession: Families, Property and Death: Text and Cases*, LexisNexis Butterworths, 2013, pp 284-5.

3 Lang, above n 1, at 87-9.

4 *Ibid*, at 103.

5 Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8 (formerly Wills, Probate and Administration Act 1898 s 18A); Wills Act 2000 (NT) s 10; Succession Act 1981 (Qld) s 18 (formerly Succession Act 1981 (Qld) s 9(a)); Wills Act 1936 (SA) s 12(2); Wills Act 2008 (Tas) s 10 (formerly Wills Act 1992 (Tas) s 26); Wills Act 1997 (Vic) s 9; Wills Act 1970 (WA) s 32 (formerly Wills Act 1970 (WA) s 34). Australian courts have acknowledged the remedial nature of the

Lang's analysis of early dispensing judgments in South Australia (the first Australian jurisdiction to enact a judicial dispensing power in 1975) shows the relatively innocuous defects in wills' execution that would have resulted, but for the exercise of the dispensing power, in those wills' refusal to probate and, therefore, the negation of the testators' dispositive intent. These errors included witnesses' failure to attest to a testator's signature; witnesses' absence when a testator signed a will; and a witness's acknowledgement of his or her signature to another witness who was absent when the former witness signed the will.<sup>6</sup> However, in the course of time, as Lang notes,<sup>7</sup> Australian probate courts faced more complex testamentary rescue cases that featured not only more drastic departures from the statutory requirements for wills' formal validity but also concerned instruments not cast in typical testamentary form. Adjudication on such cases has yielded divergent outcomes, principally because Australian courts engaged in a varied manner with a requirement common to dispensing provisions in all Australian jurisdictions, namely, that the deceased must have intended the instrument in question as his or her will. Australian courts and legal scholars have identified this requirement as posing the greatest challenge to the exercise of dispensing powers.<sup>8</sup>

Australia belongs to the Common Law legal family. South Africa, on the other hand, is a mixed jurisdiction where Roman-Dutch law, South Africa's civilian Common Law, was infused with aspects of the English Common Law in the aftermath of the second British occupation of the Cape of Good Hope (present-day Cape Town) in 1806.<sup>9</sup> The British abolished the typically Civil Law wills in use at the Cape at the time and, from the middle of the nineteenth century, introduced legislation that mirrored the prescripts of the Wills Act 1837 (UK) regarding the execution of wills. These prescripts endured, and the current South African Wills Act 1953<sup>10</sup> therefore prescribes formalities similar to those found in its Australian counterparts insofar as a will's formal validity is procured, for the most part, by the signatures of the testator and two attesting witnesses.<sup>11</sup> The South African Wills Act's prescripts on the requirements for wills' formal validity serve the same purposes as those of corresponding Australian statutes, namely, curtailing opportunities for fraud and undue influence; obviating uncertainty; and ensuring that wills reflect testators' authentic and voluntary dispositions.<sup>12</sup> The Wills Act's formality prescripts are peremptory; consequently, non-compliance with one or more of the execution

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various dispensing provisions: see, eg, *Estate of Peter Brock* (2007) 1 ASTLR 127; [2007] VSC 415; BC200709039 (24 October 2007) at [19]-[20] on the Wills Act 1997 (Vic) s 9; *In the Estate of Frank William Davis (dec'd)* (2011) 7 ASTLR 572; [2011] SASC 143; BC201106690 (2 September 2011) at [22] on the Wills Act 1936 (SA) s 12(2).

<sup>6</sup> Lang, above n 1, at 107.

<sup>7</sup> *Ibid.*, at 107-8.

<sup>8</sup> See, eg, *National Australia Trustees Ltd v Fazey; The Estate of Nancy Elaine Lees, Late of Strathfield* [2011] NSWSC 559; BC201103959 (10 June 2011) at [18]; P Vines, 'The Quality and Proof of Intention in the Dispensing Power: Lessons from a Short History' (2002) 9 *APLJ* 1 at 6.

<sup>9</sup> For an overview of the development of Roman-Dutch law as South Africa's Common Law, as well as the establishment of South Africa's mixed legal system, see A B Edwards, *The History of South African Law — An Outline*, Butterworths, 1996, pp 13-100; R Zimmermann and D Visser, 'Introduction: South African Law as a Mixed Legal System' in *Southern Cross: Civil Law and Common Law in South Africa*, R Zimmermann and D Visser (Eds), Clarendon Press, 1996, pp 2-30.

<sup>10</sup> The Act commenced on 1 January 1954 but was amended on a number of occasions. South Africa is not a federal state and the Wills Act 1953 therefore applies uniformly throughout the Republic.

<sup>11</sup> Wills Act 1953 s 2(1)(a).

<sup>12</sup> M M Corbett, G Hofmeyr and E Kahn, *The Law of Succession in South Africa*, Juta, 2001, p 49.

formalities occasions a will's invalidity. It is unsurprising, therefore, that South African courts echoed their Australian counterparts' frustration at the negation of testators' dispositive intent in instances where courts' enforcement of the Wills Act's demand for strict formalism occasioned the invalidity of formally non-compliant wills and, therefore, a negation of testamentary intent.<sup>13</sup>

The South African Law Commission responded in the early 1990s by recommending, first, that the Wills Act's formal requirements be relaxed (although only to a limited extent), and, second, that High Courts (the courts of first instance in all matters regarding wills and deceased estates) be empowered to dispense with aspects of wills' formal validity.<sup>14</sup> The commission's recommendations were incorporated in a draft Bill, and ultimately included in the Law of Succession Amendment Act 1992.<sup>15</sup> This Act imported s 2(3) — a dispensing provision, or, as it is generally known in South Africa, a condonation provision — into the Wills Act 1953. Section 2(3) 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 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 subs (1).

It must be noted, by way of explication of the above provision, that the British introduced the English system of executorship to South Africa but that South Africa, unlike Australia, does not have a formal probate system. Nevertheless, the Master of the High Court's acceptance of a testamentary instrument, referred to in the above subsection, fulfils, by and large, the same role in South Africa as does probate courts' admission of similar instruments to probate in Australia. It is evident, therefore, that the South African Wills Act's condonation provision shares the objective of the dispensing provisions of its Australian counterparts, namely, to remedy the negative impact of testamentary formalism on testators' dispositive intent. This is achieved through the rescue of formally irregular, and therefore invalid, wills, and their admission to the formal legal process for the winding-up of deceased estates by executors. It is, moreover, unsurprising that early South African condonation judgments, in consonance with Lang's above-mentioned analysis of early South Australian dispensing judgments, concerned the rescue of wills where invalidity

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13 In *Kidwell v The Master* 1983 (1) SA 509 (E) a will was voided because the testator failed to sign its final page at the end thereof as prescribed by the Wills Act 1953. Kannemeyer J lamented that this outcome was 'unfortunate . . . and may frustrate the testator's intention . . . [but] is the result of a failure to observe a statutory requirement for the validity of wills which is peremptory': at 514F. In *The Leprosy Mission v The Master of the Supreme Court* 1972 (4) SA 173 (C) a will was voided because the same witnesses did not sign both pages of a 2-paged will. Corbett J said at 184H:

I recognise that this is a hard case in the sense that on the evidence of the various witnesses there does not appear to be any doubt that the document in question genuinely represents the last will of the testatrix and in that invalidity will result in worthy beneficiaries being deprived of substantial bequests. Nevertheless, there are important questions of legislative policy and principle at stake which transcend the equities of the particular case.

14 South African Law Commission (Project 22), *Report on Review of the Law of Succession*, 1991, at [2.29]. The commission's current appellation is the South African Law Reform Commission.

15 The Act commenced on 1 October 1992.

resulted from relatively innocuous errors in the execution process.<sup>16</sup> However, in the course of time South African courts were also confronted with cases that involved more drastic departures from the statutory requirements for wills' formal validity and also with instances where the instruments in question were not cast in typical testamentary form. These cases presented South African courts with challenges similar to those faced by their Australian counterparts. These similarities are occasioned, by and large, by the fact that the South African Wills Act's condonation provision requires, in the same vein as the various Australian statutory dispensing provisions, that the deceased must have intended the document in question as his or her will. This requirement has been as contentious in South Africa as it has been in Australia.

The above synopsis shows that Australian and South African statutory provisions on testamentary rescue serve a common purpose, namely, the preservation of testators' dispositive intent despite defective compliance with statutory formality precepts.<sup>17</sup> Moreover, these provisions' intention requirements pose challenges to courts in both legal systems. This article analyses, in the narrative legal-comparative tradition, the judicial approach to testamentary rescue and its intention requirement in particular in Australia and South Africa.<sup>18</sup>

Orucu opines that comparative-law research occasions the improvement and consolidation of legal knowledge, not in the abstract, but of law in context.<sup>19</sup> She contends, moreover, that comparative-law research involves essentially the comparison of legal rules, and, where the primary sources of law include court decisions, these must necessarily form part of comparative scholars' research focus.<sup>20</sup> Orucu also observes an increased interest among comparative scholars in mixed legal systems.<sup>21</sup> This article on testamentary rescue in Australia and South Africa seeks to

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16 Eg. *Horn v Horn* 1995 (1) SA 48 (W) where witnesses failed to sign the deceased's will; *Logue v The Master* 1995 (1) SA 199 (N) where, inter alia, the deceased signed only the second page of a 2-paged will; *O'Connor v The Master* 1999 (4) SA 614 (NC) where the deceased signed a will with a thumbprint (which necessitated certification by a commissioner of oaths) but the will was defectively certified.

17 The South African condonation provision permits testamentary rescue in instances of non-compliance with execution and amendment formalities. Australian dispensing provisions do likewise, but some Australian provisions include also formally irregular revocation within their regulatory ambit (eg, Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8). The South African Wills Act 1953 s 2A regulates the condonation of informal acts of testamentary revocation separately from s 2(3)'s condonation of formally irregular execution and amendment. This article focuses predominantly on testamentary rescue in instances of non-compliance with execution formalities and, to a lesser extent, non-compliance with amendment formalities. Dispensing with formally irregular revocation falls outside the article's scope.

18 The nature and various manifestations of testamentary intent are beyond this article's scope. It must be noted, however, that judicial engagement with testamentary intent in testamentary rescue cases differs, in South Africa and Australia, from that in, eg, cases concerning the interpretation or construction of wills. Both scenarios involve an inquiry into the deceased's intention, but the former concerns, as is shown later in this article, whether the deceased created the instrument in question with the *animus testandi* (the intention to make a will); the latter involves ascertaining the deceased's intention as manifested by the instrument in question. It is also shown later in the article that, in testamentary rescue cases, South African and Australian courts are willing to look beyond the instrument in question to the circumstances surrounding its creation to determine whether the deceased intended it as his or her will. In instances of testamentary interpretation or construction, on the other hand, South African and Australian courts are loath to look, save when apposite rules on the admission of evidence so permit, beyond the particular instrument itself to determine the deceased's intention: see M J de Waal and M C Schoeman-Malan, *Law of Succession*, Juta, 2008, p 221 on the South African position, and Croucher and Vines, above n 2, p 440 on the position in Australia. The South African Supreme Court of Appeal observed astutely in *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) that the key question in a condonation application is not what the particular document means (that would be the question in an application for the interpretation or construction of the document), but whether the deceased intended the document as his or her will: at [15]–[16].

19 E Orucu, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, Martinus Nijhoff Publishers, 2004, p 33.

20 *Ibid*, p 49.

21 *Ibid*, p 204.

address the aforementioned three hallmarks of contemporary legal-comparative research. First, it looks to consolidate legal knowledge in a heretofore under-researched field of Australian and South African legal-comparative inquiry. Second, its jurisprudential analysis focusses particularly on the convergences and divergences in Australian and South African courts' responses to the challenges that statutory provisions on testamentary rescue and their intention requirements in particular pose. Third, it aims to provide a contextualised comparison of testamentary rescue between Australia as a Common Law jurisdiction and South Africa as a mixed jurisdiction. To this end, the article examines three scenarios that have confronted Australian and South African courts in testamentary rescue cases: instructions for the preparation of wills; draft wills; and suicide letters.

## II Preliminary matters

Australian courts will admit a formally irregular will or otherwise informal document to probate in terms of the applicable dispensing provisions upon the fulfilment of three requirements: (i) a document must exist; (ii) the document must embody the deceased's testamentary intentions; and (iii) the deceased must have intended the document as his or her will. South African courts will order condonation of similar instruments in terms of s 2(3) of the Wills Act 1953 if three requirements are met: (i) a document must exist; (ii) the deceased must have drafted or executed the document; and (iii) the deceased must have intended the document as his or her will. Before dealing with the intention aspect of testamentary rescue in Australia (requirements (ii) and (iii) aforementioned) and South Africa (requirement (iii) aforementioned), some preliminary observations on the document requirement in both legal systems are apposite.

### A. The existence of a document

Documents of the classical paper variety naturally fall within the scope of all Australian dispensing provisions. Some Australian statutes on wills bring documents other than those of the classical paper variety within dispensing provisions' ambit<sup>22</sup> whereas interpretation statutes in other Australian jurisdictions occasion a similar effect.<sup>23</sup> Consequently, Australian courts have granted probate to, among others, an audio tape that contained supplementary directions regarding the disposal of a deceased estate;<sup>24</sup> a (print-out of a) computer file that contained testamentary directives;<sup>25</sup> and an electronic document embodying testamentary intentions produced on a smart phone.<sup>26</sup> The South African position is different. Neither the

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22 Eg, the Wills Act 1970 (WA) s 32(1)(a)-(d) includes under its definition of 'document' anything on which there are marks, figures, symbols or perforations bearing a meaning for persons qualified to interpret them; anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and a map, plan, drawing or photograph. The Wills Act 2000 (NT) s 10 is to similar effect.

23 Eg, Acts Interpretation Act 1954 (Qld) s 36 read with Sch 1; Interpretation of Legislation Act 1984 (Vic) s 38; Interpretation Act 1987 (NSW) s 21.

24 *Treacey v Edwards; Estate of Edwards* (2000) 49 NSWLR 739; [2000] NSWSC 846; BC200005014 with reliance on the Interpretation Act 1987 (NSW) s 21.

25 *Re Trethewey* (2002) 4 VR 406; [2002] VSC 83; BC200201109 with reliance on the Interpretation of Legislation Act 1984 (Vic) s 38. See also, eg, *Yazbek v Yazbek* [2012] NSWSC 594; BC201203869 (1 June 2012).

26 *Re: Yu* [2013] QSC 322; BC201315105 (6 November 2013) with reliance on the Acts Interpretation Act 1954 (Qld) s 36.

Wills Act 1953 nor the Interpretation Act 1957 contains a definition of 'document' comparable to those of their Australian counterparts. Binns-Ward J opined in *Ex parte Porter*<sup>27</sup> that, in light of the absence of such definitions, the word 'document' in s 2(3) of the Wills Act 1953 must be given its ordinary meaning, determined with proper regard to its contextual employment.<sup>28</sup> The Interpretation Act 1957 permits some leeway regarding written documents insofar as it states that, in every law, expressions relating to writing shall be construed, unless a contrary intention appears, as inclusive of typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.<sup>29</sup> However, whether informal electronic documents that express testamentary intent but that cannot be reduced to writing within the foregoing meaning are capable of rescue in South Africa remains uncertain. The fact that the Electronic Communications and Transactions Act 2002 which sets a statutory framework for the facilitation and regulation of electronic communications and transactions in South Africa expressly excludes wills from its regulatory ambit complicates this issue.<sup>30</sup>

Nevertheless, South African courts have rescued informal testamentary instruments that existed, at least initially, in electronic form only. In *Macdonald v The Master*,<sup>31</sup> for example, the deceased indicated in a note written shortly before he committed suicide that his will was to be found on his office computer. The particular computer file was accessed, printed, and thereafter presented to the court for condonation. The High Court, satisfied that the security measures with regard to the computer file were not breached and, therefore, that the unexecuted hard-copy version of the electronic document reflected the deceased's authentic testamentary dispositions, issued a condonation order.<sup>32</sup> Hattingh J observed that '[t]he deceased's will was indeed a document that was stored in his computer in accordance with his instructions'.<sup>33</sup> Some legal scholars have construed the *Macdonald* judgment as accepting of electronic documents for the purpose of testamentary rescue in South Africa.<sup>34</sup> The Supreme Court of Appeal's judgment in *Van der Merwe v The Master*<sup>35</sup> fortified this view. In this case an unexecuted will, sent as an electronic document by email, was printed and thereafter presented for judicial condonation. The court, again satisfied with the document's authenticity, granted a condonation order.<sup>36</sup> Navsa JA in *Van der Merwe* echoed Hattingh J's sentiments in *Macdonald* when the former said that 'the document still exists on the deceased's computer'.<sup>37</sup> *Van der Merwe's* case, therefore, provided further impetus to judicial engagement with informal

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27 2010 (5) SA 546 (WCC).

28 Ibid, at [7].

29 Interpretation Act 1957 s 3.

30 Electronic Communications and Transactions Act 2002 s 4(3) read with Sch 1; s 4(4) read with Sch 2.

31 2002 (5) SA 64 (O).

32 Ibid, at 72E-G, 73B.

33 Ibid, at 71I-J.

34 Eg, S Cornelius, 'Condonation of Electronic Documents in Terms of Section 2(3) of the Wills Act 7 of 1953' (2003) 1 *J S Afr L* 208 at 210; M C Wood-Bodley, '*Macdonald v The Master*: Computer Files and the "Rescue" Provision of the Wills Act' (2004) 121 *S Afr LJ* 34 at 38-9; M C Wood-Bodley 'Wills, Data Messages, and the Electronic Communications and Transactions Act' (2004) 121 *S Afr LJ* 526 at 527.

35 2010 (6) SA 544 (SCA).

36 Ibid, at [17]-[19].

37 Ibid, at [17].

electronic documents in the context of South Africa's testamentary rescue dispensation. It has been contended, however, that the availability of the printed versions of the respective computer documents in the *Macdonald* and *Van der Merwe* cases renders these judgments less 'revolutionary' than they may at first glance appear.<sup>38</sup> It has been suggested, therefore, that South Africa should follow the Australian example by defining statutorily the meaning of 'document' for the purpose of testamentary rescue.<sup>39</sup> Whether such a definition should include electronic instruments, and, if so, whether South African law's engagement with such instruments should be limited to the testamentary rescue sphere (as opposed to the full recognition of electronic wills) are questions beyond this article's scope. However, these issues are debated in contemporary South African legal scholarship.<sup>40</sup>

## **B. Drafting or execution by the deceased**

The South African Wills Act's condonation provision differs from the dispensing provisions of its Australian counterparts insofar as the former requires the deceased to have drafted or executed the informal instrument in question. It is important to note that these two actions are stated in the alternative: the deceased must either have drafted or have executed the particular document. The meaning of 'executed' in this context is not entirely clear, but, in the opinion of some South African legal scholars, it entails simply that the deceased must have appended his or her signature at least once to the otherwise defectively-executed document.<sup>41</sup> Accordingly, South African courts have granted condonation orders when the document in question bore the deceased's signature, but its formal irregularity was occasioned by, for example, defective attestation by witnesses.<sup>42</sup> This approach corresponds with the Australian experience where, according to Vines, the likelihood of informal instruments being admitted to probate increases significantly when a document complies substantially with the formalities and where its only formal defect lies in, for example, the witnesses' defective attestation.<sup>43</sup>

The South African Supreme Court of Appeal held in *Bekker v Naude*<sup>44</sup> that, if the deceased did not execute the document in the aforementioned manner, the document is condonable only if the deceased drafted or otherwise created the document him or

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38 M de Waal, 'A Court's Power to Condone Non-Compliance with Testamentary Formalities (the "Dispensing Power"): The South African and Australian Experiences' in *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens Vol 1*, A-L Verbeke et al (Eds), Intersentia, 2012, pp 417 at 433.

39 F du Toit, 'Testamentary Condonation in South Africa: A Pyrrhic Victory for Private Autonomy over Mandatory Formalism in the Law of Wills?' in Verbeke et al, above n 38, pp 513 at 523.

40 See, eg, J T Faber and P J Rabie, 'Van Tikmasjien tot Rekenaar: 'n Ondersoek na die Ontwikkeling van die Suid-Afrikaanse Erfreg in die Tegnologiese Era' (2005) 4 *J S Afr L* 767; A R van Staden and C Rautenbach, 'Enkele Gedagtes oor die Behoeftes aan en Toekoms van Elektroniese Testamente' (2006) 39 *De Jure* 586; S Papadopoulos, 'Electronic Wills with an Aura of Authenticity: *Van der Merwe v Master of the High Court and Another*' (2012) 24 *SA Merc LJ* 93.

41 M C Wood-Bodley, 'Did You Say "Asinine" Milord? *Bekker v Naude* 2003 5 SA 173 (SCA)' (2004) 25 *Obiter* 222 at 228-9; M J de Waal, 'The Courts' Power of Condonation in Respect of the Execution and Revocation of Wills: Unfortunate New Elements of Uncertainty' (2004) 121 *S Afr LJ* 529 at 532.

42 See, eg, *Logue v The Master* 1995 (1) SA 199 (N) where the court condoned a document signed by the deceased but not by witnesses; *Raubenheimer v Raubenheimer* 2012 (5) SA 290 (SCA) where the court condoned a will signed by the testator and two witnesses, but not in each other's presence.

43 Vines, above n 8, at 3.

44 2003 (5) SA 173 (SCA).

herself.<sup>45</sup> An unexecuted document prepared for the deceased by, for example, a solicitor is, accordingly, not condonable under the South African testamentary rescue dispensation. In the Australian case of *In the Will and Estate of Brian Bateman*<sup>46</sup> the Supreme Court of Victoria granted probate of a draft will prepared for the deceased by the state trustees and signed by two witnesses but not by the deceased himself.<sup>47</sup> If the abovementioned scholarly view regarding the South African condonation provision's execution requirement is correct, this case would have yielded a different outcome if it had served before a South African court. Such a court would have refused condonation because the deceased in the *Bateman* case had neither executed (signed it himself at least once) nor drafted personally the document in question. Therefore, the South African condonation provision's drafted-or-executed requirement in respect of the relevant instrument imposes a limitation (albeit an often-criticised one)<sup>48</sup> on testamentary rescue that is foreign to its Australian counterparts. Consequently, South African courts will disallow condonation in some instances where Australian courts are willing to exercise dispensing powers.<sup>49</sup> The South African condonation provision's prescript that the deceased must have drafted or executed the particular document occasions a further differentiation with the Australian position. In *Treacey v Edwards; Estate of Edwards*<sup>50</sup> the NSW Supreme Court, acting under the dispensing provision of the former Wills, Probate and Administration Act 1898, admitted to probate a deceased's will as well as an audio tape that contained the deceased's supplementary testamentary dispositions. Austin J opined by way of an obiter dictum that incorporation by reference constituted an alternative (albeit more tenuous) basis for admitting the audio tape to probate.<sup>51</sup> In light of the uncertainty in South African law regarding the question of whether informal non-paper instruments are capable of testamentary rescue,<sup>52</sup> it is doubtful whether a South African court would condone an audio tape in circumstances similar to those in *Treacey's* case. But a South African court's rescue of that audio tape is unlikely for two further reasons. First, the deceased neither executed nor drafted personally the tape in *Treacey*. The Supreme Court of Appeal in *Bekker v Naude*,<sup>53</sup> in its insistence on the deceased's personal drafting of an unexecuted informal document in order to bring it within the condonation provision's ambit, did not limit such drafting to personally-handwritten documents but acknowledged that typed

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45 Ibid, at [9], [19].

46 (2011) 9 ASTLR 188; [2011] VSC 277; BC201104678 (24 June 2011).

47 Ibid, at [25], [49].

48 See, eg, M Paleker, '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' (2004) 121 S Afr LJ 27.

49 Compare, eg, the judgment on cross-signed mirror wills of the South African Supreme Court of Appeal in *Henriques v Giles* NO 2010 (6) SA 51 (SCA) with that of the Supreme Court of South Australia in *In the Estate of Hennekam (dec'd)* (2009) 104 SASR 289; 264 LSJS 65; [2009] SASC 188; BC200905685. Both cases concerned spouses' wills. The South African court denied condonation of such wills on the ground that neither will was drafted personally by the testator for whom it was made (a solicitor prepared both wills), nor did either of the testators execute the 'correct' will: at [8]-[9]. The court instead dealt with the matter on the basis of testamentary rectification: at [15]-[24]. In *Hennekam*, on the other hand, the court preferred to exercise the dispensing power in terms of the Wills Act 1936 (SA) s 12(2) because it opined that the circumstances of the case represent 'precisely the "mischief to which the section is directed": at [36]. The court regarded rectification under the Act's s 25AA as an artificial remedy under the circumstances: at [36]-[37].

50 (2000) 49 NSWLR 739; [2000] NSWSC 846; BC200005014.

51 Ibid, at [32]-[36].

52 See above Part IIA.

53 2003 (5) SA 173 (SCA).



documents and documents produced *verbatim* by a scribe from the deceased's dictation also meet the requirement of personal drafting.<sup>54</sup> However, it is uncertain, despite this leeway afforded in *Bekker*, whether an audio tape qualifies as a personally-drafted document under s 2(3) of the Wills Act 1953. The South African Law Commission's insistence, in its report that preceded the introduction of the Wills Act's testamentary rescue dispensation, on writing as the only 'acceptable and manageable' medium for the capturing of testators' dispositive intent and the commission's consequent rejection of the statutory recognition of video-taped wills support this standpoint.<sup>55</sup>

The second reason why the *Treacey* case would have yielded a different outcome before a South African court relates to Austin J's opinion on incorporation by reference as an alternative ground for securing probate of the audio tape in that case. South African law does not recognise the English-law doctrine of incorporation by reference. South African law's rejection of the doctrine stems from the Wills Act's (and many of its provincial predecessors') requirement that each page of a testamentary instrument be executed in accordance with the prescribed formalities — another document not so executed at the time of a will's execution can, therefore, not be incorporated into a will through that will's reference to such a document.<sup>56</sup> Kannemeyer J confirmed in *Burnett NO v Kohlberg*<sup>57</sup> that, under South African law, 'no document, irrespective of its nature, can be incorporated in a will by reference'.<sup>58</sup> It is, in this light, interesting to note Hattingh J's remark in *Macdonald v The Master*<sup>59</sup> that the condonation of the 'printed will and testament as found on the computer' in that case obviated the need to decide the matter on the basis of incorporation by reference.<sup>60</sup> It can be inferred from his Honour's remark that, had he not condoned the 'printed will and testament as found on the computer' but instead condoned the handwritten note that referenced the will on the computer, any attempt at procuring the Master's acceptance of the printed computer document via the rescued handwritten note's reference to it would have been unsuccessful for violating South African law's non-adherence to the doctrine of incorporation by reference.

### **III The intention requirement**

#### **A. Introductory observations**

Australian dispensing provisions generally engage with the deceased's intention through two requirements for testamentary rescue: the instrument in question must embody the deceased's testamentary intentions, and the deceased must have

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<sup>54</sup> *Ibid*, at [8].

<sup>55</sup> South African Law Commission (Project 22), *Report on Review of the Law of Succession*, 1991, at [2.166]-[2.167].

<sup>56</sup> *Moses v Abinader* 1951 (4) SA 537 (A) at 553A-G; *Estate Orpen v Estate Atkinson* 1966 (2) SA 639 (C) at 645A-B; Corbett, Hofmeyr and Kahn, above n 12, pp 66-8.

<sup>57</sup> 1984 (2) SA 137 (E). The abbreviation 'NO' in the judgment's citation stands for '*Nomine Officio*', indicating that a litigant acted in an official, and not in a personal, capacity — eg, in *Burnett's* case the applicant sought, in his capacity as the executor of a deceased estate, an order against the first respondent.

<sup>58</sup> *Ibid*, at 143D.

<sup>59</sup> 2002 (5) SA 64 (O). See above Part IIA.

<sup>60</sup> *Ibid*, at 72G-H.

intended that instrument to constitute his or her will. The South African condonation provision requires simply that the deceased must have intended the instrument as his or her will. Vines shows that, despite some courts having approached the matter differently from time to time, the so-called 'document-centered approach' has become dominant in Australia: the instrument in question must embody the deceased's final post-mortem dispositions, and the deceased must have intended that very document as his or her will.<sup>61</sup> Recent South African legal scholarship proposed that the South African condonation provision's intention requirement is, in fact, no different from those of its Australian counterparts. For example, Wood-Bodley argues that it is jurisprudentially incorrect to typify a mere general inclination to make a will as a form of *animus testandi* (the intention to make a will) — unless and until a testator has recorded his or her final wishes in a document intended to operate as a will, such a testator has not (yet) achieved the state of mind acknowledged by South African law as *animus testandi*.<sup>62</sup> South African law, therefore, relates pertinently a testator's intention to make a will to the recorded manifestation of that dispositive intent in a document intended to operate as such. In this light, it is submitted that the South African Wills Act's condonation provision's engagement with the deceased's intention is on par with those of its Australian counterparts.

South African condonation judgments support the foregoing contention. In *Ex parte Porter*,<sup>63</sup> for example, Binns-Ward J stated that the words 'the document' in s 2(3) of the Wills Act 1953 cannot be construed widely to include any document that reflects (even exactly) the contents of the intended testamentary instrument; rather, these words must be confined to 'the narrower concept of the actual piece of paper in issue, which . . . is what the statutory provision has in contemplation'.<sup>64</sup> This standpoint corresponds with that expressed by, among others, the Supreme Court of Victoria in *Estate of Peter Brock*<sup>65</sup> where Hollingworth J said that 'the legislature did not intend that *any* document expressing or reflecting testamentary intentions could be probated under s 9 [of the Wills Act 1997 (Vic)]; the testator must have intended the *particular* document to constitute a will, and for the document to immediately operate as his or her will at the time it was created or completed'.<sup>66</sup>

Hollingworth J's aforementioned observation that the deceased must have intended the document in question to operate immediately as a will at the time of its creation or completion raises a further introductory point for comparison between the Australian and South African testamentary rescue dispensations, namely, in regard to the timing of the required intention. The South African Supreme Court of Appeal stated authoritatively in *Van Wetten v Bosch*<sup>67</sup> that the deceased's intention

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61 Vines, above n 8, at 7. See also R Atherton, 'Dispensing with Wills Formality in Australia: The Problem of the Draft Will in the Tranquil Revolution' (1994) 2 *APLJ* 68 at 70-5.

62 M C Wood-Bodley, 'Can Section 2(3) of the Wills Act 7 of 1953 Properly Be Applied to a Mere Instruction to Draft a Will? *Mabika v Mabika*' (2013) 130 *S Afr LJ* 244 at 255.

63 2010 (5) SA 546 (WCC).

64 *Ibid*, at [11]. In *Porter* the court held, therefore, that the Wills Act's condonation provision cannot rescue an emailed copy of a validly-executed codicil where the latter was lost subsequent to its execution: at [8].

65 (2007) 1 *ASTLR* 127; [2007] VSC 415; BC200709039 (24 October 2007).

66 *Ibid*, at [29].

67 2004 (1) SA 348 (SCA).

regarding the instrument in question must be established at the time of the instrument's creation or execution, and that evidence of a subsequent change of mind on the deceased's part is, consequently, irrelevant and inadmissible.<sup>68</sup> This finding ostensibly negated earlier suggestions by South African lower courts that a subsequent transformation in the deceased's intention towards the document in question warranted judicial consideration.<sup>69</sup> However, the facts of *Van Wetten* were peculiar. The deceased handed an envelope, addressed to his solicitor and containing the disputed document, to a friend with the instruction that it should be opened only in the event that something were to happen to the deceased. The court inferred from the evidence on the handing-over of the envelope that the deceased contemplated suicide at the time of the document's production. This inference led the court to the conclusion that the deceased did not intend for the friend to deliver the document to a solicitor for the preparation of a will. Instead, the deceased envisaged that, at the time when the envelope would be opened and the document read, he would already be dead and, therefore, unable to execute any will prepared in accordance with the document contained in the envelope. In the court's opinion this showed that the deceased intended the document from the outset as a will, rather than instructions for the preparation of a will.<sup>70</sup>

Wood-Bodley suggests that *Van Wetten*, in light of the case's peculiar facts, does not necessarily preclude condonation by a South African court in the scenario where a deceased prepared a document initially as an *aide-memoire* on possible testamentary dispositions, but then fell ill and informed family and friends that this document indicates how they must deal with his or her estate after death.<sup>71</sup> This standpoint corresponds with that assumed by, among others, the NSW Court of Appeal in *In the Estate of Masters (dec'd); Hill v Plummer; Plummer v Hill*,<sup>72</sup> a case where the deceased also handed over an informal document to a friend with the instruction that the document's directives should be implemented upon the deceased's death.<sup>73</sup> Priestley JA acknowledged that the dispensing power (in terms of s 18A of the former Wills, Probate and Administration Act 1898) could be applied to that document even though the deceased might not have intended it as a will at the time of its production, but subsequently intended it as such when he handed it to his friend.<sup>74</sup> The court ordered the document's admission to probate in light of the deceased's transformed intention.<sup>75</sup> The question regarding a transformation of a deceased's intention with regard to the instrument in question is explored further in the discussions hereafter on instructions for the preparation of wills and draft wills.<sup>76</sup>

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68 *Ibid*, at [21]. See also *Harlow v Becker* 1998 (4) SA 639 (D) at 643F-G; *De Reszke v Maras* 2006 (2) SA 277 (SCA) at [11]; M C Wood-Bodley, 'Tertius Bosch's Final Over: *Van Wetten v Bosch*' (2005) 122 *S Afr LJ* 52 at 55.

69 See, eg, *Kotze v Master of the Court* [1998] 1 All SA 312 (NC) at 318e.

70 *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) at [18]-[19], [27].

71 Wood-Bodley, above n 68, at 57.

72 [1994] 33 NSWLR 446; BC9405178.

73 *Ibid*, at 464E-5A.

74 *Ibid*, at 469C-E.

75 *Ibid*, at 453F.

76 See below Parts IIIB and C.

The different approaches to the timing of the required intention in *Van Wetten* on the one hand, and *In the Estate of Masters* on the other hand, but the similarity in the outcomes of the two cases, underscore the truism that the success (or not) of testamentary rescue invariably turns on the facts of each case. It is not surprising, therefore, that Australian and South African courts have identified various indicators to be considered when adjudicating on testamentary rescue cases. It is equally unsurprising that the same indicators have been propounded in South Africa and the various Australian jurisdictions. Some such common denominators are: (i) the document's purport, tone and content (including the fact that it refers to itself as a will);<sup>77</sup>(ii) the document's form (particularly where it follows the usual construction of a will);<sup>78</sup> (iii) the deceased's knowledge of, or previous experience with, testamentary formalities;<sup>79</sup> (iv) the document's authenticity as a product of the deceased's actions;<sup>80</sup> and (v) any indication by the deceased (whether by verbal or written statements, or through placement in a strategic location) that the informal document must be acted upon after his or her death.<sup>81</sup> It is important to note, however, that the foregoing are indicators only, and they are, therefore, not in themselves determinative to the outcome of testamentary rescue cases in Australia and South Africa.

The foregoing introductory overview provides a basis for the analysis hereafter of testamentary rescue's intention requirement in scenarios that have confronted courts in Australia and South Africa in the past. Three instances are considered: (i) instructions for the preparation of wills; (ii) draft wills; and (iii) suicide letters.

## **B. Instructions for the preparation of wills**

Scholarly analyses of testamentary rescue jurisprudence in Australia and South Africa show that courts in both systems agree that, generally speaking, documents embodying mere instructions for the preparation of wills are incapable of testamentary rescue. Vines argues that instruction documents fall short of meeting the intention requirement under Australian jurisdictions' dispensing powers because they lack the requisite immediacy of intention insofar as they are not intended to

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<sup>77</sup> Eg (Australia), *Tsagouris v Bellairs* (2010) 5 ASTLR 403; 269 LSJS 451; [2010] SASC 147; BC201003978 (28 May 2010) at [23]; *Re Estate of Gholam (dec)* [2011] SASC 125; BC201105782 (4 August 2011) at [27]; and (South Africa) *Horn v Horn* 1995 (1) SA 48 (W) at 49I; *Schneller NO v Master of the Supreme Court* [1999] 3 All SA 425 (C) at 433i; *Smith v Parsons* 2009 (3) SA 519 (D) at [22]; *Van derMerwe v The Master* 2010 (6) SA 544 (SCA) at [18].

<sup>78</sup> Eg (Australia), *Estate of Peter Brock* (2007) 1 ASTLR 127; [2007] VSC 415; BC200709039 (24 October 2007) at [31]; *Estate of the late Evert Jacob Bulder Evert Jan Bulder v Surya Kanta Evert Jan Bulder* [2012] NSWSC 1328; BC201210528 (1 November 2012) at [40]; and (South Africa) *O'Connor v The Master* 1999 (4) SA 614 (NC) at 622B-E; *Raubenheimer v Raubenheimer* 2012 (5) SA 290 (SCA) at [11].

<sup>79</sup> Eg (Australia), *Estate of Peter Brock* (2007) 1 ASTLR 127; [2007] VSC 415; BC200709039 (24 October 2007) at [34], [37]; *Costa v The Public Trustee of NSW* [2008] NSWCA 223 (17 September 2008) at [110]; *Estate of Laura Angius; Angius v Angius* [2013] NSWSC 1895; BC201316540 (17 December 2013) at [288]; and (South Africa) *Anderson and Wagner NNO v The Master* 1996 (3) SA 779 (C) at 783J-4B; *De Reszke v Maras* 2006 (2) SA 277 (SCA) at [17].

<sup>80</sup> Eg (Australia), *Belcastro v Belcastro* [2004] WASC 111; BC200402966 (25 May 2004) at [15]; *In the Estate of TLB* (2005) 94 SASR 450; 243 LSJS 1; [2005] SASC 459; BC200510563 at [12]; *Re Estate of Gholam (dec)* [2011] SASC 125; BC201105782 (4 August 2011) at [25]; and (South Africa) *O'Connor v The Master* 1999 (4) SA 614 (NC) at 622F-G; *Macdonald v The Master* 2002 (5) SA 64 (O) at 72C-G; *De Reszke v Maras* 2003 (6) SA 676 (C) at [25]; *Van derMerwe v The Master* 2010 (6) SA 544 (SCA) at [17].

<sup>81</sup> Eg (Australia), *Hough v Harris; Estate of Graham* [2004] NSWSC 958; BC200409662 (18 October 2004) at [8]; *Costa v The Public Trustee of NSW* (2008) 1 ASTLR 56; [2008] NSWCA 223; BC200809445 (17 September 2008) at [24]; and (South Africa) *Horn v Horn* 1995 (1) SA 48 (W) at 49C; *Smith v Parsons* 2010 (4) SA 378 (SCA) at [16]-[19].

operate immediately as wills at the time of their creation.<sup>82</sup> Wood-Bodley, in his critique of the judgment in *Mabika v Mabika*<sup>83</sup> (a case discussed hereafter on the condonation of a document headed 'Application for the Drafting of a Will'), opines in similar vein that, under South Africa's testamentary rescue dispensation, preliminary documents or documents that merely record the deceased's wishes without having been intended to take immediate effect as wills do not meet the condonation provision's intention requirement.<sup>84</sup>

Judicial opinion in South Africa and Australia affirms the foregoing views. In *Anderson and Wagner NNO v The Master*, Thring J said:

To me the words of s 2(3) of the Act are clear. The provisions of the subsection apply only to certain documents. To come within the ambit of the subsection the document concerned . . . must have been drafted or executed by the person concerned with a certain intention. That intention must have been that the document should itself constitute his will or an amendment of his will, as the case may be. An instruction by a testator to his attorney or other adviser to draft or prepare a will or an amendment of a will along certain lines or in certain terms, no matter how precisely defined, is not written with the intention required by the subsection, and consequently cannot be brought within its terms. The difference between a document which is intended by its maker to be his will, or an amendment of his will, on the one hand, and an instruction by him to another person to draw a will or an amendment to a will, is neither merely technical nor insubstantial: in my view it is fundamental. In the former case, the maker of the document intends it to constitute the final expression of his wishes as regards the disposal of his estate. It is not subject to change, save, perhaps, by means of a subsequent and entirely fresh and separate amendment or codicil. In the latter case, the maker of the document does not vest it with the same intention of finality: he anticipates that another document will, in due course, be prepared and placed before him for his consideration and approval, which he may or may not sign or alter, as he may wish when it is presented to him.<sup>85</sup>

Hallen J observed in similar vein in *Estate of Laura Angius; Angius v Angius*:

The sole question for the court is the status of the undated document — whether the court is satisfied that the deceased intended the undated document to form her will. It would not be sufficient if the court came to the view that the deceased had intended the undated document to record only her instructions for a will, or to be a draft will made to assist in the preparation of a final will by her then solicitors. Nor is it enough if the court is only satisfied that the undated document contained the deceased's ideas about her testamentary intentions. The document must be intended to be the legally

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82 Vines, above n 8, at 9. See also *In the Estate of Parkinson* (1988) 143 LSJS 336 at 340 where White J said that '[i]t does not require much professional or bench experience to realise that intending testators do change their minds between the time of "finally" giving instructions and the time of ultimate execution of their wills'.

83 [2011] ZAGPJHC 109 (8 September 2011).

84 Wood-Bodley, above n 62, at 251.

85 1996 (3) SA 779 (C) at 784G-785A. See also, eg, *Ex parte Williams: In re Williams' Estate* 2000 (4) SA 168 (T) at 179C; *Ndebele NNO v The Master* 2001 (2) SA 102 (C) at [32].

operative act which purports to dispose of the deceased's property upon her death and be intended by her to have present operation as her will.<sup>86</sup>

However, instruments with the outward appearance of instructions for the preparation of wills have been admitted to probate in some Australian cases, either because they were in fact intended to operate as wills at the time of their creation despite their appearance, or, alternatively, because they were initially conceived as instructions but were subject to a subsequent transformation of intention on the deceased's part. Australian courts generally require, in the latter instance, that the deceased must have manifested the transformed intention through conduct with regard to the instrument in question, either through having signed it, having placed it with other personal documents, or having declared verbally that an instruction document henceforth constituted a will.

*Newman v Brinkgreve; The Estate of Floris Verzijden*<sup>87</sup> is an example of the former of the aforementioned two instances in which Australian courts admitted ostensible instruction documents to probate. In this case the deceased, while hospitalised, wrote what appeared to be instructions for the amendment of his will on the back of a form of the NSW Government Department of Health. He headed the document 'To Hamer & Hamer Legal', whereafter followed the proposed amendments.<sup>88</sup> The document bore the deceased's signature and that of a single witness (ostensibly appended some time after the deceased signed the document).<sup>89</sup> Hallen J, satisfied that the document purported to state the deceased's testamentary intentions,<sup>90</sup> opined that the form of the document is not solely determinative to the success of testamentary rescue.<sup>91</sup> His Honour, after having analysed the pertinent facts (among others that the deceased signed and dated the document; had it witnessed (albeit defectively); and referred to the document as his will)<sup>92</sup> concluded, despite the document's heading and its general tenor as a letter of instructions, that the deceased indeed intended this document from the outset as an alteration to his existing will.<sup>93</sup> Consequently, Hallen J granted probate in solemn form of the deceased's will and the informal document.<sup>94</sup>

*National Australia Trustees Ltd v Fazey; The Estate of Nancy Elaine Lees, Late of Strathfield*,<sup>95</sup> on the other hand, is an example of the latter of the above-mentioned two instances. Here the deceased had an existing will but made handwritten notes on a notepad regarding the division of estate assets, funeral and cremation arrangements, as well as the nomination of executors.<sup>96</sup> The persons named as executors sought to prove this document under s 8 of the Succession Act 2006

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86 [2013] NSWSC 1895; BC201316540 (17 December 2013) at [281]-[282]. See also, eg, *Estate of Peter Brock* (2007) 1 ASTLR 127; [2007] VSC 415; BC200709039 (24 October 2007) at [30]; *Re Yates; Ex parte The Public Trustee* [2008] WASC 211; BC200808573 (1 October 2008) at [47]-[48].

87 [2013] NSWSC 371; BC201301871 (18 April 2013).

88 *Ibid.*, at [16]-[17].

89 *Ibid.*, at [21].

90 *Ibid.*, at [88].

91 *Ibid.*, at [117].

92 *Ibid.*, at [119]-[122].

93 *Ibid.*, at [123].

94 *Ibid.*, at [125].

95 [2011] NSWSC 559; BC201103959 (10 June 2011).

96 *Ibid.*, at [7].

(NSW).<sup>97</sup> Windeyer AJ, again satisfied that the document set out the deceased's testamentary intentions,<sup>98</sup> considered that the document was initially written as a list of instructions to the deceased's solicitor for the preparation of a new will. However, the evidence pointed to the deceased having changed her intention towards the document in the aftermath of being informed that, by reason of illness, she did not have long to live. Moreover, the deceased's *ipssissima verba* were that the notepad contained her final wishes.<sup>99</sup> Windeyer AJ therefore granted probate of the informal document, particularly in light of the evidence on the deceased's transformed intention with regard thereto.<sup>100</sup>

South African cases on applications for the condonation of instructions for the preparation of wills are, arguably, more uniform with regard to their outcomes, with only one judgment having elicited scholarly criticism regarding its jurisprudential soundness. In *Letsekga v The Master*<sup>101</sup> the deceased drafted an unexecuted document that ostensibly set out changes to his will, apparently to provide for the unborn child conceived with his partner.<sup>102</sup> Navsa J, in a condonation application in respect of this document, had regard to the facts, among others, that the document was untitled and not signed by the deceased; that it did not refer to the deceased's existing will; that some of its stipulations could not be related to that will; and that the deceased had knowledge of testamentary execution formalities.<sup>103</sup> His Honour ruled that the document might have been a reminder by the deceased to himself as to what terms in his will he intended to change, or it might have constituted instructions to someone to effect changes to his will, but that the deceased did not intend it finally as an amendment to his will.<sup>104</sup> In *De Reszke v Maras*<sup>105</sup> the appellant (a beneficiary under the disputed informal document) advanced the 'transformation-of-intention argument' and contended that the deceased initially prepared the document that was the subject of the condonation application as instructions to his solicitor for the drafting of a will, but that the deceased's intention regarding the document subsequently changed and that, thereafter, he intended the document as his final will. The appellant relied in support of this contention on, among others, the facts that the deceased signed the document; that he had it witnessed (albeit defectively); and that he wrote the words 'no more suffering' on the document.<sup>106</sup> Mlambo JA found this contention without merit because the deceased, after he had made the disputed document, gave instructions to a different solicitor for the drafting of a new will; moreover, the document did not conform to the deceased's knowledge of testamentary execution formalities.<sup>107</sup>

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97 *Ibid*, at [8].

98 *Ibid*, at [18].

99 *Ibid*, at [19]-[20].

100 *Ibid*, at [22].

101 1995 (4) SA 731 (W).

102 *Ibid*, at 732D-3C.

103 *Ibid*, at 735H-7A.

104 *Ibid*, at 736H, 737B.

105 2006 (2) SA 277 (SCA).

106 *Ibid*, at [13]-[14].

107 *Ibid*, at [15]-[17].

The condonation applications in *Letsekga* and *De Reszke* were, therefore, unsuccessful because the documents in question were, in the opinions of the respective courts, intended as instructions and not as wills. *Letsekga* would undoubtedly have yielded a similar outcome before an Australian court. But would an Australian court have decided *De Reszke's* case differently? One can but speculate on the answer to this question; nevertheless, *National Australia Trustees Ltd v Fazey; The Estate of Nancy Elaine Lees, Late of Strathfield*, among others, suggests that Australian courts are more receptive to the 'transformation-of-intention argument' than their South African counterparts. An Australian court might, therefore, have considered favourably the appellant's argument in *De Reszke* regarding the deceased's transformed intention in respect of the informal document in question, which might have resulted in the judicial rescue of that document under an Australian dispensing provision. Australian courts have acknowledged, moreover, that so-called 'stop-gap wills' are capable of testamentary rescue where the deceased intended the informal document in question as an interim statement of testamentary intent, to be superseded later by a properly-executed will.<sup>108</sup> This phenomenon has not taken root in South Africa's testamentary rescue dispensation.<sup>109</sup> It is arguable, however, that an Australian court, depending on its assessment of the case's pertinent facts, might have perceived the deceased's actions in *De Reszke* as indicative of an intention that the informal document in question had to operate as a stop-gap testamentary instrument until his subsequent instructions to the solicitor for the drafting of a new will came to fruition, and, therefore, that such a court might have dispensed with that document's formal invalidity.<sup>110</sup>

*Mabika v Mabika*<sup>111</sup> is best described as the 'odd one out' among South African cases on point. Here the deceased completed a document from her bank headed 'Application for the drafting of a Will', which stated that the bank would 'endeavour to prepare [a will] compatible with the Client's instructions'. It is not apparent from the judgment whether the deceased signed this form, but she placed a handwritten statement at the end thereof regarding burial, her children's ownership of property, and the division of the proceeds of policies and investments. The deceased undertook to sign the will once the bank had prepared it, but, if the bank did in fact do so (the judgment is silent on this point), she died without executing a will.<sup>112</sup> The applicants (the deceased's children and a grandchild) sought condonation of the aforementioned application form under s 2(3) of the Wills Act 1953. It is important to note that, in the

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<sup>108</sup> See, eg, *In the Estate of Masters (dec'd); Hill v Plummer; Plummer v Hill* [1994] 33 NSWLR 446 at 469; BC9405178; *Public Trustee v New South Wales Cancer Council — the Estate of Rita Lillian McBurney* [2002] NSWSC 220; BC200202004 (15 March 2002) at [47]; *Yazbek v Yazbek* [2012] NSWSC 594; BC201203869 (1 June 2012) at [104]-[105].

<sup>109</sup> See, eg, *Kotze v Master of the Court* [1998] 1 All SA 312 (NC) where the court refused condonation of a document, handwritten by the deceased and signed by a single witness, that benefitted the applicant, the deceased's (then) fiancée. The court did not regard this document's creation as an attempt at a stop-gap will during the subsistence of the engagement, but reasoned that the deceased intended to execute the document (and, hence, bestow validity onto it) only after his marriage to the applicant (which, by reason of the deceased's death, never occurred). The court, therefore, construed the deceased's intention regarding the document as conditional in nature, which negated any possibility of the document's rescue: at 319a-c.

<sup>110</sup> See also Wood-Bodley, above n 62, at 249.

<sup>111</sup> [2011] ZAGPJHC 109 (8 September 2011).

<sup>112</sup> *Ibid.*, at [11].



absence of such a condonation order, the first respondent, the deceased's husband with whom she had had a very strained relationship, would have been one of the deceased's intestate heirs.<sup>113</sup> Moshidi J granted the condonation order.<sup>114</sup>

South African legal scholars have not, however, received his Honour's judgment favourably. Wood-Bodley argues that Moshidi J failed to engage adequately with the condonation provision's intention requirement, and that, therefore, the judgment evinces no appreciation of the distinction between a general intention to benefit or disinherit someone on the one hand, and the requisite intention that a particular document be one's will on the other hand.<sup>115</sup> Wood-Bodley's view is based partly on Moshidi J's stance that, in light of the strained relationship between the deceased and her husband, she would not have wished for him to benefit from her estate and that, consequently, it would have been unfair and unjust for him to have inherited on intestacy.<sup>116</sup> Wood-Bodley argues, rightly it is submitted, that these factors are irrelevant to a condonation application.<sup>117</sup> Van der Linde expresses a similar view, and points out that South African law does not permit judicial invocation of (un)fairness and (in)equity as freestanding norms in the resolution of legal disputes. Van der Linde opines, therefore, that Moshidi J's judgment is jurisprudentially unsound insofar as it ignored the condonation provision's intention requirement, but relied instead on considerations not pertinent to testamentary rescue.<sup>118</sup> It is submitted, therefore, that *Mabika's* outcome should have corresponded with those in *Letsekga* and *De Reszke*, and that the judgment is not typical of South African courts' approach to instructions for the preparation of wills in the context of testamentary rescue.

### C. Draft wills

Courts in South Africa and Australia have remarked on testators' tendency to change their minds regarding their testamentary dispositions, even after draft wills have attained ostensibly final versions.<sup>119</sup> In the normal course of events, the fate of a draft will is determined by subsequent conduct in respect thereof — it is either fully executed (at which point it becomes a valid will); or the testator alters its provisions (in which case it is not a will unless the altered version is subsequently fully executed), or it is not executed at all (in which case it is not a will). In the context of

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113 In terms of the Intestate Succession Act 1987 s 1(1)(c)(i).

114 *Mabika v Mabika* [2011] ZAGPJHC 109 (8 September 2011) at [19].

115 Wood-Bodley, above n 62, at 257.

116 *Ibid.*, at 258. See *Mabika v Mabika* [2011] ZAGPJHC 109 (8 September 2011) at [15] for these aspects of the judgment.

117 *Ibid.*

118 A van der Linde, '*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' (2012) 45 *De Jure* 412 at 421-2. See also Wood-Bodley, above n 62, at 259. See the Supreme Court of Appeal's criticism in *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) at [34]-[36] of the judicial invocation of reasonableness and fairness as freestanding norms and the consequent threat occasioned by legal uncertainty to the rule of law in South Africa.

119 See the respective judges' above-quoted remarks in *Anderson and Wagner NNO v The Master* 1996 (3) SA 779 (C) at 784G-5A and *Estate of Laura Angius; Angius v Angius* [2013] NSWSC 1895; BC201316540 (17 December 2013) at [81]-[82]. Richings AJ observed astutely in *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N) at 647F-G that testators are notoriously fickle in that the possibility always exists that their wishes may change in the period prior to final approval of their wills — a sentiment shared by White J in *Estate of Parkinson* (1988) 143 LSJS 336, above n 82. See also generally R F Croucher, 'Conflicting Narratives in Succession Law — A Review of Recent Cases' (2007) 14 *APLJ* 179 at 193-200.

testamentary rescue, however, courts have to adjudge the fate of draft wills in circumstances ranging from the deceased having signed the otherwise unexecuted document at the one end of the spectrum, to, at the other end of the spectrum, the deceased having performed no subsequent act at all with regard to the document. The question regarding the rescue of draft wills therefore turns, in South Africa and Australia, on the immediacy of the deceased's intention that the informal document in question operates finally as his or her will. Atherton analyses earlier Australian jurisprudence in her seminal article on the topic,<sup>120</sup> and cautions against the judicial disregard of an appropriate form in which the deceased's intentions were cast because '[to] venture too far upon considerations as to the testator's conclusions as to the substance of her or his will, in the absence of formal execution, might be seen to dispense with wills formalities ... altogether'.<sup>121</sup> Vines argues in similar vein that '[t]he presence or absence of a signature is a strong signal as to the testator's probable finality or lack of finality, and the courts treat it as such'.<sup>122</sup> However, Australian courts have rescued unsigned draft wills where, in consonance with the above-discussed approach to instruction documents, the deceased dealt physically in some way with the document prior to his or her death and therefore manifested the finality of his or her intention in regard to that document.<sup>123</sup> The discussion below shows that South African testamentary rescue case law reflects a similar trend.

The Supreme Court of Appeal formulated South African law's approach in *Van Wetten v Bosch*:<sup>124</sup> the question is not what the particular document means, but whether the deceased intended it as his or her will — an inquiry that necessitates an examination of the document itself within the context of the surrounding circumstances.<sup>125</sup> South African courts have held in the application of this test that draft wills are generally not condonable. *Ex parte Maurice*<sup>126</sup> (despite predating *Van Wetten*) is typical of this approach. In this case the deceased prepared a handwritten concept of what a joint will for his wife and him should stipulate. He forwarded this document to a friend to 'knock into shape' and 'put it into legal jargon'<sup>127</sup> but died a short while later without having executed the final product. The handwritten draft was presented to the court for condonation. Selikowitz J opined that it is insufficient for the document at hand to reflect merely the deceased's distribution intentions; instead, the deceased must have intended the very document as his or her will.<sup>128</sup> His Honour held, therefore, that the deceased intended the document before the court as instructions for the drafting of a will or, at most, as a preliminary draft will, but

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120 Atherton, above n 61.

121 *Ibid.*, at 77.

122 Vines, above n 8, at 8.

123 See the authoritative statement to this effect by the Court of Appeal of Western Australia in *Oreski v Icac* [2008] WASCA 220; BC200809666 (30 October 2008) at [54]-[55]. See also the discussion of some earlier judgments on point by P Vines, 'When is the Testator's Intention the Requisite Intention Under the Dispensing Power?: The Need for Physical Dealing with the Will: *Estate of Trickey (No 1)* (1994) 34 NSWLR 539 and *Estate of Masters; Hill v Plummer* (1994) 33 NSWLR 446; BC9405178' (1995) 3 *AFLJ* 152.

124 2004 (1) SA 348 (SCA).

125 *Ibid.*, at [16].

126 1995 (2) SA 713 (C).

127 *Ibid.*, at 717F.

128 *Ibid.*, at 716J-7A.

certainly not as the final will of his wife and him.<sup>129</sup> Selikowitz J consequently refused to order condonation.<sup>130</sup> Brand J elaborated in *Ndebele NO v Master of the Supreme Court*<sup>131</sup> and held that, if the evidence points to the fact that the deceased contemplated the production of another document for approval and execution, any preceding informal document, whether instructions or a preliminary draft, is not condonable.<sup>132</sup>

South African courts have condoned draft wills or concept documents when the evidence showed, as in *Van Wetten* discussed earlier,<sup>133</sup> that the deceased, because of, for example, contemplation of suicide and therefore imminent death, did not intend the instrument in question as a mere provisional statement of dispositive intent, but intended it as constituting his or her final testamentary dispositions at the time of its creation.<sup>134</sup> *Abrahams v Francis*

*NO*<sup>135</sup> provides a variation on this theme. In this case the deceased, ostensibly while contemplating suicide, drafted a handwritten but unexecuted document regarding the disposition of his assets upon death. The deceased did not, however, commit suicide but died of a heart attack (or possibly in the resultant accident while cycling to visit family). Bozalek J held that the deceased's decision not to commit suicide did not exclude the informal document from condonation.<sup>136</sup> His Honour ruled, in light of the circumstances surrounding the document's creation (among others, the document's contents and the fact that the deceased retained it amongst his private papers), that the deceased did indeed intend it as his final will from the outset.<sup>137</sup> The court granted the condonation order.<sup>138</sup> *Taylor v Taylor*<sup>139</sup> also supports the reasoning in *Van Wetten* and *Abrahams* despite its different outcome. Here Griffiths J refused condonation of a so-called 'wish list' that the deceased drafted, signed and dated approximately 2 months prior to his death from terminal lung cancer. The document lacked attestation by witnesses. His Honour opined that, at the time of the document's preparation, the deceased must have been aware that his death was near, but that the evidence did not support a contention that his death was so imminent that he was unlikely to have had an opportunity to have the document formally executed if he so wished.<sup>140</sup> *Taylor's* case is, therefore, distinguishable on the facts from that in *Van Wetten*, and, given the two courts' uniform approach to the condonation provision's intention requirement, the court's refusal to grant condonation in *Taylor* is hardly surprising.

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129 *Ibid*, at 717F-G.

130 *Ibid*, at 717H. See also *Williams: In re Williams' Estate* 2000 (4) SA 168 (T) at 179A-C.

131 [2000] 1 All SA 475 (C).

132 *Ibid*, at [33].

133 See above Part IIIA.

134 See also *Mdlulu v Delarey* [1998] 1 All SA 434 (WLD) at 444a-b where, in a successful condonation application with regard to a defectively-executed document that purported to be the deceased's will, the court remarked that '[i]t is clear from the content of the document that the deceased contemplated her death, that she intended to make disposition of the assets comprising her estate, and that she intended this document to be a final instruction regarding the disposal of her estate'. See also Wood-Bodley, above n 62, at 249.

135 [2010] ZAWCHC 542 (10 November 2010).

136 *Ibid*, at [14].

137 *Ibid*, at [14], [21], [23].

138 *Ibid*, at [26].

139 2012 (3) SA 219 (ECP).

140 *Ibid*, at [20].

However, South African courts have handed down a number of controversial judgments on draft wills or concept documents in the past. In *Longfellow v BOE Trust Ltd* NO,<sup>141</sup> for example, the court refused condonation of an unexecuted will kit completed by the deceased's husband. The court based its ruling on the fact that the deceased did not intend the document as her final will.<sup>142</sup> However, Baartman J's engagement with the condonation provision's intention requirement in this case is puzzling, because the matter should have been disposed of on the basis that the deceased neither drafted personally nor executed the document in question.<sup>143</sup> In *Dikgale v The Master of the High Court, Polokwane*<sup>144</sup> diary entries in the deceased's native African language (translated into English for the purpose of the proceedings) regarding dealings with her property upon death were condoned because Teffo J was satisfied that the deceased intended the diary extracts as her will.<sup>145</sup> However, the judgment's engagement with jurisprudence on the condonation provision's intention requirement can be described as scant at best, and Wood-Bodley's above-discussed criticism of Moshidi J's judgment in *Mabika* regarding a lack of judicial comprehension of the specific intention required for testamentary rescue is certainly apropos also to Teffo J's judgment in *Dikgale*.

Testamentary rescue cases in South African High Courts are frequently heard by single judges (for example, Moshidi J in *Mabika* and Teffo J in *Dikgale*) — a fact that, arguably, contributes to the at times divergent (and hence contentious) outcomes of condonation judgments. Atherton remarks on a similar trend in Australia, with the result that jurisprudence on dispensing powers is often ad hoc in nature.<sup>146</sup> The judicial weight accorded to a (slight) variation in the facts pertinent to otherwise comparable cases can, therefore, yield different outcomes in testamentary rescue cases. A comparison of two Australian judgments on the rescue of draft wills underscores this point. In *Deeks v Greenwood*<sup>147</sup> the deceased's solicitors prepared a draft will in accordance with the deceased's instructions. The deceased, who had been informed that the document required execution to ensure its validity, confirmed verbally that the document represented his final wishes, but died before keeping the appointment for the execution thereof.<sup>148</sup> Heenan J, echoing Atherton's aforementioned view, remarked that '[i]t is not surprising ... that the authorities show instances of mixed success when attempts have been made to prove as an informal will a document prepared as a conventional will but, for various reasons, never actually executed by the deceased'.<sup>149</sup> His Honour reasoned that the deceased in this case settled finally upon his testamentary intentions, which were conveyed to his solicitors, and that the deceased was satisfied with the terms of the resultant draft will. The deceased gave instructions for a final will to be prepared in those terms, but

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141 [2010] ZAWCHC 117 (28 April 2010).

142 *Ibid.*, at [27], [28].

143 See above Part IIB. See also Van der Linde, above n 118, at 415.

144 [2013] ZAGPPHC 85 (26 March 2013).

145 *Ibid.*, at [26].

146 Atherton, above n 61, at 70.

147 [2011] WASC 359; BC201110191 (22 December 2011).

148 *Ibid.*, at [45], [53].

149 *Ibid.*, at [75].

his sudden decline in health prevented that will from being executed. Heenan J accordingly ordered that the draft be accepted as an informal will expressing the deceased's testamentary intentions.<sup>150</sup>

In *Rowe v Storer*,<sup>151</sup> on the other hand, the deceased's solicitor also prepared a draft will on the deceased's instructions, which was forwarded to the deceased under a covering letter directing its execution.<sup>152</sup> Evidence regarding an attempt by the deceased to sign the will at the solicitor's office was inconclusive, but the deceased died without having executed the draft will.<sup>153</sup> McMillan J, evincing a manifestly document-centered approach,<sup>154</sup> insisted that the deceased must have intended the particular draft document as her will in order for it to be rescued.<sup>155</sup> Her Honour highlighted a slight difference between the deceased's instructions to her solicitor on the one hand, and the actual draft produced by the latter on the other hand, and opined that the deceased might have insisted on a correction had she indeed consulted her solicitor prior to her death.<sup>156</sup> Her Honour distinguished expressly the *Deeks* case from the one before her — in *Deeks* the deceased made arrangements to have the draft will executed, but in *Rowe* the evidence on this issue was inconclusive; in *Deeks* the deceased confirmed verbally his approval of the draft, but in *Rowe* the deceased did not; and in *Deeks* the draft captured accurately the deceased's testamentary intentions, but in *Rowe* the deceased might have insisted on further changes to the draft document.<sup>157</sup> Her Honour consequently refused admission of the draft will to probate.<sup>158</sup>

The *Deeks* and *Rowe* judgments show, therefore, how factual variations occasion differences in judges' assessments of deceased persons' intentions, and how these assessments affect the outcomes of testamentary rescue cases. It is submitted, therefore, that the core principles regarding the exercise of dispensing powers in Australian jurisdictions are clear, but these are of such a nature that their application, particularly with regard to the rescue of draft wills, requires a level of implication from the facts at hand that easily leads to different results depending on each judge's impression of those facts. In this light, it is unsurprising that Heenan J and McMillan J devoted the greater parts of their respective judgments to analyses of jurisprudence on the applicable dispensing provisions' intention requirements, and how such jurisprudence related to the facts in question in each case. However, had these cases served before South African courts such a course of action would have been unnecessary because neither document was executed nor drafted personally by the particular deceased. In *Bekker v Naude*<sup>159</sup> the deceased's bank prepared a draft joint will for the deceased and his wife. The bank forwarded the draft to the deceased along

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150 *Ibid*, at [86]-[87].

151 [2013] VSC 385; BC201311493 (2 August 2013).

152 *Ibid*, at [14].

153 *Ibid*, at [20]-[27], [29].

154 See above Part IIIA.

155 *Rowe v Storer* [2013] VSC 385; BC201311493 (2 August 2013) at [46].

156 *Ibid*, at [48].

157 *Ibid*, at [57].

158 *Ibid*, at [61].

159 2003 (5) SA 173 (SCA).

with directions for its execution.<sup>160</sup> Neither the deceased nor his wife executed the document.<sup>161</sup> Approximately 5 years elapsed between these events and the deceased's death.<sup>162</sup> It is certainly arguable, given this inordinate length of time, that the deceased and his wife no longer intended the draft as their final will (hence their failure to execute it or physically interact with it in another way), and one can only speculate on the (conceivably significant) portion of the judgment the Supreme Court of Appeal would have devoted in its condonation ruling to the question of the deceased's intention in respect of the bank-drafted will. However, the court's strict interpretation of the condonation provision's drafting requirement<sup>163</sup> obviated that course of action, and the court, in a relatively brief judgment, dismissed the appeal against the lower court's refusal to issue a condonation order. The court did so simply on the ground that the deceased neither executed nor prepared personally the draft will.<sup>164</sup>

The foregoing does not suggest that the South African condonation provision is better tailored than those of its Australian counterparts. However, in light of judicial pronouncements in both legal systems that the availability of testamentary rescue does not negate statutory prescripts on wills' formal validity,<sup>165</sup> as well as Australian legal scholarship emphasising the relevance to testamentary rescue of a deceased's signature and/or physical interaction with the instrument in question,<sup>166</sup> it is arguable that the South African provision's drafted-or-executed requirement achieves a 'connectedness' between the particular document on the one hand, and the deceased's intention with regard to that document on the other hand. The comparison between the *Deeks* and *Rowe* judgments shows that such connectedness is certainly an important consideration in the rescue of draft wills.

#### **D. Suicide letters**

Australian and South African courts have been asked to rescue letters or notes written shortly before the drafters' suicides which contained, among other things, directives on dealing with their estates post-mortem. The letters or notes in these cases rarely conformed to the format in which wills are traditionally cast; moreover, they typically contained also personal messages, declarations of remorse and pleas for forgiveness. They were usually produced in the deceased's handwriting and sometimes bore his or her signature or name, but were invariably not duly executed in accordance with statutory formality prescripts. Is such a suicide letter or note capable of testamentary rescue? Australian and South African courts have answered this question in the affirmative.<sup>167</sup> Moreover, judicial engagement with the deceased's intention regarding

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<sup>160</sup> *Ibid.*, at [2].

<sup>161</sup> *Ibid.*, at [3].

<sup>162</sup> *Ibid.*

<sup>163</sup> See above Part IIB.

<sup>164</sup> *Bekker v Naude* 2003 (5) SA 173 (SCA) at [20]-[21].

<sup>165</sup> Eg (Australia), *Belcastro v Belcastro* [2004] WASC 111; BC200402966 (25 May 2004) at [6]; *Estate of Peter Brock* (2007) 1 ASTLR 127; [2007] VSC 415; BC200709039 (24 October 2007) at [20]; and (South Africa) *Logue v The Master* 1995 (1) SA 199 (N) at 203F; *Anderson and Wagner NNO v The Master* 1996 (3) SA 779 (C) at 785B-C.

<sup>166</sup> See Atherton, above n 121; Vines, above n 122.

<sup>167</sup> See, eg, *MacDonald v MacDonald* [2012] NSWSC 1376; BC201210552 (7 November 2012) at [8] where White J stated that the fact that the instrument in question is a suicide note does not preclude its admission to probate as an informal

a suicide letter or note has yielded remarkably similar trends and outcomes in past Australian and South African judgments. A comparison between the *Costa* judgments in New South Wales and the *Smith* judgments in South Africa illustrates this assertion.

In *Alexander Costa v The Public Trustee in the Estate of Robert Costa (aka Wayne Geary Coaster)*<sup>168</sup> the NSW Supreme Court was asked to declare a document in the deceased's handwriting, found amongst books and papers next to his bed after he had committed suicide, as the deceased's will pursuant to s 18A of the former Wills, Probate and Administration Act 1898. The document was written as a poem and requested the deceased's parents to look after his writings, but also stated that they should have his house.<sup>169</sup> Windeyer J conceded that the deceased must have produced the document at a time when his death was imminent; moreover, that the location where the document was found pointed to an intention on the deceased's part that it constituted his will.<sup>170</sup> His Honour opined, however, that the following considerations pointed to an absence of the requisite intention: the document's precatory, rather than dispositive, wording; the deceased's familiarity with the formal requirements for a will's validity; the absence of the deceased's signature on the document; and the poetic form in which the deceased wrote the document.<sup>171</sup> His Honour concluded that the document, given its form and wording, was a suicide note expressing wishes and requests and not a document intended to operate as a testamentary instrument. He accordingly dismissed the statement of claim for the grant of probate.<sup>172</sup>

In *Smith v Parsons NO*<sup>173</sup> the Durban and Coast Local Division of the KwaZulu-Natal High Court, coram Luthuli AJ, was asked to condone a handwritten and dated suicide letter to which the deceased appended his nickname on the day of his death. The note was found under a crucifix on the kitchen counter in the deceased's home and purported to set out amendments to the deceased's existing will. The amendments were in favour of the deceased's female life-partner (the applicant) who was not a beneficiary in terms of the aforementioned will. The letter contained expressions of remorse and pleas for forgiveness, but also stated that the applicant 'can have this house' as well as the money in the deceased's bank account. The letter mentioned, moreover, where the deceased's will was to be found, and that 'I leave everything else to Jeremy [the deceased's son] as stated therein'.<sup>174</sup> Luthuli AJ opined that the format, structure, contents and wording of the letter were not of the type normally found in testamentary instruments;<sup>175</sup> moreover, that the deceased's use of 'loose language' (precatory rather than dispositive) did not conform to the making of

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testamentary document under the Succession Act 2006 (NSW) s 8. In *Horn v Horn* 1995 (1) SA 48 (W) the court considered the condonation of an informal document written by the deceased on the day he committed suicide (after he had shot and killed his two children).

<sup>168</sup> [2007] NSWSC 1271; BC200709671 (12 November 2007).

<sup>169</sup> *Ibid*, at [7].

<sup>170</sup> *Ibid*, at [15].

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid*, at [19].

<sup>173</sup> 2009 (3) SA 519 (D).

<sup>174</sup> *Ibid*, at [6]-[10].

<sup>175</sup> *Ibid*, at [22].

testamentary bequests;<sup>176</sup> and, finally, that the deceased's previous experience with wills and deceased estates rendered it unlikely that he intended the suicide letter as an amendment to his existing will.<sup>177</sup> His Honour consequently refused condonation of the suicide letter.<sup>178</sup> Hodgson JA, in an appeal against Windeyer J's primary judgment to the NSW Court of Appeal in *Costa v The Public Trustee of NSW*,<sup>179</sup> reasoned that the suicide letter, addressed to the deceased's parents, was clearly meant to come to their attention, and that this fact rendered the document's precatory wording, the absence of the deceased's signature thereon, and the deceased's knowledge of the formal requirements for the validity of wills of lesser importance in adjudicating on the deceased's intention.<sup>180</sup> Of greater significance, according to his Honour, were the facts that the deceased wrote the letter on a solemn and unique occasion as a last message to his parents, and that the deceased must have known that, in the absence of the letter's disposition of the house to his parents, the house would go, in terms of his existing will, to a former acquaintance with whom he had lost contact.<sup>181</sup> His Honour concluded, therefore, that the suicide letter purported to govern the disposition of the deceased's house; and that the deceased intended the implementation of this disposition after his death.<sup>182</sup> Hodgson JA accordingly allowed the appeal.<sup>183</sup> The appeal to the Supreme Court of Appeal against Luthuli AJ's judgment in *Smith v Parsons*<sup>184</sup> was also successful, and for reasons similar to those in *Costa*. Seriti AJA opined that the deceased must have known that his existing will made no provision for his partner, hence the provision for her in the suicide letter and the letter's 'clear and unequivocal' instructions regarding the award of the house and money to her.<sup>185</sup> His Honour regarded, moreover, the letter's placement under the crucifix as a strong indication that the deceased intended for it to be found, and intended its instructions to be implemented after his death.<sup>186</sup> Seriti AJA accordingly allowed the appeal.<sup>187</sup>

The *Costa* and *Smith* cases were decided in different jurisdictions. Nevertheless, the respective courts of first instance on the one hand, and appeal courts on the other hand, had regard to the same documents - the respective suicide letters. Yet, the appeal judges' application of the law to the facts in both cases yielded diametrically opposite outcomes from those propounded by the respective primary judges. This is, arguably, a startling phenomenon, but underscores the fact that the outcomes of testamentary rescue cases, whether in Australia or South Africa, invariably turns on the judicial weight accorded to particular facts and, therefore, whether the informal

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176 Ibid, at [23].

177 Ibid, at [31].

178 Ibid, at [35]-[36].

179 (2008) 1 ASTLR 56; [2008] NSWCA 223; BC200809445 (17 September 2008).

180 Ibid, at [24], [27].

181 Ibid, at [28].

182 Ibid, at [29].

183 Ibid, at [30]. Ipp JA and Basten JA concurred: at [52], [114].

184 2010 (4) SA 378 (SCA).

185 Ibid, at [17].

186 Ibid, at [19].

187 Ibid, at [23]. Lewis JA, Heher JA, Mhlantla JA and Leach JA concurred: at [24].



instrument's proponent(s) discharged the onus of proving the deceased's intention with regard to that instrument.

#### **IV Conclusion**

South African legal scholarship on testamentary rescue has, on occasion, taken cursory note of Australian jurisprudence on dispensing powers.<sup>188</sup> However, very little (if any) comparative scholarship on testamentary rescue with South Africa as the comparable jurisdiction has to date appeared in Australia. The (perceived) divide between Australia's Common Law tradition and South Africa's mixed, though predominantly civilian, legal heritage may explain this phenomenon. This article shows, however, that English law shaped the law regarding wills' formal validity in Australia and South Africa. South Africa and the various Australian jurisdictions opted, moreover, for a judicial dispensing or condonation power as the appropriate mode of testamentary rescue to remedy the negative impact of formalism on testators' dispositive intent. In this light, it is unsurprising that courts in both systems have been confronted with similar challenges regarding testamentary rescue, and have resolved these challenges in broadly the same manner. It is equally unsurprising that the requirement regarding the deceased's intention, more so than testamentary rescue's other requirements, has posed the greatest challenge to South African and Australian courts. This article's comparative analysis shows, however, that in three particular instances – the rescue of instruction documents, draft wills, and suicide letters – Australian and South African courts have been relatively consistent in their interpretation and application of broadly corresponding statutory prescripts on testamentary rescue's intention requirement. These consistencies prevail despite the different legal traditions within which testamentary rescue operates in Australia and South Africa on the one hand, and variations in legislative formulation of the testamentary rescue provisions in the two countries' applicable statutes on the other hand.

It was stated in this article's introduction that it set out, in its analysis of testamentary rescue's intention requirement in Australia and South Africa, to meet Orticui's three hallmarks of comparative-law research.<sup>189</sup> It is submitted that this goal has been achieved. First, the article consolidates legal knowledge through its contextualised perspective on testamentary rescue in Australia and South Africa. Second, it acknowledges that court decisions constitute primary sources of law in Australia and South Africa, and it therefore explains convergences and divergences in Australian and South African courts' engagement with statutory prescripts on testamentary rescue, and their intention requirements in particular. Third, it relates testamentary rescue jurisprudence in Australia as a Common Law legal system to that in South Africa as a mixed jurisdiction with a strong civilian tradition.

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<sup>188</sup> See, eg, De Waal, above n 38, at 423-34; Du Toit, above n 39, at 514-6; Wood-Bodley, above n 62, at 250-1.  
<sup>189</sup> See Part I above.