Interpretation of Wills – Does the *Endumeni* Case Apply?

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Abstract

This article argues that the general approach to documentary interpretation articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (*Endumeni*) applies also to the interpretation of wills, subject to adaptation for context. It is argued that interpretation of wills and the application of an interpretation to a particular factual setting are coequal tasks. Each case must be decided on its own facts. The cardinal rule is the ascertainment of a testator's intention and giving effect thereto, provided that this will not bring about a violation of the law. It is argued that a court must put itself in the armchair of the testator and, after determining where the probabilities lie, it must infer or presume what the testator had in mind at the time that the will was created. Although intention is subjective, the interpretive process to determine a testator's intention is objective in form. It is argued that a court must, in every instance, understand the purpose for which it seeks to determine a testator's intention. This is so that it can undertake the correct enquiry. If the aim is to determine the meaning of a testamentary provision, then a testator's intention must be ascertained as memorialised in the written text of the will read as a whole, taking into account also the purpose of the text and its context. If, on the other hand, the aim is to determine whether a document is a testator's intended last will and testament, as is the case when section 2(3) of the *Wills Act* 7 of 1953 is invoked, then a testator's intention must be ascertained with reference to the document's purpose, taking also into account all legally relevant and admissible internal and external contextual factors. It is argued that all this is, as confirmed in *Endumeni*, consistent with the modern trend favouring an objective, purposive, contextual cum teleological mode of documentary interpretation.

Keywords

Animus testandi; contextual interpretation; *Endumeni*; freedom of testation; objective interpretation; purposive interpretation; teleological interpretation; textual interpretation; testator; *Wills Act*.

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1 Introduction

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] (hereafter *Endumeni*) the Supreme Court of Appeal (SCA) formulated what Wallis JA described as the "proper approach to interpretation"[2] of documents of every kind, including legislation, statutory instruments and contracts. In terms of *Endumeni*, interpretation is essentially one unitary exercise in methodology requiring simultaneous consideration of the context, purpose and text of a document, with none of these considerations predominating the other.[3] That text, context and purpose are considered at the same time is not novel. This is a trite interpretive technique.[4] It is now accepted that *Endumeni* consigned to the history books the decision in *Coopers & Lybrand v Bryant,*[5] where the Appellate Division (now SCA) crafted an artificial, two-step interpretive process.[6] *In casu,* the court held that interpretation entails, first, establishing the literal meaning of the words being construed. Once ascertained, consideration is then given to the context and background circumstances, applying extrinsic evidence of surrounding circumstances when an ambiguity is found in the language.

The kernel of the judgment in *Endumeni* for the present purposes is the SCA's expression of the following statement as a representation of the present state of the law governing the interpretation of documents generally:[7]

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

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1 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Endumeni*).

2 *Endumeni* para 17.

3 *Endumeni* paras 18-19. Also, see *Bothma-Botho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) para 12.

4 See *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 5 SA 29 (CC) para 31 (hereafter *Waymark*).

5 *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) 768A-E.

6 See Wallis 2019 *PELJ* 8.

7 *Endumeni* para 18. Footnotes omitted.

These interpretational directives have been applied consistently, including by the Constitutional Court (CC).[8] In *Raubenheimer v Raubenheimer*,[9] a case that post-dated *Endumeni* but did not refer to it at all, the SCA applied the principles of contractual interpretation to the interpretation of a will. This is consonant with the proposition in *Endumeni* that the principles articulated in the above extract apply equally to the interpretation of contracts and statutory instruments.[10] This includes wills and codicils to which the *Wills Act* 7 of 1953 (hereafter the *Wills Act*) applies.[11]

2 Statement of the interpretive problem

In a minority judgment in *CSARS v Daikin Airconditioning SA (Pty) Ltd*,[12] Majiedt JA and Davis AJA held that a literalist-cum-intentionalist approach applies to statutory interpretation; not a purposive-cum-contextualist approach as advanced by *Endumeni*.[13] Whilst they accepted that the *Endumeni* approach is proper for the interpretation of contracts and similar documents, they held the *Endumeni* approach to be inappropriate to statutory interpretation because, so they argue, the decision of Harms DP in *KPMG Accountants (SA) v Securefin Ltd* on which *Endumeni* relied does not support the conclusion that there is no difference in approach to the interpretation of legislation and contracts (or other similar documents).[14] The nub of the minority's reasoning lay in their contention that a legislative process is unlike any that precedes the conclusion of a contract or similar document. To this end, they held:

> Context is fact-specific and can be applied in the interpretation of contracts and like documents, but not of statutes.[15]

Consequently, the minority concluded that, contrary to *Endumeni*, the process involved in legislative interpretation differs from that applicable to

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8 See *Waymark* para 29; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 5 SA 1 (CC) para 29 (and the authorities cited there at fn 27).

9 *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA) para 21 (hereafter *Raubenheimer*).

10 *Endumeni* para 18.

11 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA) para 16 (hereafter *United Manganese*).

12 *CSARS v Daikin Airconditioning SA (Pty) Ltd* 2018 ZASCA 66 (25 May 2018) paras 31-34 (hereafter *Daikin*).

13 *Daikin* para 33.

14 *Endumeni* para 18 (fn 14) reads: "That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) para 39." (hereafter *KPMG*).

15 *Daikin* para 31.

the interpretation of contracts and other like documents.[16] This decision caused an interpretive dilemma: it raised doubts about the wisdom of *Endumeni*. In *Telkom SA Soc Ltd v CSARS*[17] and *United Manganese*,[18] the SCA rejected the criticisms of *Endumeni* levelled in *Daikin*. The SCA held that the minority misconstrued the import of *Endumeni,* which led to incorrect conclusions on matters of law pertaining to the interpretation of documents.

In *Telkom SA*[19] and *United Manganese*,[20] the SCA held that the court in *Endumeni* relied on *KPMG* as authority for the proposition that a common set of rules applies to the admissibility of evidence in the interpretation of documents generally. As a result, the SCA held that logic dictates that, as concluded in *Endumeni*, the approach to interpreting documents will not vary based on their nature. Accordingly, *Endumeni* is authority for the principle that rules of interpretation are not document-specific but are of a general nature and open to adaptation so far as the context may require.

The SCA held further that merely because *Endumeni* distilled a basic set of guidelines for the interpretation of all documents using a unitary interpretive methodology did not mean, as suggested by the minority in *Daikin*, that *Endumeni* introduced a uniformed interpretive process that applies across the board to the interpretation of all documents, irrespective of their nature.[21] On the contrary, the SCA pointed out that *Endumeni* requires that the peculiar genesis of a document, whether a contract, statute, trust deed, court order, will or other writing, must be considered when it is interpreted. This is part of the contextualist interpretive mode advanced in *Endumeni*.[22]

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16 *Daikin* para 32 reads: "What is required when seeking to ascertain the meaning of legislation is to subject the words used to an engagement, not with speaker meaning, but with the principles and standards that are appropriate to relevant law making exercise and the subsequent exercise of legal interpretation." As regards the distinction between "speaker meaning" and "sentence meaning", the minority in *Daikin* explained it in para 30 (fn 1) as follows: "While the words used in the text to be interpreted are to be classified as sentence meaning, speaker meaning is that which can be attributed to the speaker from an examination of the context and the circumstances which gave rise to the existence of the sentence under examination interpretative process …".

17 *Telkom SA Soc Ltd v CSARS* 2020 4 SA 480 (SCA) paras 10-17 (hereafter *Telkom SA*).

18 *United Manganese* paras 16-17.

19 *Telkom SA* para 14.

20 *United Manganese* para 16.

21 *Telkom SA* para 14(b).

22 In *United Manganese* para 16, Wallis JA said the following: "Context is fundamental in approaching the interpretation of all written instruments, but there are differences in context with different documents, including the nature of the document itself.

In *Endumeni* the SCA held that the contextual interpretation of a document requires that due regard must be given to its specific nature and purpose, as well as the fact-specific background pertaining to its preparation and production ("the circumstances attendant upon its coming into existence").[23] Thus, whilst the *Endumeni* approach ensures that public instruments (such as statutes) apply equally to all subjects and that their "interpretation cannot vary from one factual matrix to the next",[24] the *Endumeni* approach is also sufficiently flexible to enable private instruments (such as wills and trust deeds)[25] to be interpreted in a manner that is case-specific, using general principles of interpretation.

3 Objective of the article

In a recent article, Wallis[26] argues that the *Endumeni* approach to interpretation applies to wills subject to adaptation because the field of the study of wills

> … is special and encumbered by a considerable number of terms and concepts that are technical and have special meaning deserving of lengthier and more detailed consideration than is feasible in this article.

This article aims to engage in the research envisaged by Wallis which, a literature survey reveals, has hitherto not been undertaken in any published work. Consequently, this article has the potential to contribute significantly to any discourse on the proper approach to be followed by a court[27] when a document satisfying the formalities in section 2(1) of the *Wills Act* is interpreted,[28] or a court enquires into whether a document is intended to be

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Legislation is different in character from contracts, and a contract formulated carefully by lawyers after lengthy negotiations will differ from one scribbled by laypeople on a page torn from a notebook."

23 *Endumeni* para 18.

24 *Telkom SA* para 15.

25 *Endumeni* was applied by Molemela JA in *Harvey v Crawford* 2019 2 SA 153 (SCA) paras 25-27 (hereafter *Crawford*) to the interpretation of a trust deed and a will.

26 Wallis 2019 *PELJ* 22.

27 Section 1 of the *Wills Act* 7 of 1953 (the *Wills Act*) defines "Court" to mean "a provincial or local division of the Supreme Court of South Africa or any judge thereof".

28 Section 2(1)(a)(i) of the *Wills Act* requires a will to be signed by a testator or by someone signing in his presence and on his direction; s 2(1)(a)(ii) requires a testator to sign a will "in the presence of two or more competent witnesses present at the same time"; s 2(1)(a)(iii) requires witnesses to "attest and sign the will in the presence of the testator and of each other"; s 2(1)(a)(iv) provides that if a will consists of more than one page then each page, other than its ending page, must also be signed anywhere on the page by the testator or such other person signing on his behalf; s 2(1)(a)(v) provides that a commissioner of oaths must issue a prescribed

a will or an amendment of a will.[29] This article seeks to establish a basis for the hypothesis that the interpretive guidelines issued in *Endumeni* apply, adapted with the necessary contextual changes, to documentary interpretation for all purposes arising from the *Wills Act*.[30]

4 Roadmap of the discussion

The ensuing discussion is structured as follows. First "objective interpretation" is discussed because the description in *Endumeni* that an interpretive process "is objective not subjective"[31] must be juxtaposed with the well-established rule that the interpretation of a "will"[32] is geared to determining the subjective intention of a testator at the time when a will was executed so that those wishes are carried out post-mortem. Secondly the "purposive interpretation" of wills is discussed. Here attention is focussed on how the rules of this mode of construction are applied to avoid the materialisation of the undesirable results identified in *Endumeni*, namely, an interpretation[33]

> … that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

At the same time, the discussion of purposive interpretation is aimed at showing how a determination ought to be made of when a testator has crossed the Rubicon from merely intending to make a disposition to going

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certificate if the testator signed by making a mark or if the will was signed by someone else in the presence and by the direction of the testator.

29 Section 2(3) of the *Wills Act* empowers a court to condone non-compliance with the formalities prescribed in s 2(1) and "order the Master to accept" a document as a will or an amendment if the court "is satisfied" that it was intended to be of such a nature. Although this article focusses mainly on the interpretation of a will, the submissions made here also apply when a court undertakes an enquiry under s 2(3).

30 *Grobler v Master of the High Court* 2019 ZASCA 119 (23 September 2019) (hereafter *Grobler*) para 13. In *Westerhuis v Westerhuis* 2018 ZAWCHC 84 (27 June 2018) para 50 the court held that a party alleging a testator intended a document to be a will "must show unequivocally that the intention existed concurrently with the execution or drafting of the document" (emphasis added). The underlined word suggests that the bar for discharging the burden of proof resting on an applicant was raised higher than the usual, ordinary civil standard of balance of probability referred to in *Grobler* para 13. If so, then *Westerhuis* was wrongly decided and ought not to be followed.

31 *Endumeni* para 18.

32 Section 1 of the *Wills Act* defines "will" as "includes a codicil and any other testamentary writing". For the meaning and effect of "includes", see *De Reuck v Director of Public Prosecution, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 18. In this article, unless the context indicates otherwise, a "will" means any writing whereby a testator disposes his property, or any part thereof, or otherwise regulates the post-death administration of his estate or personal affairs.

33 *Endumeni* para 18.

over to the business of making a will with the solemn intention that it be of final force and effect on his death.[34] In the case of the former, a will is not created as envisaged by the *Wills Act*.[35]

Thirdly, the "contextual interpretation" of wills is discussed with a view to showing the kind of internal and external contextual material (data) that may be considered for the purposes of ascertaining a testator's intention. In addition, the discussion aims to outline the relevant rules governing the admissibility of extrinsic evidence. Fourthly, the "teleological interpretation" of wills is discussed to show how objective, normative values inherent in South Africa's (SA) democratic, constitutional order influence the interpretation of wills. Finally, the conclusion distils the main submissions that bolster the case for the central hypothesis which this article seeks to advance.

5 The proper approach to the interpretation of wills

5.1 Objective cum textual interpretation

Whenever a court interprets the provisions of a will it is required to ascertain the testator's intention.[36] As a result, it is necessary to consider the impact of the view expressed in *Endumeni* that interpretation does not concern ascertaining the intention of a draftsman. There the SCA held that interpretation is an objective enquiry that "is restricted to ascertaining the meaning of the language of the provision itself."[37]

The view that authorial intention is not fundamental to documentary interpretation is not new. Referring to *Endumeni*, the Constitutional Court (CC) has held that it is a "well-established" interpretive principle that courts "need not look to the drafter's intention".[38] In *Endumeni*, Wallis JA was merely pointing out, with merit, that authorial intention is a fiction ("entirely

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34 The principles of interpretation discussed here are universal so that they can be applied to the interpretation of other provisions of the *Wills Act* (such as, to s 2A related to revocation), subject always to any necessary contextual changes. A discussion of those other provisions is beyond the scope of this article.

35 *Marshall v Baker* 2020 3 SA 463 (WCC) para 54 (hereafter *Baker*).

36 In *Robertson v Robertson's Executors* 1914 AD 503, the court held that determining a testator's wishes is central to the interpretation of wills. Once ascertained, a court must give effect to that intention, unless it is prevented from doing so by some rule or law.

37 *Endumeni* para 20.

38 *Mansingh v General Council of the Bar* 2014 2 SA 26 (CC) para 27.

artificial").[39] Since such intention is by and large illusory, a draftsman's real intention is elusive and will evade an interpreter.

In *Endumeni* Wallis JA described the phrases "the intention of the legislature or the draftsman" and "the intention of the contracting parties" as misnomers,[40] slippery phrases,[41] and as ephemeral.[42] He stated that intention is "a myth or abstraction remote from the reality of interpretation and unnecessary."[43]

This raises the question: does *Endumeni* say that authorial intention is irrelevant when interpreting any document, irrespective of its nature? "No!" In *Endumeni*, Wallis JA merely advocated that interpreters ought to avoid resorting to the aforementioned conventional expressions, but then only

> … insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties [or draftsman].[44]

When interpreting wills, use of the phrase "intention of the testator" or any variant would be appropriate because this aligns with the language of the *Wills Act.* However, no interpreter can dive into a testator's mind, nor determine with mathematical precision what was really contemplated when a will was conceived or drafted. Also, when a will is interpreted the testator is deceased and thus cannot testify to his actual intention or the document's purpose at the time of its execution. Consequently, at the date of interpretation a court can only infer or presume what a testator had in mind when he executed the document forming the subject of the judicial enquiry (that is, an inferred or presumed intention).[45] This is determined by having regard to all legally relevant and admissible evidence, and by using generally accepted legal standards and values, as well as techniques of

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39 *Endumeni* para 20. De Ville *Constitutional and Statutory Interpretation* 36 contends that a resort to authorial intention as a basis for interpretation is an evasion of responsibility for judicial decision-making and must be avoided. Also, see Michelman 1998 *Acta Juridica* 219. For the elusiveness of testamentary intent, see Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 14.

40 *Endumeni* para 20.

41 *Endumeni* para 20 (fn 21).

42 *Endumeni* para 21.

43 *Endumeni* para 20 (fn 22).

44 *Endumeni* para 20.

45 For example, in *Smith v Parsons* 2010 4 All SA 74 (SCA) para 17 (hereafter *Parsons*), the court concluded that it "can thus reasonably be inferred that when he wrote the suicide note, the deceased intended that his instructions would be implemented". Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 17 states with merit: "The difference between interpretation of actual intent and ascribing presumed intent is only a difference in probability."

legal interpretation.[46] Although a testator's intention is a subjective element, the process of its determination is objective in form. This is known as objective interpretation.[47]

That determining a testator's intention is not an exact science is a view echoed in *Taylor v Taylor*,[48] for example. *In casu,* the court was required to decide whether for the purposes of section 2(3) of the *Wills Act* a written wish list was intended to be an amendment to a testator's will. In describing the court's difficult role in ascertaining intention, Griffiths J and Zilwa AJ held that[49]

> … we must *attempt to divine* what the deceased had in mind when he drafted the wish list.

A testator's intention is expressed through a will's text. Thus, the wording must be interpreted to ascertain that intention. This is known as textual interpretation. Whenever the provisions of a will are interpreted, the relevant intention sought to be discerned will be inferred by way of a fair-minded and balanced evaluation of the document's text and its internal context, as read and understood in the light of the document's background and purpose, as well as the surrounding circumstances relating to its preparation, production and execution, to the extent that any such consideration is legally relevant and admissible.[50] This interpretive process is essentially one unitary exercise.[51]

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46 Steyn J, in *Ex parte Kock* 1952 2 SA 502 (C) 516F-G, remarked: "Our Courts are also almost daily approached to construe wills badly drafted and in which the meaning and intention of the testator is not clearly expressed: when doing so, certain recognised rules of construction are applied, but whether the Courts always succeed in finding the real intention of the testator as to the disposition of his assets after his death is another question."

47 *Endumeni* para 23. Wallis 2019 *PELJ* 15 explains "objective interpretation" as entailing "interpreting the language used in the document … and not trying to go behind it to any unwritten or unexpressed intention that the … parties may have had in formulating the document". Wallis states that objective interpretation "stands in contradistinction to the notion that the search is for a subjective intention … not apparent from the words used in the document in the light of the relevant context" (emphasis added). For further distinction between subjective and objective interpretation, see Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 12.

48 *Taylor v Taylor* 2012 3 SA 219 (ECP) (hereafter *Taylor*).

49 *Taylor* para 12. Emphasis added.

50 See *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 5 SA 1 (SCA) paras 17-18 (hereafter *Hendrik Schoeman Primary*).

51 *Endumeni* para 19. When interpreting wills, courts in some common law jurisdictions also apply the unitary interpretive mode advanced in *Endumeni*. See, for example, *Perrin v Morgon* 1943 AC 399 420; *Abram Estate v Shankoff* 2007 BCSC 1368 para 77.

To this end, *Endumeni* is authority for the proposition that interpreters of all documents, irrespective of their nature, must from the outset proceed to ascertain the meaning and effect of the document's content read as a whole,[52] bearing in mind that the[53]

> … 'inevitable point of departure is the language of the provision [or document] itself', read in context and having regard to the purpose of the provision [or document] and the background to the preparation and production of the document [or provision].

5.2 Purposive interpretation: establishing animus testandi[54]

In terms of section 4 of the *Wills Act*, to make a valid will a testator must possess the requisite competence to do so.[55] This necessitates that a testator must at the time of executing a will ("at the time of making the will") be of sound mind and sober senses in that he has sufficient mental powers so as to be able, on the one hand, to properly understand the type of business that he is engaged in ("appreciating the nature … of his act") and, on the other, to properly understand the consequences of his conduct ("appreciating the … effect of his act"). To satisfy this test, a testator must have such mental capacity as would enable him "to understand and appreciate the testamentary act in its different bearings".[56]

When adjudicating an application brought under section 2(3) of the *Wills Act*, it is necessary for a court to determine whether the instrument in question was created with *animus testandi*, having regard *inter alia* to its

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52 *Raubenheimer* para 22.

53 *Endumeni* para 18.

54 In this article, unless the context indicates otherwise, *animus testandi* means "the intention to make a will". This must be distinguished from the wishes of a testator regarding the distribution of property, or general administration of his estate or affairs. For a discussion of this distinction, see Glover 2016 *Geo Mason L Rev* 582.

55 Section 4 of the *Wills Act* reads: "Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging same."

56 *Tregea v Godart* 1939 AD 16 49. As regards the standard of mental capacity required for the purposes of s 4 of the *Wills Act*, in *Katz v Katz* 2004 4 All SA 545 (C) para 22 it was held: "This entails, first, an appreciation of the nature of the transaction itself, i.e. the act of disposing of one's property to named beneficiaries after one's death and appointing one or more executors to oversee the process; secondly, the ability to distinguish between potential heirs and to make a rational and reasoned decision as to their respective claims to the testator's assets; and finally, the ability to appreciate in broad terms the nature, extent and value of the testator's estate." If a testator is able to clearly discern and discreetly judge all these things and circumstances, then s/he has the requisite competence to bring about a document which is in the nature of a "rational, fair and just testament" (*Katz* para 23).

wording, form, structure and context. In *Bekker v Naude*[57] the SCA interpreted section 2(3) restrictively so that non-compliance with any testamentary formality in section 2(1) can be condoned only for a document that is personally drafted or executed by a testator. The touchstone of the SCA's rationale for this strict interpretation appears in the following passage:[58]

> Die vereiste dat die dokument deur die testateur self opgestel is, waarborg darem 'n mate van betroubaarheid omdat dit bewys van 'n persoonlike handeling van die testateur vereis, waaruit sy bedoeling duidelik afgelei kan word. Daarenteen, as die vereiste slegs een is van 'laat opstel' is die kanse vir bedrog en valse bewerings wat die testateur na sy dood nie kan betwis nie, veel groter.

This decision made more onerous a court's task of ascertaining *animus testandi* in relation to a document that does not satisfy section 2(1). In this regard, interpretation for the purposes of section 2(3) differs from contractual interpretation. The latter involves ascribing a meaning to a text after a contract was formed. In that setting, interpretation is not concerned with whether the parties' conduct creates a contract.[59] However, when section 2(3) of the *Wills Act* is implicated, a court determines if a document reflects "present and final testamentary intent"[60] so that its drafting or execution amounts to the solemn juristic act of creating a will that may be enforced as such.

The SCA has described the basic interpretive rule for wills as follows:

> The cardinal rule is that 'no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes can be carried out'.[61]

It is clear from this extract that the interpretive rule in question applies when a court adjudicates the nature and effect of a provision in a will (such as, whether a deceased intended to create a usufruct or *fideicommissum*, or

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57 *Bekker v Naude* 2003 5 SA 173 (SCA) paras 16-20 (hereafter *Bekker*). Also, see *Grobler* para 14.

58 *Bekker* para 16. Thus, for the purposes of s 2(3), the word "drafted" means that a will must be written, typed or in some other way brought into existence personally by the testator. See *Bekker* para 9.

59 Wallis 2019 *PELJ* 15.

60 Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 14. For a discussion of the difficulties involved in deciding if a document expresses "present testamentary intent or only future intent to make a will", see Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 15-16.

61 *Raubenheimer* para 23. Although no reference is made here to context, purpose and surrounding circumstances per *Endumeni*, this was dealt with in *Raubenheimer* para 21.

intended to make a *donatio mortis causa*).[62] Indeed, this was the context in which the above rule was used in *Raubenheimer* after the SCA declared the document in issue to be a will. An entirely different enquiry is at play when a court determines if a testator had *animus testandi*.

In the latter enquiry, which applies under section 2(3), a court is not concerned with the meaning and/or effect of any provision in the relevant document but simply with whether a testator intended the document to be his will or an amendment to it.[63] The requisite intention would be present if the document records an instruction about the disposal of a testator's estate or the regulation of his affairs in circumstances where a court is satisfied that, on a balance of probabilities, the instruction was intended to be final in effect (not preparatory in nature) and was intended to be carried out on death.[64]

Therefore, for the purposes of section 2(3) the objective of the interpretive exercise is to determine, on the conspectus of admissible evidence, the nature and effect of the document for legal purposes. This entails a court's enquiring into the reason the document was conceived, drafted and/or executed. This does not entail an interpretation of the provisions therein. Ultimately, a court decides whether, based on its probable purpose, the testator intended the document to be operative in the sense that he intended it to be given practical effect on his death. If the answer is in the affirmative, then *animus testandi* would be established. Here the distinction between purpose and intention is important.[65] The document's purpose is a reliable pointer to the testator's intention. This is referred to as purposive interpretation.[66] It aligns with *Endumeni,* which obliges interpreters not to undermine a document's purpose but rather to give practical expression to it.

From the foregoing, it is clear that when a will or a document alleged to be a will is interpreted, a court must appreciate the context in which the interpretive exercise occurs so that the correct enquiry is undertaken. For

62 See, for example, *Parsons* para 21; *Gordon's Bay Estates v Smuts* 1923 AD 160 165; *Brits v Hopkinson* 1923 AD 492 495.

63 *Van Wetten v Bosch* 2004 1 SA 348 (SCA) para 16 (hereafter *Van Wetten*).

64 *Letsekga v Master* 1995 4 SA 731 (W) 735F; *Ex parte Maurice* 1995 2 SA 713 (C) 716E.

65 *Endumeni* para 23. Also, see Guzman 2011 *Kan L Rev* 310.

66 Schutz JA, in *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) para 21, held that "our law is an enthusiastic supporter of 'purposive construction'".

the purposes of section 2(3), the applicable enquiry was explained as follows in *Van Wetten*:[67]

> That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

From this extract it is evident that *animus testandi* is not determined in the abstract, nor in a manner detached from the purported will itself. On the contrary, that document is central to the enquiry undertaken to determine its legal nature and effect. This is logical, particularly because section 2(3) expressly states that an order can be granted thereunder only if

> … a court is satisfied that *a document or the amendment of a document* drafted or executed by a person who has died … was intended to be his will or an amendment of his will.[68]

When analysing a document to ascertain *animus testandi*, relevant internal material that would assist in determining its intended nature includes the document's purpose, scope, subject matter, heading, format, structure, content and wording.[69] No single factor, however, outweighs any other, nor is any one factor decisive. Every relevant consideration appearing *ex facie* the document must be given its due weight. A conclusion that the document contains the testator's final wishes of how his property is to be distributed *post mortem* would support a finding that the requisite *animus* is present. This view also accords with the definition of "will" in section 2D(2) of the *Wills Act*.[70]

However, the converse of the statement in the preceding paragraph does not hold true; namely, the absence of a direction as to how a testator's estate is to be disposed after death does not, in and of itself, mean that *animus testandi* is lacking. This is because a will does not serve only to

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67 *Van Wetten* para 16.

68 Emphasis added.

69 See *Schnetler v Die Meester* 1999 4 SA 1250 (C) 1260. In *Schnetler* 1260F-G, the court concluded that the contested will was executed with *animus testandi*. Relevant considerations were: (i) the appointment therein of an "eksekuteur", (ii) the fact that the testator bequeathed ("bemaak") his property in somewhat meticulous detail, (iii) the testator indicated therein certain arrangements for his burial, (iv) the testator ended the document by stating that it is his "laaste will", and (v) the testator dated and signed the document. In *Raubenheimer* para 11, the court took into account that the document (i) was headed "testament", (ii) was signed, and (iii) referred to the signatory as "testator". In *Parsons* paras 14-17, the content, wording and signature of a suicide note was analysed in reaching the conclusion that it was intended to be an amendment to a will.

70 Section 2D(2) of the *Wills Act* reads: "In the application of this section "will means any writing by a person whereby he disposes of his property or any part thereof after his death."

regulate the disposal of property. In practice, a will deals with matters affecting a testator's estate and personal affairs in general, some of which are wholly unrelated to the disposal of property.

For example, a will can deal with (i) the nomination of an executor, (ii) the creation of a testamentary trust, (iii) the nomination of a trustee for a testamentary trust, (iv) the cremation or other method of dealing with the testator's body after death, (v) the application of Shari'ah or any other law to the administration of a testator's estate, (vi) the guardianship of a testator's child(ren), (vii) instructions as to how the testator's medical doctors are to deal with him in the event of the exclusion of an inheritance from the operation of an in community of property marital regime or accrual system existing between a beneficiary and his/her spouse.

A document that deals with any of these or similar matters that are commonplace in a modern-day will can still qualify as a final will envisaged by section 2(3). The implication hereof is that the absence of an instruction to dispose of property is not fatal to an interpretive exercise under section 2(3). The document's purpose and by extension the testator's intention that it functions as a will are fact-specific. This operative (or functional intent) is not determined with reference to a *numerus clausus* of factors. All legally relevant factors in the context of a case must be considered. No hard and fast rules as to relevance can be laid in advance. This aligns with the interpretive principles outlined in *Endumeni*.

The words of a will are the most reliable expression of a testator's wishes and the best available evidence of his purpose and thus his intention. At a time when the testator cannot himself speak, his written words assume heightened significance. This is more so when the document sought to be validated under section 2(3) complies with section 2(1)(a)(i) of the *Wills Act* in that the testator personally signed it.[71] In the absence of credible evidence of fraud, mistake or undue influence which would vitiate intent and defeat the purpose of this testamentary formality, the appearance of a testator's signature on a document purporting to be his will ought to be thrown into the mix of relevant factors that a court considers when determining if a document was intended to function as a will or an amendment to a pre-existing will.

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71 For a discussion of the legal effect of a signature on a document, see *Global & Local Investments Advisors (Pty) Ltd v Fouche* 2020 ZASCA 8 (18 March 2020) paras 10-13.

When deciding an application brought under section 2(3), in the end a court postulates whether, on a balance of probability,[72] a testator had concurrently with the drafting or execution of the purported will the intention to make a final will and intended the document in question to be that will. Every case is decided on its own facts and merits. The existence of facts similar to or even identical with those of an earlier case does not mean that the result in the latter case must mirror that of the former.[73] Therefore, in practice, trawling through law reports has limited value in cases involving the interpretation of wills. The value thereof lies fundamentally in distilling general legal principles that are relevant to the interpretive exercise at hand.

5.3 Internal and external contextual interpretation

As stated above in 5.2, when any will, including a purported will, is interpreted, determining its purpose is a useful starting point. To determine its purpose, attention must be given *inter alia* to the document's internal content and wording read as a whole. Through inferential reasoning a court can then ascertain the testator's intention concerning, for example, the document's nature or the meaning of a provision, and then give effect to any such aim. This accords with well-known rules of documentary interpretation.[74]

When analysing the relevant internal material of a will, a textual or ordinary grammatical meaning is given to its wording. In doing so, words are given a plain, natural and literal interpretation.[75] That meaning must be ascribed, unless the context indicates the testator intended a different meaning, or unless that meaning leads to an absurdity, inconsistency or hardship that the testator could not have contemplated.[76] The text of a will cannot be viewed in isolation (that is, detached from its setting and surrounds).[77]

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72 *Grobler* para 13. In *Anderson and Wagner v The Master* 1996 3 SA 779 (C) 783F (hereafter *Wagner*), Thring J held that, on the evidence, it was "probable" that the disputed document was not intended by the deceased to be an amendment of his will.

73 *Baker* para 40; *Crawford* para 30; *Estate Kemp v McDonald's Trustee* 1915 AD 491 505.

74 *Eke v Parsons* 2016 3 SA 37 (CC) paras 29-30 (hereafter *Eke v Parsons*).

75 *Waymark* para 33.

76 *Allgood v Blake* 1873 LR 8 Exch 160 163, referred to with approval in *Cuming v Cuming* 1945 AD 201 (hereafter *Cuming*). Also, see *Hendrik Schoeman Primary* para 16.

77 The SCA, in *Standard General Ins v Commissioner for Customs and Excise* 2005 2 SA 166 (SCA) para 25, held that a word must "take its colour, like a chameleon, from its setting and surrounds".

Context gives colour to the language of a document.[78] Therefore, the context in which words appear in a will must be considered, even if the text of the will is clear and unambiguous.[79]

Accordingly, contextual interpretation for the purposes of determining the presence or absence of *animus testandi* involves consideration of the light thrown on the purpose of a purported will by its text. As shown above in 5.2, relevant considerations in this regard include the document's scope, subject matter, heading, format, structure, content and wording. This is its "internal context".[80] Since a broad approach is taken to contextualising documents for the purposes of interpretation, courts also consider their external context, within limits.[81]

To understand the kind of external factors that our courts consider, particularly for the purposes of section 2(3), a survey of case law was undertaken. The following is a list of categories of external factors from which inferences were drawn as to where the scale of probabilities tilted as regards a document alleged to contain the "fixed and final expression"[82] of the testator's intention: the nature of the deceased's relationship with the person seeking to inherit through the document;[83] the reason for non-compliance with testamentary formalities;[84] the manner by which the deceased dealt with the document after its drafting or execution and/or any instructions given in relation thereto;[85] the deceased's mental state and/or

78 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 92 (hereafter *Bato Star Fishing*).

79 *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society* 2020 2 SA 325 (CC) paras 41-42 (hereafter *KZN Law Society*).

80 *KZN Law Society* para 42. Also, see *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53; *AfriForum v University of the Free State* 2018 2 SA 185 (CC) para 43.

81 *KZN Law Society* para 42. For a useful discussion of internal and external context, see Kroeze 2007 *TSAR* 25.

82 *Osman v Nana* 2019 ZAGPJHC 161 (3 May 2019) para 23 (hereafter *Nana*). In *Van Wetten* para 26, the disputed will was held to be a final instruction because the terms used therein were such that they constituted "the words of a person who has made a decision to which immediate effect is to be given".

83 In *Grobler* para 14, the court took into account the "apparent discord between the deceased and the appellant regarding the nature of the latter's inheritance of the deceased's immovable property".

84 In *Raubenheimer* para 11, reliance was placed on the fact that, although the deceased knew that the purported will had to be witnessed, the "only reason it was not properly witnessed was due to the testator's hard-headedness in refusing to do the necessary before his business partner with whom he had fallen out."

85 In *Opperman v Opperman* 2016 ZAFSHC 26 (3 March 2016) para 4, reliance was placed on the deceased placing the purported will in a sealed envelope and giving it to a close friend "for safe-keeping" with a request "to make it available to his bank

physical health when the document was drafted or executed;[86] the time lapse between the drafting or execution of the document and the deceased's death;[87] the educational and/or professional background of the deceased;[88] the import of relevant communication(s) by the deceased at the time of, or before, or after the drafting or execution of the purported will;[89] and any relevant conduct by the deceased after the document was drafted.[90]

This list is not exhaustive. It is merely illustrative of the kind of surrounding circumstances that our courts have considered for the purposes of section 2(3). The list may prove useful to practitioners as a guide to how they may use external factors to advance their case regarding a deceased's *animus testandi*. However, as explained above in 5.2, relevance is a matter to be determined by a court in the light of the facts in the particular case with which it is seized.

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after his death". In *Parsons* para 19, the court was fortified in its view that the deceased "wanted the instructions contained in it [suicide note] to be implemented on his death" by reason that the deceased, "who was apparently a committed Christian", placing the document "where it could be seen, under a crucifix". In *Van Wetten* para 26, reliance was placed on "the handing over of the documents in a sealed envelope to Van der Westhuizen, to be opened only should something happen to him [the deceased]."

86 In *Parsons* para 18, reliance was placed on the fact that, when authoring a suicide note, the deceased "knew that he was about to commit suicide". In *Van Wetten* paras 18-19, reliance was placed on an "inference that the deceased contemplated suicide" so that when he gave the disputed will in a sealed envelope "to a friend … for safekeeping", he intended it to be his final will. "At the time when it was envisaged that the envelope would be opened, and the document read, the deceased would already be dead. A dead man cannot execute a will, and the deceased, even in a troubled frame of mind, would have appreciated that." (*Van Wetten* para 19)

87 In *Taylor* paras 7, 12, reliance was placed on the deceased executing "a formal and incontestable last will and testament" seven months before his death as part of "certain estate planning exercises" owing to his learning some months earlier that he had terminal cancer. In *Grobler* para 14, the court pointed to "the lapse of a whole year with no tangible move by any of the parties to finalise the exercise" relating to the completion of the deceased's will. In *Nana* para 17, reliance was placed on the fact that the purported will headed "NOTES on WILL" was drafted by the deceased as far back as "29 years before his death".

88 In *Wagner* 783I, consideration was given to the deceased's not being "an ignorant or badly educated man" and he "was a retired clergyman". Also, see *Baker* para 47.

89 In *Wagner* 783G, the tenor of a covering letter attached to the purported will was considered. In *Baker* paras 50-51, *ex post facto* Whatsapps were considered.

90 Only *ex post facto* conduct that sheds light on the mind of the deceased at the time when the document was created is relevant and may be considered. See *Van Wetten* para 21.

The CC[91] has endorsed the following dictum by the SCA dealing with certain classes of admissible evidence when documents are interpreted:[92]

> Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document. Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty.

Although this dictum was made in the context of contractual interpretation, it articulates general principles of the law of evidence that transcend all forms of documentary interpretation, irrespective of the document's nature.[93] Thus, it applies to wills. It must also not be overlooked that, as pointed out above in 1, the SCA has applied principles of contractual interpretation to wills.[94]

As a result, the question arises: in the light of the rules of evidence, to what extent is extrinsic evidence admissible when a will is interpreted? The existing body of reported cases and published research does not address this issue. Hence, the research undertaken thereon in this article has practical and academic value. This is more so because in *Baker* Cloete J held that the *parol* evidence (or integration) rule discussed in *KPMG* applies to contractual interpretation and that relying upon it when a will is interpreted "is misplaced".[95] This decision creates uncertainty relating to the interpretation of wills, because it goes against the grain of established judicial precedent.[96]

When interpreting a will to determine the meaning and effect of its terms (such as whether a clause creates a legacy, usufruct or *fideicommissum*), extrinsic evidence is admissible. This is because of the “armchair rule”: a court sits in the testator's armchair at the time he made the will to understand his thought process so as to determine his intention. While sitting there, a court cannot make a will for the testator. Two limitations apply: first, extrinsic evidence is limited to cases of ambiguity or uncertainty

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91 *Eke v Parsons* para 30.

92 *Engelbrecht v Senwes Ltd* 2007 3 SA 29 (SCA) paras 6-7. In *KPMG* para 39, the SCA held that distinguishing "background facts" and "surrounding circumstances" is "artificial" and to be avoided. Instead, the terms "context" or "factual matrix" ought to be used.

93 *KPMG* para 39.

94 See *Raubenheimer* para 21.

95 *Baker* para 43.

96 *KPMG* paras 38-39. Also, see *Aubrey Smith v Hofmeyer* 1973 1 SA 655 (C) 657-658.

arising from the text, which cannot be resolved with reference only to internal context.[97] Secondly, based on the *parol* evidence rule, facts of surrounding circumstances are impermissible if the aim is to contradict, vary or amend the clearly expressed wishes of a testator.

When interpreting a document for the purposes of an enquiry under section 2(3) of the *Wills Act*, evidence of background facts pertaining to the document and its coming into existence ought to be admissible. This refers to all the material facts and circumstances known to the deceased when drafting or executing the document with reference to which he is to be taken to use the words therein and with reference to which a court must declare what the deceased presumably had in mind when using the chosen words.[98] Background facts, as envisaged here, are part of the document's context and are thus relevant to determining intention in relation to its purpose. However, even in relation to section 2(3), the admissibility of extrinsic evidence is subject to the two limitations mentioned above. To the extent that extrinsic evidence is necessary to contextualise a document and establish its purpose or factual matrix, resort to it must be "as conservative[ly] as possible".[99]

5.4 Teleological interpretation

A court must interpret every document through the prism of relevant constitutional and other legal norms and standards. This is referred to as teleological (or value-based) interpretation. This applies equally to wills. The supreme *Constitution of the Republic of South Africa*, 1996 (Constitution) is a key source from which values are derived. It is part of the external context

97 See *Cuming* 213. Also, see *Hendrik Schoeman Primary* para 17.

98 *Cuming* 213. The SCA, in *In re BOE Trust Ltd* 2013 3 SA 236 (SCA) para 30, held that, to ascertain the meaning of a testamentary text, "the court may have regard to evidence outside of the wording of the will 'to fit the four corners of the will to the ground'". In *Crawford* para 30, Molemela JA held: "The circumstances and other external facts which may be taken into consideration include the degree of the skill of the draftsman and other circumstances of which the donor or testator was aware and which were uppermost in his or her mind at the time of the making of the will."

99 *KPMG* para 39. Since distinguishing "background" from "surrounding" circumstances is problematic, in practice "everything tends to be admitted" into evidence (*KPMG* para 39). Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 21 argues that "when it comes to finding testator's intent, formalism may do more harm than good". He points that in common law jurisdictions and continental legal systems, "[e]xtrinsic circumstances are generally accepted as relevant for every case of interpretation" of a will. To exclude such evidence, so he argues with some merit, "can lead to unfair and unreasonable results" (Vukotic 2017 *Journal of Law, Social Sciences and Humanities* 18).

discussed above in 5.3. Accordingly, its normative spirit, purport and objects must influence the interpretation of every instrument, including a will.[100]

Freedom of testation, a pillar-stone of our law of testate succession, is fundamental to the interpretation of wills.[101] This freedom is closely associated with the property rights entrenched in section 25 of the Constitution,[102] and is also "an important facet of the right to dignity".[103] Although sacrosanct, freedom of testation is not absolute. It is subject to limits which must be applied when a will is interpreted. To this end, the following dictum is instructive:[104]

> South African courts enjoy no general jurisdiction to authorize a variation of the terms of a will or trust deed. But it has always been recognised that effect will not be given to a provision that is contrary to public policy. Since the advent of our constitutional era, public policy is rooted in the Constitution and the fundamental values it enshrines. The Constitutional Court has stated that 'the normative influence of the Constitution must be felt throughout the common law.' Public policy has to be moulded to meet the conditions of an ever-changing world. Given its dynamic nature, present day notions of public policy, must be infused by constitutional values such as human dignity, equality and freedom. Thus, some testamentary provisions that have been accepted as valid in the past, may no longer pass muster in light of our Constitution's equality and non-discrimination imperatives.

Therefore, constitutional and other legal norms of SA's democratic order are deeply imbricated in the interpretation of a will. Testamentary provisions that offend the Constitution or its foundational tenets may be set aside. Thus, our courts have struck down provisions that discriminate or are *contra bonos mores*.[105] To the extent that the interpretation of a will involves the application of the objective normative value system of SA's constitutional order, a court's decision is a value judgment. Viewed in this light, the

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100 For a discussion of the spirit, purport and objects of the Constitution, see Moosa 2018 *J Forensic Leg Investig Sci* 1.

101 *Crawford* para 41. Also, see *Moosa v Minister of Justice and Correctional Services* 2018 5 SA 13 (CC) para 18.

102 The right to freely dispose of one's property, whether by will, trust deed or otherwise, is a manifestation of the right of ownership protected by s 25 of the *Constitution of the Republic of South Africa,* 1996 (the Constitution). See *Crawford* para 56.

103 *Crawford* para 64. Also, see *Crawford* para 22.

104 *Crawford* para 53. For a discussion of the impact of the Constitution on the freedom of testation generally, see Du Toit 2001 *Stell LR* 222. Also, see *Crawford* paras 57-67.

105 See *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C); *Curators, Emma Smith Educational Fund v University of KwaZulu Natal* 2010 6 SA 518 (SCA) para 46.

adjudicative process pertaining to the relevant will is both evaluative and interpretive.

Freedom of testation ought not to be narrowly construed. It should not be limited to a testator's freedom to identify or name beneficiaries, to select the property a beneficiary is entitled to inherit, to specify the proportion of an inheritance, and to dictate the terms and/or conditions attached to a bequest. A narrow, overly formalistic interpretation of this freedom would be incongruent with SA's liberal, democratic culture. If the Constitution is to play a dynamic role and attain its objectives, then concepts such as freedom and the freedom of testation must be interpreted more broadly. It is only if this occurs that effect can be given to the full measure of entrenched constitutional rights and values. This is part of a so-called "generous" and "full benefit" interpretive approach.[106]

Consequently, freedom of testation ought to extend to include a testator's freedom *inter alia* to nominate his executors testamentary and trustees testamentary, and to choose the form and structure of a will. As explained above at 5.3, the form and structure of a document are relevant considerations when determining its purpose to be that of a will.[107] When viewed in this light, the decision in *Parsons* to accept a will in the form of a suicide note is to be welcomed as a manifestation of a broader, more enlightened notion of the freedom of testation. Likewise, the court's decision in *Baker* to accept that a will may be written in schematic form with few words and/or sentences also reflects the broad conception advanced here.[108] Further evidence hereof emerges in *Young v The Master, Durban*.[109] *In casu* the court accepted that a document in electronic format may be a will. All of these precedents accord favourably with a teleological mode of interpretation that enables courts to develop jurisprudence that keeps pace with modern times and changing needs.

When interpreting a will, courts must guard against giving effect to a will tainted by illegality (such as, if the document was brought about through

106 *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) para 58.

107 Langbein 1975 *Harv L Rev* 489 argues that a document's form aids in determining testamentary intent but, correctly so, points out that form is not conclusive proof.

108 *Baker* para 6. The single page document at issue in *Baker* is fully reproduced at para 12 of the judgment. Ultimately, it was not accepted as a final will: "it was a recordal of the deceased's testamentary intentions, and not what he intended to be his will for purposes of s 2(3)" (*Baker* para 54).

109 *Young v The Master of the High Court, Durban* 2015 ZAKZDHC 65 (28 August 2015) para 11. Also, see *MacDonald v The Master* 2002 5 SA 64 (N); *Ex parte Porter* 2010 5 SA 546 (WCC); *Van der Merwe v Master of the High Court* 2011 1 All SA 298 (SCA).

undue influence or fraud). In such cases the testator has not freely and voluntarily agreed to the terms of the will, nor can it be said that he intended the document to be a will. Under such circumstances, public policy and the values underpinning freedom of testation reinforce a court's constitutional duty to refuse the enforcement of the will. To hold otherwise would be to do violence to the testator's true intentions and his freedom of testation.

There is also a line beyond which courts may not tread. It is well known that courts may not exceed the bounds of interpretation and engage in drafting by judicial fiat.[110] In *Endumeni* this was expressed as follows:[111]

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.

This guiding principle applies equally in the context of a will. It is embodied in the trite rule that a will does not mean whatever a judicial officer wishes it to mean. Every case must be decided on the basis of established legal principles. A court must interpret a will and then give effect to the testator's intention as determined, irrespective of a judicial officer's own personal or intellectual preferences.[112] This salutary principle precludes a judge subverting a testator's intention and replacing it with something which the judge considers more reasonable or sensible in the circumstances.

By emphasising the divide between interpretation and drafting, the rationale underpinning *Endumeni*, when applied to the interpretation of wills, buttresses the freedom of testation, prevents a testator's intention from being undermined, and promotes the fulfilment of a will's underlying purpose. Therefore, the approach to interpretation summarised in *Endumeni* ought to be applied when a will or a document purported to be a will is interpreted.

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110 In public law, courts must show respect for the separation of powers. See *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) paras 89-92.

111 *Endumeni* para 18.

112 In *Cuming* 213, the former Appellate Division cited with approval *Allgood v Blake* 1873 LR 8 Exch 160 163, where it was held that, by virtue of the duty on a court "to construe the will as made by the testator, not to make a will for him", a court is duty bound to execute a testator's expressed intention "even if there is great reason to believe that he has, by blunder, expressed what he did not mean."

6 Conclusion

In 1952 Steyn J lamented, in *Ex parte Kock*, the confused state of the will which he was called upon to interpret. He pointed to the enormous challenges in having to discern the testator's true intention in circumstances where the draftsman *inter alia* did not possess the requisite drafting skills and competencies, wrote a will in a language with which he was unfamiliar, used non-existent words, and also used words whose meaning and purport he did not grasp "with the result that in one instance in the same clause of the will two conflicting meanings become apparent".[113]

Having regard to the high volume of judgments since 1952, both reported and unreported, that have dealt with the interpretation of wills, it is reasonable to conclude that the warning sounded in clear and unequivocal language by Steyn J about the importance of wills being drafted with clarity and the consequences that would likely ensue if they are not has, by and large, not been heeded (or sometimes possibly even been ignored).

For all these reasons and more, which cannot be listed in an article regulated by rules as to length, there is a real need for a set of interpretive guidelines or directives that can serve as the tools of the trade for legal practitioners and judicial officers alike. It is in this context that *Endumeni* is most beneficial. Its summation of what Wallis JA called "the present state of the law"[114] of documentary interpretation brought considerable clarity to an area of law that, for a long time until then, was mired in uncertainty, as can readily be gleaned from any, even cursory, survey of South African case law.

Ever since *Endumeni* was reported in 2012, it has with regularity been cited with approval, even in SA's apex court, as shown in this article. This underscores that *Endumeni* is widely accepted as correctly reflecting the modern trend in documentary construction, consistent with the approach to interpretation enunciated in the seminal exposition by Schreiner JA in *Jaga v Dönges; Bhana v Dönges,*[115] which in turn was endorsed by the CC in *Bato Star Fishing*.[116] As such, *Endumeni* is firmly part of legal nomenclature.

Whatever criticisms or misgivings some scholars or philosophers may have of *Endumeni* in relation to its formulation of the governing rules pertaining

113 *Ex parte Kock* 1952 2 SA 502 (C) 516.
114 *Endumeni* para 18.
115 *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A) 664H. See *Endumeni* para 19.
116 *Bato Star Fishing* para 89.

to statutory interpretation, *Telkom SA* and *United Manganese*, discussed above in this article, underscore that *Endumeni* remains good authority. I agree. At a moment of uncertainty in our nation's history, this outcome ought to be welcomed because it promotes, probably even restores, certainty in the law of documentary interpretation. In doing so, the rule of law is upheld. Legal certainty is a hallmark of the rule of law, a value foundational to our Constitution's ethos.[117]

This article demonstrates that when it comes to documentary interpretation in general, and wills in particular, a useful starting point is to bear in mind the remarks of Rumpff CJ in *Swart v Cape Fabrix (Pty) Ltd*[118] to the effect that[119]

> … words should not be clipped out of the document and placed on a clean piece of paper and their meaning determined, but that they should be examined in the light of the nature and purpose of the document and their situation in the document as a whole.

Having regard to the rules of interpretation articulated in *Endumeni,* which must necessarily be adapted for the purposes of the subject matter dealt with in this article, and also taking into account the principles applicable to the interpretation of wills as distilled from a survey of cases, it is submitted that the following is a fair reflection of the present state of our law regarding the proper approach to the interpretation of wills:

- Interpretation is a matter of law and not of fact. Therefore, the interpretation of wills is a matter for the courts. It is not a question for witnesses or litigants.[120] The interpretation of every will or document alleged to be a will must be decided on its own facts and merits. In this context judicial precedent has value, but within limits. The interpretation of a will and the application of an interpretation to a particular factual scenario are "coequal tasks": they are "simultaneous and intricated".[121] When interpreting a will, the cardinal rule is to ascertain and give effect to a testator's intention, unless doing so would result in a violation of a rule of law.
- Whenever a will is interpreted, the usual rules for the admissibility of evidence apply, including the *parol* evidence rule. Also, evidence of surrounding circumstances after the creation of a will is relevant only

117 *Veldman v Director of Public Prosecutions, WLD* 2007 3 SA 210 (CC) para 26.
118 *Swart v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A) 202C.
119 This translation is by Wallis 2019 *PELJ* 6.
120 See *KPMG* para 39.
121 *AMCU v Chamber of Mines of South Africa* 2017 3 SA 242 (CC) para 34 (fn 28).

if it sheds light on what a testator's intention was at the time when he executed the will. A court must put itself in the armchair of the testator and, after determining where the probabilities lie in accordance with the law of evidence, it must infer or presume what the testator had in mind when the will was created. Although intention is subjective, the interpretive process of determining a testator's intention is objective in its form.

- When commencing the interpretive process, a court must be clear on the objective of the exercise in order that it may undertake the correct enquiry. If its aim is to determine the meaning of a testamentary provision, then a testator's intention must be ascertained as memorialised in the written text of the will read as a whole, also taking into account the purpose of the text and its context. If, on the other hand, the aim is to determine whether a document is a testator's intended last will and testament, as is the case when section 2(3) of the *Wills Act* is invoked, then a testator's intention must be ascertained with reference to the document's purpose, also taking into account all legally relevant and admissible internal and external contextual factors. All of this applies equally, with any necessary contextual changes, when a will is interpreted to ascertain a testator's *animus revocandi*.

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List of Abbreviations

CC	Constitutional Court
Geo Mason L Rev	George Mason Law Review
Harv L Rev	Harvard Law Review
J Forensic Leg Investig Sci	Journal of Forensic, Legal and Investigative Sciences
Kan L Rev	Kansas Law Review
PELJ	Potchefstroom Electronic Law Journal
TSAR	Tydskrif vir die Suid Afrikaanse Reg
SA	South Africa
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review