

Execution Formalities - Overview

Execution formalities outlines in **s 2(1)(a) of the Wills Act 7 of 1953**

Compliance is an absolute requirement - should they be faulted in anyway the will is declared invalid.

The essence of the execution formalities lies in the signing of a will by: testator, the person who signs the will on the testator's behalf (*amanuensis*), witnesses and commissioner of oaths (COO)

What does signing of a will entail & what qualifies as a signature for purposes of s 1(1)(a) of the Wills Act?

- making of initials - unclear on writing out of full name and surname.

- making of mark (only testator) - typically X or thumbprint. Additional formality: COO needs to certify this.

- making of signature

Jhajibhai v The Master: Sign includes. usual signature as well as any other mode adopted by signer to write their name.

As such the following are examples: Abicha Tshaimala, actual signature, A.T.

amneck and Rautenbach (eds) The Law of Succession in South Africa (2009) 68:

Anything besides name does not count (i.e. nickname doesnt count). however:

In *Smith v Parsons* nickname Wally was allowed for condonation of the document under s 2(3) of the Wills Act

-Unclear if same approach will be followed w signing of a will for the purpose of its execution in terms of s 1(1)(a) of the Wills Act

Ricketts v Bryne

Execution Formalities - Overview (cont)

Testator signed first page of will with regular signature but wrote out name & surname in full on second page

invalid: 'Inconceivable that testator *in casu* wrote names as signature, while on first page used normal signature

s 2(1)(a) of the Wills Act

S 2(1)(a)(i) - Five Issues:

1) Testator must sign Will in one of the four aforementioned ways.

2) Amanuensis can sign on behalf of testator should they be incapacitated

- Can sign the testators signature of any of the aforementioned ways besides making a mark

- If they sign their name in block letters (*Jhajibhai*) they should follow it with p.p. (per procurationem)

3) Amanuensis must sign the will in front of the testator. The testator needs to be able to see the will or if they are blind they need to be in a position where they could if they werent blind.

4) If amanuensis signs will, the will needs to be certified by a commissioner of oaths

5) The will must be signed at the end thereof

- **Kidwell v The Master:** signature must appear as close as reasonably possible to the concluding words of the will

Examples on page 5 of notes

S 2(1)(a)(ii): Four issues

1) Signature must be made in the presence of at least 2) two witnesses

- They can acknowledge a signature made without witnesses in the presence of witnesses

- Acknowledgement looks like the testator/-animus declaring that the signature is indeed theirs

s 2(1)(a) of the Wills Act (cont)

3) "In the presence of" = witnesses must have seen the will being signed by amanuensis/testator or if blind.. etc.

4) Witness must be competent. Means they must be above 14 and competent enough to give evidence in a court of law.

S 2(1)(a)(iii): 5 issues:

Witnesses must attest & sign will in presence of the testator, each other and amanuensis (if applicable)

1) Witnesses who sign will must be the same in whose presence testator/amanuensis signed the will

2) To attest means to act in the capacity of a witness

3) The witness's signatures serves to verify the authenticity of the testator/amanuensis's signature only.

- They do not need to know the content of the will

4) In the presence of = meaning in S 2(1)(a)(ii)

5) It is not expressly indicated where witnesses should sign.

- Generally accepted that they should sign the last page of the will - not indicated where on the last page

- They must sign after testator/amanuensis sign in terms of time, so it makes sense that they sign after their signatures.

Liebenberg v The Master: Testator signed one-paged will at the end thereof but two witnesses signed at the top of the page above the wording of the will.

Found: It is sufficient guard against fraud if testator signed at the end of the will. Not justified to interpret the Wills Act so as to make it obligatory for the witnesses to also sign at the end of the will.

s 2(1)(a) of the Wills Act (cont)

S 2(1)(a)(iv): Four Issues

- 1) Each page other than the page on which the will ends, must be so signed by the testator/amanuensis 2) anywhere on the page - customary to sign at the end.
- 3) Witnesses do not need to sign all pages - last page sufficient
- 4) So signed' means that witnesses, when signing the will, must act in the presence of the parties stipulated in s 2(1)(a)(iii)

S 2(1)(a)(v): Deals with the certification of a will

- 1) *Which instances require certification of a will?* If (i) the testator signed it by the making of a mark & (ii) testator directed an amanuensis to sign the will on their behalf
- 2) *Who must conduct the certification?* A commissioner of oaths.

- **Radley v Stopforth:** The certificate must express the commissioner of oaths' capacity as such explicitly - even if they are an attorney.

- 3) *What must the certificate indicate?* That the COO has satisfied themselves w (i) the identity of the testator and (ii) that the will concerned is indeed that will of that testator

Example on page 9

- 4) *Where must the certificate be placed on the will?* Any page, however, the COO must sign each page other than the page on which the certificate appears. Can sign anywhere

- 5) *When in the execution process must the certificate be placed on the will?* At the same time compliance with the other formalities is effected.

s 2(1)(a) of the Wills Act (cont)

- S 2(1)(a)(v)(aa): if certification is required, it must be signed in the presence of the COO by the testator/amanuensis & witnesses. It must be made asap after it was so signed by the testator/amanuensis & witnesses.

- Exception s 2(1)(a)(v)(bb): if certification required but testator dies after will signed by testator/amanuensis & witnesses, but before the COO has made certificate, the commissioner shall asap after the death complete certificate & sign will on all pages other than certificate page

Examples pg10

Amendment formalities - 2(1)(b) of the Will Act

Amendment: Deletion, addition, alteration (changing words) , interlineation.

Interlineation: inserting new words between the lines of a will

Deletion: Deletion, cancelation or obliteration that does not intent to revoke the entire will

- If testator effects deletion that intends to revoke entire will, amendment formalities dont need to be complied with.

S 2(1)(b)(i): The amendment must be identified by the signature of the testator/amanuensis

S 2(1)(b)(ii): The above signature must be made or acknowledged by signing parties in the presence of two competent witnesses

2(1)(b)(iii); Amendment must be identified by the signatures of the witnesses & testator/amanuensis

S 2(1)(b)(iv): If the amendment is identified by the testator's mark or by the signature of an amanuensis, a COO must certify on will that they satisfied themselves w testator's identity & that amendment has been made by/at request of the testator

Amendment formalities - 2(1)(b) of the Will Act (cont)

- All parties must identify this in front of COO who must make certificate asap. If testator dies, they should make it asap after their death.

NB Example pg12 - 14

S 2(2):

-The amendment formalities apply only to amendments made after a will's execution - if during no need for compliance.

- Because its not easy to determine whether amendments were made during or after a will's execution, s 2(2) presumes that any amendment made in a will was effected after the will's execution (and must, comply with amendment formalities)

- A rebuttable presumption & contrary can be proven by factual evidence. Here compliance need not occur