REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 330/2011

In the matter between:

BESTER LESLEY AFRIKANER	**APPLICANT**
and	
THE MASTER OF THE HIGH COURT OF NAMIBIA	**1ST RESPONDENT**
HELMUTH AFRIKANER	**2ND RESPONDENT**
ELIZABETH NANUS	**3RD RESPONDENT**
JOSEPH KOOPER	**4TH RESPONDENT**
SYDNEY AFRIKANER	**5TH RESPONDENT**
CLODEN EISES	**6TH RESPONDENT**
EDWIN KHEIBEB	**7TH RESPONDENT**
BENNET KHEIBEB	**8TH RESPONDENT**
SOLASTICA RHEIS	**9TH RESPONDENT**
EDWARD RHEIS	**10TH RESPONDENT**
CECILIA RHEIS	**11TH RESPONDENT**
GOTFRIED RHEIS	**12TH RESPONDENT**
HEDWIG RHEIS	**13TH RESPONDENT**
CASSIUS HOFFMANN	**14TH RESPONDENT**
YAMILLA RHEIS	**15TH RESPONDENT**

Neutral citation: *Afrikaner v The Master of the High Court of Namibia* (A 330/2011) [2013] NAHCMD 224 (29 July 2013)

Coram: GEIER J

Heard: **20 March 2013**

Delivered: **29 July 2013**

Flynote: Will - Validity of - Certification by notary public in terms of sec. 2 (1) (a) (v) of Act 7 of 1953, as amended - Can be appended or completed after date on which testator and witnesses signed but before the death of the former -

Will - Execution of - Certificate under sec. 2 (1) (a) (v) of Act 7 of 1953, as amended - Requirement of a certificate in terms of the section is an execution requirement - Certificate must he appended or completed before the death of the testator -

Summary: Application for leave that notary public complete certification of a testament post mortem the testator – notary public had merely appended his notarial certificate in terms of sec. 2 (1) (a) (v) of the Wills Act No 7 of 1953, as amended, on the last page of the testament and not on pages 1 to 4 of the will -

The Court held that the legislature, in section 2(1) (a) (v) of the Wills Act, 7 of 1953, as amended, intended that the requirement of a certificate, as inserted by the Legislature into section 2 (1) (a) (v), was intended to be a requirement of execution and not merely a provision allowing later proof as to identity of the maker of a mark. This is supported by the consistent use of the present tense by the Legislature ("unless the will... is signed": and "if the will is signed... a magistrate... certifies at the end thereof..."), which indicates a continuous process which would involve, normally, the certifier appending his certificate immediately, or at least shortly, after the will had been signed by the testator and witnesses, but at the latest before he dies.

Such interpretation would also be in accordance with the fundamental principle that a will should speak from the moment of death of the testator and thus should be validly executed and completed at the latest by that time.

The Court held that the certificate in terms of section 2 (1) (a) (v) of Act 7 of 1953 which appeared only on the last page of the will could not be appended by the certifier after the death of the testator on the remaining pages of the will –

Application accordingly dismissed.

ORDER

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1. The application is dismissed with costs.

JUDGMENT

GEIER J:

[1] Section 2(1)(a)(v) of the Wills Act, Act No 7 of 1953 provides that:

(a) no will executed on or after the first day of January, 1954, shall be valid unless-

…..

(v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a magistrate, justice of the peace, commissioner of oaths or notary public certifies at the end thereof that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and if the will consists of more than one page, each page other than the page on which it ends, is also signed, anywhere on the page, by the magistrate, justice of the peace, commissioner of oaths or notary public who so certifies …'.

[2] *In casu* the notary public, who attended to the signing of the will in question, certified at the end thereof, in his capacity as notary public, that it was the deceased's will. He however failed to sign and certify the other pages of the will.

[3] The question which thus arises is, whether or not, the notary public in question, can now, post-mortem, affix his signature and certificate to these other pages of the will?

[4] The events preceding the signing of the will by the deceased, by way of a thumbprint, are undisputed.

[5] On 4 July 2011, applicant instructed Mr Gert Olivier, a duly admitted legal practitioner and notary public, to prepare the Last Will and Testament, for the now late Mr Benjamin Kheibeb. On the same day Mr Olivier, accompanied by Ms Audrey Hendricks, attended on the deceased at the Welwitchia Hospital in Walvis Bay. In the presence of applicant and a number of other witnesses, Mr Olivier first established that the deceased was awake and of sound mind. Mr Olivier also talked to Mr Kheibeb, who then confirmed his instructions in regard to his last will. Mr Olivier then read each paragraph of the draft will which had already been prepared on the information supplied by the applicant. Each clause was apparently explained in detail and Mr Olivier ensured that Mr Kheibeb understood and confirmed each clause, whereafter Mr Kheibeb apparently also confirmed the content of the entire will.

[6] With the assistance of Mr. Olivier, Mr Kheibeb affixed his thumbprint at the bottom of each page. The witnesses present, Ms Hendricks and Ms Reinette van Rhyn, then also signed the will on each page. Mr Olivier certified on the last page that had satisfied himself *' … as to the identity of the aforegoing Testator Benjamin Kheiseb and that the afore will (was) signed by him by the making of his right thumb print is his Will'.* He also affixed his seal as notary public. Mr Olivier did however not sign pages 1 to 4 of the will, as mentioned above.

[7] On 7 July 2011 Mr Kheibeb passed away.

[8] Subsequently, applicant, who had been nominated as executor therein, was informed that the Master of the High Court, had decided not to accept the Last Will and Testament of the deceased, for the reasons that the notary public, Mr Olivier, had failed to append his signature to pages 1 to 4 of the will, despite having done so on the last page, on which his certificate and seal as notary public did appear.

[9] At the same time the Master's also advised that the executor to be appointed would be one *'in terms of intestate succession'*.

[10] Applicant thus consulted Mr Olivier who confirmed *'that an administrative oversight was made which causes the execution of the will to be in partial compliance with Section 2(1)(v) of the Wills Act 1953'*.

[11] The decision of the Master was not acceptable to the applicant as, *'if the estate, according to the ruling of the Master of the High Court, should inherit intestate, this would not be in accordance with the will and wishes of the late Benjamin Kheibeb and would be an injustice to the designated heirs if this should occur solely because of an aforesaid administrative oversight'*.

[12] At this stage it might be apposite to mention that this view was not shared by all the family members as it also appeared from the papers that there was grave dissatisfaction within the family with the deceased's dispositions, as made in the will, so much so, that certain members of the family had already taken possession of the estate's assets, which according to the applicant had also already been illegally divided amongst them.

[13] As however, in view of the underlying legal position, the Master could not just be 'entreated' to condone the aforesaid 'oversight' and to allow Mr Olivier to complete the certification of the will by simply signing pages 1 to 4 of the will, the applicant decided to approach the court for appropriate relief, which was formulated as follows.

'That the testamentary document executed on 4 July 2011 by the late Benjamin Kheibeb who died on 7 July 2011, a copy of which is appended to the founding affidavit of Bester Lesley Afrikaner as annexure "A", is declared to have been intended by the deceased to be his will.

That the first respondent (the Master) is directed to accept the aforementioned testamentary document as a will for purposes of the Administration of Estates Act 66 of 1965.

That the administrative oversight by not signing pages 1-4 of the testamentary document by the notary that certified such document as contemplated by Section 2(1)(a)(v) of the Wills Act 7 of 1953 be condoned and that the notary is ordered to rectify such oversight by signing pages 1-4 of the testamentary document.

That any party who is not appointed as either executor or heir by the testamentary document is interdicted from interfering with the administration of the estate.

That any party that has taken possession of any of the estate assets is interdicted to return such assets to the satisfaction of the Master of the High Court.

Costs of suit (only in the event of the application being opposed).'

[14] The respondents' in answer related their version of the events leading up to the deceased's death. They also took the point that, when the late Mr Kheibeb deposed to the will in question, he was not of a sound mind. This contention was based on the fact that the deceased, while in good health and during his life time, was always able to sign documents, including his cheques. On the 1st of July 2011, the deceased was still able to sign his cheques clearly and concisely, but some three days later, he was suddenly unable to use his hands to sign his Last Will and Testament, for which he then needed assistance from Mr Olivier to make a thumbprint thereon. They also based this contention on the fact that the deceased had made certain questionable dispositions in his will relating to property that allegedly did not belong to him. Also the name of the deceased had been misspelt. No medical evidence was however adduced in regard to the mental state of the deceased at the time of the making of the will.

[15] In such premises, Mr Brandt who appeared on behalf of the respondents, at the hearing of this matter, did - correctly so - not persist with this point.

[16] It should also be mentioned that the applicant did not continue to seek the interdictory relief reflected above.

[17] The parties were also agreed that if the relief sought by applicant would not be obtained, the deceased's signing of the testament would in any event be without consequence and also his mental state, at the time, would become irrelevant as, in such case, the estate would have to be distributed as an intestate one.

[18] In such premises the question, which remained, was whether or not the court can condone the non-compliance with the peremptory formalities provided for by the Wills Act 1953 and direct the notary public in question to *post mortem* affix his signature and certificate to the remaining pages of the will?

[19] Without wanting to do an injustice to the arguments raised on behalf of each party it would seem that this question is to be determined with reference to the applicable South African case law, which, so I have been made to understand, reflects two schools of thought before the applicable legislation was amended in South Africa, in order to create legal certainty. No Namibian authority exists on the point.

[20] South African case law however is not binding on this court and merely constitutes persuasive authority – which a Namibian Court is free to adopt in all fitting cases.[1] Both counsel where alive to this and it was thus not surprising that each party submitted that the matter be decided in accordance with the particular line of authority supportive of its case.

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[1] *Westcoast Fishing Properties v Gendev Fish Processors Limited* (A 228/2012) [2013] NAHCMD 185

(28 June 2013) at [9] reported at http://www.saflii.org/na/cases/NAHCMD/2013/185.html

THE ARGUMENT ON BEHALF OF APPLICANT

[21] Mr Franck SC - before conveniently summarising the South African approach – pre Namibian Independence - in his heads of argument - first set the atmosphere against which he wished his further submissions to be considered by referring this court - to the remarks made by the South African courts – with the benefit of hindsight - subsequent to the passing of the South African amendment legislation.

[22] In this vein he then submitted that:

‘ … subsequent to the introduction of the Wills Act – in 1953 - in South Africa - the highest court in that country set the tone for the rigid adherence to the letter of the law. This approach was so counter-productive in frustrating the intention of testators that the legislature in that country intervened to ameliorate what was referred to as a “formal strait-jacket” by the insertion in 1992 (by way of Act 45 of 1992) of a new section 2(3) …’.

[23] This particular aspect, relating to the execution of wills, was from then onwards regulated by the South African Parliament as follows:

‘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, as a will, although it does not comply with all the formalities for the execution or amendment of wills …”.[2] *(counsel’s underlining)*

[24] Mr Frank then referred to the comments made by the South African courts on the pre-amendment era with the benefit of hindsight:

‘The Wills Act, as now amended, stresses the importance of giving effect to the genuine will of a deceased expressed in a document.’ [3]

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[2] See section 2(3) of the Wills Act as amended by Act 45 of 1992

[3] *Logue v The Master* 1995 (1) SA 199 (N) at 203F

'What the Legislature had in mind in my view was the circumstance that the intention of a testator as demonstrated in writing in his own hand should not be frustrated because the writing does not comply in all respects with the requirements of s 2(1) of the Act. There have been many such cases.

For example, where the testator or the witnesses initialled but did not sign in full one or more pages of the will, it was held to be invalid (*Govindamall v Munsami and Others* 1992 (1) SA 676 (D); approved on appeal sub nom *Harpur NO v Govindamall and Another* 1993 (4) SA 751 (A); *Mellvill and Another NNO v The Master and Others* 1984 (3) SA 387 (C)). And even where there was no doubt that the testator had intended his mark to be his signature, the will was held invalid because of some technical error in the certificate of the commissioner of oaths thereon (*Soobramoney and Others v Moothoo and Others* 1957 (3) SA 707 (D); *Ex parte Naidu and Another* 1958 (1) SA 719 (D); *Radley en 'n Ander v Stopforth en 'n Ander* 1977 (2) SA 516 (A)).

Then, in *The Leprosy Mission and Others v The Master of the Supreme Court and Another* NO 1972 (4) SA 173 (C), the facts were that a two-page will had originally been signed only on p 2 by the testatrix and two witnesses. Thereafter, with the intention of rectifying the situation, the testatrix signed p 1 and her signature thereto was witnessed by two persons who were not the witnesses to her signature on p 2. The will was held bad for want of compliance with the prescribed formalities.

In *Oosthuizen v Die Weesheer* 1974 (2) SA 434 (O) the testators had bequeathed certain land to their daughters and had attached a sketch plan to their will, both the will and the plan having been duly signed by the testators and two witnesses. Thereafter, the testators executed a later will in which they revoked the earlier will. Their signatures to the second will were witnessed by two different witnesses. The second set of witnesses did not, however, sign the old sketch plan which was attached to the new will. The second will was on that account held to be invalid.

And in *Kidwell v The Master and Another* 1983 (1) SA 509 (E) a testator had signed the second page of his two-page will some 13 centimetres below the signature of the second witness and some 17 centimetres below the attestation clause. He had signed the first page some nine centimetres below the end of the typing on that page. In view of the requirement

that a will be signed 'at the end thereof' the second page of the will was held to be invalid. It was argued that, if that were the decision of the Court, the first page should be held to be the will of the testator. It was held that as his signature on that page was 9 centimetres below the end of the typing it, too, could not be declared to be a valid will because it had not been signed 'at the end' thereof.

I venture to suggest that in each of these cases a different conclusion would have been arrived at if the Act had contained s 2(3) when they were decided. Indeed, in my view, it was precisely to prevent just this kind of frustration of the wishes of the testator that s 2(3) was inserted in the Act.'[4]

[25] In respect of the issue in hand, namely, as to when the certification by the notary had to be effected, counsel for the applicant then referred the court to *'The Law of Succession in South Africa'* - one of the leading textbooks in this field - where the learned authors *Corbett, Hahlo, Hofmeyr and Kahn* analysed the position as follows:

'The question arose as to whether the certification had to take place together with the completion of the other formalities at one and the same time (*uno et eodem tempore*) or whether it could take place after the execution of the will and, if so, after the death pf the testator. In a number of cases, notably *Arendse v The Master*[5] (where the authorities were extensively reviewed), it was held that the certificate could be appended to the will after the death of the testator. In other decisions a contrary view as taken. This conflict was settled by the Appellate Division in *Radley v Stopforth*[6] where it was held that the requirement of certification was a requirement of execution and that for the will to be valid such certification had to be completed before the death of the testator.'[7]

[26] It was then argued that in the *Radley* case the Appellate Division did not base its decision on the question as to whether a certification had to be done as part of the execufion of the will, but on an interpretation of the section on the basis of which the court came to the conclusion (which counsel considered to be somewhat of a

[4] *Webster v The Master* 1996 (1) SA 34 (D) at 41F -42E
[5] *Arendse v Master of the Supreme Court* 1973 (3) SA 333 (C)
[6] *Radley v Stopforth* 1977 (2) SA 516 (A)
[7] First Ed. at 51

compromise between the different views) that the section in the 1953 Act, properly interpreted, indicated that the certification had to follow soon after execution and at least prior to the death of the testator.[8]

[27] Mr Frank conceded that prior to Independence Namibia was bound by the aforesaid decision and that the Master had thus correctly rejected the will as it obviously did not comply with the requirements as laid down in the *Radley* decision.

[28] He contended further that the question which arose in such circumstances was 'whether this country must still deal with the matter as per the *Radley* judgment or whether the Namibian courts should follow the line of interpretation as suggested in the *Arendse* case?

[29] In this regard he submitted that:

' … the underlying ratio for the subsection under consideration is to identify the testator whose mark is appended to the document and that such person intends that document to be his/her will. These facts although having to exist at the time the will is executed are evidenced by the document (itself) which will be complete on the face thereof. The only issue which may need clarification is of an identificatory nature, namely who is the person who signed the will by making a mark (and not a signature). Why a notary public cannot assist in this regard does not, it is submitted, make sense. The notary does not execute anything. He is not the testator nor a witness to the will. He is simply a witness that thus certifies (testifies) that it is the testator's mark (signature) who intended to place his

[8]' … Of so 'n sertifikaat ná die dood van die erflater aangebring kan word, hang van die bedoeling van die Wetgewer af. Dit is, myns insiens, duidelik dat die vereiste van 'n sertifikaat, soos dit deur die Wetgewer in art. (2) (1)(a) (v) ingevoer is, bedoel is om 'n verlydingsvereiste te wees en nie bloot 'n bepaling wat latere bewys aangaande identiteit toelaat nie. Dit is waar dat die Wetgewer nie vereis dat die sertifiseerder in teenwoordigheid van die erflater moet sertifiseer nie, maar die manier waarop die Wetgewer die vereiste geformuleer het laat by my geen twyfel nie dat mens hier te doen het met 'n verlydingsvereiste. Dit word, myns insiens, gestaaf deur die konsekwente gebruik deur die Wetgewer van die teenwoordige tyd ("tensy die testament... onderteken word"; en "indien die testament... onderteken word, 'n magistraat... aan die end daarvan sertifiseer..."), wat, myns insiens, 'n deurlopende proses aandui wat sou in hou dat normaalweg die sertifiseerder sy sertifikaat sou aanbring onmiddellik, of ten minste kort nadat die testament deur die erflater en getuies onderteken is, maar op sy laaste voordat hy sterf.' At p 529 A-C

mark on a will. The latter would, in any event, normally *prima facie* follow from the nature of the document.

Based on this approach the South African courts have, prior to the *Radley* decision, held that:

a) Post morem compliance with the requirement was acceptable.[9]
b) A defective certification could be rectified post-mortem.[10]
c) The certificate need not contain the *ipsissima verba* of the Act.[11]
d) That a failure to describe one as a commissioner where the will was witnessed. [12]
e) ' … *(one should)* … not *(be)* … unmindful of the fact that the purpose of the enactment is undoubtedly to prevent the possible evil of fraud …[13] the Act ought not to be converted into an Act the better to secure intestacy … '. [14]
f) Coupled with the rationale to avoid fraud is the fact that the word of a notary is normally accepted at face value and there is nothing to suggest that a notary cannot provide the certification post mortem.'[15]

[30] Counsel urged the court to accept the reasoning of the court in the *Arendse* case as the court, in that case, after careful consideration of all the factors, had come to the correct conclusion, namely that a certification can be appended to a will *post mortem causa*. In this regard reliance was also placed on the concluding remarks as made by Baker AJ (as he then was):

'I conclude, therefore, that the certificate required by sec. 2 (1) (a) (v) can effectively be put upon a will at any time after the testator or anyone else has satisfied the certifying official contemplated by that sub-paragraph that the ostensible testator is indeed the testator and that the document involved is indeed the will of the testator. It can be appended, in my

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[9] *Arendse v Master of the Supreme Court, Roberts v The Master* 1975 (4) SA 377 (W*), Van Huyssteen v Die Meester* 1975 (4) SA 449 (W)*, Le Roux v Die Meester* 1976 (4) SA 74 (T)

[10] *Frylinck and Others v The Master and Others* 1976 (2) SA 151 (C)

[11] *In re Jennett NO* 1976 (1) SA 580 (A), *Leitao v The Master and Others* 1981 (1) SA 318 (W), *Oldfield v The Master* 1971 (3) SA 445 (N)

[12] *Ex parte Suknanan & Another* 1959 (2) SA 189 (N)

[13] '… and that according to B LUSHINGTON, J., in In the Goods of Peter Smith, 16 Jur. 178 … '

[14] *Ex Parte Naidu & Another* 1958 (1) SA 719 (D) at 723

[15] 'When a document is executed before a notary, the presumption is that every statement contained in the document is true and that all the proper solemnities have been observed by the notary public.' See : *Silver Garbus & Co (Pty) Ltd v Teichert* 1954 (2) SA 98 (N) at 108B

view, at any time after the will has been 'marked' by the testator and signed by the witnesses.'[16]

[31] With reference to the actual manner in which a will is executed counsel pointed out that a will is executed when the testator affixes a mark to it in the presence of the witnesses. This argument was made with reference to the predecessor of the Wills Act 1953, the Wills Proclamation, 23 of 1920, which Proclamation made it quite clear that a mark by the testator was regarded as a signature:

' … Sec. 1 of the Proclamation provided for signature of the will by the testator and ends off that "provided always that nothing herein contained shall prevent a mark being a sufficient signature'.

The Wills Act defines "sign" to include a mark:
'sign' includes in the case of a testator the making of a mark … and 'signature' has a corresponding meaning."

[16] *Arendse v Master of the Supreme Court* at 365 A-B – see also 360 D – H : ' …Rowland, (1966) 29 T.H.R - H.R., pp. 135 et seq., makes the submission that

'Neither the English Law nor, it is submitted, the Dutch notarial will required, as a prerequisite for validity, that the formalities be carried out uno contextu. As these are the sources from which our Wills Act and in particular sec. 2 (1) (a) (v) descended, it would seem that the South African law can hardly, in the absence of specific provision to the contrary, be said to demand either that wills be executed uno contextu, or that the certificate be appended uno contextu.' (p139)

The learned author proceeds to set out the differing opinions of our modern writers on the matter, with his own comments thereon, and draws attention to the attitude of our Courts in these cases, and their tendency towards upholding the validity, rather than the opposite, of a will valid ex facie itself (p. 141) - always postulating that the will is a genuine will and expresses the intentions of the testator. Rowland refers here (p. 141, n. 39), as I have done above, to the views of Van der Linden in his notes to the case reported in the latter's compilation (Verzameling van Merkwaardige Gewijsden, D.1, cas. 25). I agree with Rowland's conclusion that

'subject to the proviso that the formalities of a modern will must comply with the requirements of a comprehensive statute, it seems that Van der Linden expresses the spirit of our modern South African law'. (p. 142).

H I agree with his further conclusion that the certificate required by sec. 2 (1) (a) (v) need not be appended at the same time as the signatures required by sub-paras. (i) to (iv) (p. 142).

The notary in his certification simply avoids any future need for identificatory evidence as to whose mark appears on the will and what the intention was when making the mark. Because of his office and certification these two aspects can be accepted and no dispute can arise.'

[32] Finally, and with reference to the facts, Mr Frank then pointed out, in conclusion, that, as there was no dispute whatsoever in regard to the formalities, when the purported will was executed in this instance, that the applicant was thus entitled to an order in terms of prayer 3 of the notice of motion and furthermore that at least prayers 2 to 5 should follow as a consequence (prayer 2 subject to prayer 3).

THE RESPONDENT'S STANCE

[33] Mr Brandt, on the other hand, acknowledged the presumption in regard to documents executed before a notary with reference to *Silver Garbus & Co* case, also relied upon by Mr Frank. He submitted however that the facts of the present case indicated a gross digression from such compliance. He submitted further that the applicant's reliance on the amended Section 2 was misplaced, as a basis for the notary's non-compliance, as the amended section does not form part of Namibian law and that it was thus peremptory that the dictates of section 2 of the Wills Act 1953, in 'unamended' form, be observed and applied.

[34] These juxtaposed positions so came to be considered with reference to the abovementioned *Arendse* and *Radley v Stopforth* decisions.

[35] At the time that I initially prepared for the hearing of the matter and after listening to argument I formed the *prima facie* view that the decision in this matter would be easy given the two schools of thought pertaining to this matter. I considered, at the time, that I would probably, as a matter of policy, and also with the wisdom of hindsight, simply follow the *Arendse* matter[17] as this would ensure that ultimately the intention and wishes of the testator would prevail over a possible technical declaration of invalidity, which would result in the intestate liquidation and distribution of also this particular deceased estate.

[17] As in :*Frylinck and Others v The Master and Others* 1976 (2) SA 151 (C) at 153 A-B

[36] On closer scrutiny it however appeared that the *Arendse* case was not precisely on point and is actually distinguishable on the facts from the present case where this court is requested to authorize the *post mortem* 'improvement' of the notarial certification of the deceased's testament. In *Arendse* the court merely allowed the *ante mortem* validation of the will by deciding that a certificate could be put upon the will after signature of the testator and the witness but before the death of the former.[18]

[37] When Baker AJ, as he then was, stated *' … although I am of the opinion that a certificate can be appended post mortem testatoris …'* , such statement was clearly *obiter*.[19]

[38] Upon this discovery it became clear that the decision in this matter would not simply hinge on a policy choice, as persuasively argued by Mr Frank, but that the reasoning of the learned judges in both the *Arendse* and *Radley v Stopforth* cases would once again have to be subjected to closer scrutiny for purposes of also deciding this matter.

THE REASONING IN *ARENDSE v THE MASTER & OTHERS*

[39] The main grounds on which Baker AJ based his finding:

'that the certificate required by sec. 2 (1) (a) (v) can effectively be put upon a will at any time after the testator or anyone else has satisfied the certifying official contemplated by that sub-paragraph that the ostensible testator is indeed the testator and that the document involved is indeed the will of the testator. It can be appended, in my view, at any time after the will has been 'marked' by the testator and signed by the witnesses.

Although I am of opinion that a certificate can be appended post mortem testatoris, for the purposes of this application it is necessary to decide only whether a certificate can lawfully

[18] See *Arendse v The Master* at 365C
[19] See *Arendse v The Master* at 365C

be put upon a will after signature by the testator and the witnesses and before the death of the former. I decide this question in the affirmative …'[20]

appear to be the following :

'I think it desirable, in the first instance, to refer to what I believe to be a correct statement by Murray, that in cases dealing with wills signed by a mark, statutes laying down formalities should be benevolenty interpreted (see 1955 Annual Survey, pp. 122 - 4; 1958 Annual Survey, p. 130, s.v. 'Execution of Wills') …[21]

' … Dr.Joubert ((1955) 18 Tydskrif vir H.R - H.R., pp. 272 - 6), in discussing Nel's case[22] points out that in that case the Court of first instance rejected the will on two grounds. The first was what might be termed the etymological or linguistic ground, i.e. that the words 'is known' referred to a living testator, and could not appropriately be placed upon a will in a certificate after his death. The second ground of rejection is stated in a passage in the judgment of the Court of first instance reading:

'It was a recognised principle of law that in order that a document might have force and effect as a testator's will it must have been validly executed prior to his death. If an act which was, in the circumstances of the case, required by statute to form an essential part of the execution of a will was not performed prior to the testator's death, its performance after his death could in no wise remedy the defect of invalidity which existed when he died.'
As to this, Dr. Joubert says:

'Ons weet nie watter regsgesag aangehaal is ter stawing van die tweede grond nie (passim, the original judgment cites no authority) maar ons het wel die volgende gesag daarvoor gevind. Menochius (1532 - 1607)... verkondig in sy De Praesumptionibus... (etc.) liber 4, praesumptio 21, nr. 19 en 26:

'testamentum incipit habere perfectionem tempore mortis testatoris et tunc confirmatur.'

'n Testament word immers eers by die dood van 'n testateur onherroeplik en onveranderlik.'

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[20] *Arendse v The Master* at 365 A -C
[21] *Arendse v The Master* at 357 D
[22] *Ex parte Nel* 1955 (2) SA 133 (C)

With this there can be no quarrel. But Dr. Joubert then says:

'Dit moet dan wat sy vorm betref reeds voltooid wees om 'n testament te kan wees.' (pp. 273 - 4).

This, with respect, is a disputable statement. That a will speaks from the death of the testator is so; but this merely means that it does not speak until his death or, in other words, the earliest point in time at which it can speak is the moment at which the testator dies. It does not mean that at that moment the will must be perfect and unless it is perfect it cannot be made perfect. The dictum of Menochius relates to a period in which certificates of authenticity were unheard of and all ordinary wills, written or nuncupative, became perfect by the mere fact of repetition before witnesses with due formality, followed by the death of the testator. The dictum was never meant to have the effect of preventing a post mortem validation and cannot be relied upon to support a contention that, upon a proper interpretation of the Wills Act, post mortem validation is not legally possible. Dr. Joubert also points out that the Act contains no provision whatsoever that the certificate required by sec. 2 (1) (a) (v) must be appended in the presence of the testator or of the witnesses (p. 275) as was provided by sec. 1 of Ord. 11 of 1911 of the Orange River Colony in similar cases. I respectfully agree with the statements of HALL, J., and Dr. Joubert that there is no requirement in the Act obliging the certifying officer to certify in the presence of the testator and/or the witnesses; nor, indeed, I would add, at the same time as the signatures of the testator and witnesses are appended. As Dr. Joubert points out (p. 275):

'Met ander woorde, die prosedure vir die aanbring van die sertifikaat in terme van art. 2 (1) (a) (v) is nie dieselfde as vir die ondertekening en attestasie van die testament in terme van art. 2 (1) (a) (i) tot (iv) nie.'

He points out that para. (v) contemplates that the certificate is to be appended after the will has been signed and attested (p. 275). Nor did the Legislature lay down expressly that the certification should take place uno contextu with the signing and attestation.'[23]

' … Prof. Beinart suggests (Butterworth, Law Review, 1955, p. 146) that certification must be effected at the same time as the signature of the will by testator and witnesses because

[23] *Arendse v The Master* at 357H to 358H

'the best and perhaps only opportunity for the magistrate, etc., satisfying himself on all these points would be while the will is being executed. Is it not the intention that a person who cannot sign his name must execute his will in the presence of a reliable person apart from the witnesses?'

With respect, both these propositions are open to criticism. There is no ground for believing that the certifier's best opportunity for satisfying himself as to identity and authenticity is during the course of execution. It is easy to imagine circumstances in which he can only satisfy himself of these matters after execution; one such set of circumstances being when the certifier does not know the testator or the proxy signatory or the witnesses and has to ascertain by proper and conscientious enquiries, which may conceivably take time, whether the alleged testator is indeed the testator, and/or whether this person has indeed directed a proxy to sign for him, and/or whether the document is in fact the will. Nor was it Parliament's intention that a testator who cannot write his name must execute his will in the presence of anyone other than the witnesses.

Prof. Hahlo ((1955) 72 S.A.L.J., at p. 227) shares the view of STEYN, J., in Ex parte Nel, 1955 (2) SA 133 (C) (Full Bench), that

(1) the certificate required by sec. 2 (1) (a) (v) must be appended ante mortem testatoris; and

(2) it is doubtful whether certification after the date of the will but before the date of death is permissible.

He bases his concurrence upon the view that certification forms part of the execution of a will, and states that, in accordance with general principle, certification must therefore take place uno contextu with the other formalities of the will. The question is not discussed beyond the extent to which I have just adverted.

Murray (Annual Survey, 1955, p. 122) aligns himself with the contention of counsel for the appellant in Nel's case that there is no logical reason why the certificate should be given at any particular time: the Act lays down no rule in this regard.

'The section... contemplates that the certification need not be done contemporaneously with the execution of the will and it would be most inconvenient, for a magistrate, etc., to have to attend at the execution of wills, particularly as the sub-section in question covers the case, not only of a testator having to sign a will by means of a mark on account of illiteracy, but also where the testator is in extremis. If the intention was that the certifying official had to see the testator make his mark, the section would... have stated that the will must be executed in the presence of a magistrate, etc., whereas what the certifying person has to do is to satisfy himself (presumably after some sort of enquiry) that the will is the will of the testator, the latter being known to him.'

(The position in regard to certification of identity is now different, of course). With respect, this reasoning seems to me to be sound.'[24]

Rowland, (1966) 29 T.H.R - H.R., pp. 135 et seq., makes the submission that

'Neither the English Law nor, it is submitted, the Dutch notarial will required, as a prerequisite for validity, that the formalities be carried out uno contextu. As these are the sources from which our Wills Act and in particular sec. 2 (1) (a) (v) descended, it would seem that the South African law can hardly, in the absence of specific provision to the contrary, be said to demand either that wills be executed uno contextu, or that the certificate be appended uno contextu.'
(p. 139).

The learned author proceeds to set out the differing opinions of our modern writers on the matter, with his own comments thereon, and draws attention to the attitude of our Courts in these cases, and their tendency towards upholding the validity, rather than the opposite, of a will valid ex facie itself (p. 141) - always postulating that the will is a genuine will and expresses the intentions of the testator. Rowland refers here (p. 141, n. 39), as I have done above, to the views of Van der Linden in his notes to the case reported in the latter's compilation (Verzameling van Merkwaardige Gewijsden, D.1, cas. 25). I agree with Rowland's conclusion that

[24] *Arendse v The Master* at 359A to H

'subject to the proviso that the formalities of a modern will must comply with the requirements of a comprehensive statute, it seems that Van der Linden expresses the spirit of our modern South African law'.
(p. 142).

I agree with his further conclusion that the certificate required by sec. 2 (1) (a) (v) need not be appended at the same time as the signatures required by sub-paras. (i) to (iv) (p. 142).'[25]

'He then proceeds to consider the question whether the certificate can validly be appended post mortem testatoris (pp. 142 - 6). The discussion is in effect a dissection of the reasoning of STEYN, J., in Nel's case. Rowland makes the point that the 1958 amendment to the Wills Act destroys the validity of STEYN, J.'s 'central reason' in Nel's case (i.e. the reason based on the tense of 'is known').

'The certifying officer no longer has to know the testator personally - he merely has to satisfy himself as to his identity. This fundamental alteration argues strongly against the requirement that the certificate be made uno contextu, since it suggests that inquiries concerning the identity of the testator and the authority ('authenticity' is the word I would prefer) of the will will be made... before the magistrate, etc., makes his certificate. Complicated enquiries in the absence of the testator might well be difficult to reconcile with the unus contextus rule. Again, there is no implication in the new words that the testator must necessarily still be alive when the certificate is made, such as was contained in the old words 'is known to him'. The new words, on analysis, and when contrasted with the old words, suggest that the Legislature may well have contemplated post mortem certification when the amendment was made.'
(pp. 145 - 6).

The same observation is quoted in Erfreg at p. 153. I respectfully associate myself with Rowland's remarks; and with great respect to the Court concerned, with Rowland's comments on the case of Ex parte Goldman and Kalmer, NN.O., 1965 (1) SA 464 (W). I therefore agree with Rowland's submission that, in view of the 1958 amendment to the Act,

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[25] *Arendse v The Master* at 360 D to H

the certificate contemplated in sec. 2 (1) (a) (v) can be appended post mortem testatoris (p. 146).'[26]

'They point out further[27], that the purpose of the certificate is to guarantee the authenticity of the testator's mark or the signature of the amenuensis; that the reliability of the certifier does not die with the testator; and ask, with reason, why the reliability of the former should be removed by reason of the death of the latter.

The cases where the present question was raised or touched upon are the following: In Ex parte Nel, 1955 (2) SA 133 (C) (Full Bench), counsel for the appellant submitted that the certificate was designed merely to afford proof of the genuineness of the will; that it had to be done by a selected person of standing; and that it made no difference whether the certificate was appended before or after the death of the testator (p. 135D - E).

STEYN, J., rejected the submission for the following reasons: (i) His Lordship accepted for the purpose of the judgment that the certificate might conceivably be appended after the will had been executed in conformity with sub-paras. (i) to (iv), but considered that it could not be appended later than the death of the testator, because if it could be appended post mortem the validity of a will signed with a mark or cross might be left uncertain for months, or even years, after the testator's death. His Lordship said:

'I do not think that judging by the language used that could have been intended by the Legislature.'

(ii) Post mortem certification was too late because the tense used in the expression 'is known' (pp. 135F - 136B) made this clear. A statute requiring an officer to certify that a testator 'is known' to him carries a very strong indication that the testator must be alive at the A time of certification, and only if the words 'or was' could be implied between the words 'is' and 'known' could the appellant's contention be upheld. In the interpretation of statutes it is a cardinal principle that words are not to be inserted by implication unless the implication is a necessary one, and in the instant case there was no such necessityfor the implication.

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[26] *Arendse v The Master* at 360 H – 361 C

[27] Van der Merwe and Rowland, *Die Suid-Afrikaanse Erfreg*, 1969, Pretoria at p152?

(iii) The requirements of sub-paras. (i) to (v) were requirements which every testator was presumed to know, and a testator signing with a mark was presumed to know that without the necessary certificate his will would be invalid (p. 136A).

(iv) A post mortem validation by certification was a circumstance over which the testator could have no control, and the Legislature could never have intended such post mortem validation. There was no express provision in the statute for such validation (p. 136A).

(v) It was the duty of the testator to attend to the formalities prescribed by sub-paras. (i) to (v) and, if at his death any of them were not complied with, the will must be deemed to be invalid (p. 136D).

I have, with the greatest respect, the following comments to make on the above reasoning.

Ad (i): It would be most unlikely, in practice, for the validity of a will to be left uncertain for any significant length of time merely because the certificate might be appended post mortem testatoris. The officers named in sub-para. (v) are all highly responsible persons. It is inconceivable, with respect, that any such officer called upon to function in terms of that sub-paragraph would fail to do his duty. There might be some short delay caused by difficulty in ascertaining the identity of the testator, assuming him to be a stranger to the officer concerned, but I cannot imagine that the delay would ever be more than a few days. A further reason for delay might be the necessity for making proper enquiries as to the authenticity of the will, in a case where the witnesses did not know that it was a will that they were witnessing (the law does not oblige them to know this - Ex parte Suknanan and Another, 1959 (2) SA 189 (D) at p. 190H, and numerous examples in English law) and the testator had in the meantime died.

Ad (ii): The reasoning based on the tense of the verb in the expression 'is known' is sound. But that expression has been eliminated from the Act and the requirements of sub-para. (v) are now significantly different from what they were in the first instance.

Ad (iii): The proposition that there is a presumption that every testator knows the requirements of sec. 2 (1) (a) (v) and would know that if his will were not duly certified in terms of sub-para. (v) it would be invalid is, as HENNING, J., has pointed out, questionable.

'The presumption that everyone knows the law is, as far as I am aware, of very limited application, particularly in civil law'
(see Soonaram v The Master and Others, 1971 (3) SA 598 (N) at p. 604G) and see also Phillipson v Bahadur, 1956 (1) SA 83 (SR) at p. 95, citing Tighy v Putter, 1949 (1) SA 1087 (T) at p. 1108, which in turn cites Evans v Bartlam, 1937 A.C. 473 at p. 479). In my respectful opinion HENNING, J., correctly states the position in the following words:

'Sec. 2 (1) (a) of the Wills Act applies to every testator whether or not he is acquainted with its provisions' and the existence of the alleged presumption in connection with sec. 2 (1) (a) of the Wills Act appears to have been negatived by MULLER, J. (now J.A.), in Van der Merwe v Die Meester en 'n Ander, 1967 (2) SA 714 (SWA). Tighy v Putter, and Evans v Bartlam, supra, indeed go further than the passage cited from Soonaram's case: they deny any such presumption in toto. The same denial of its existence for the purposes of the civil law appears in Reynolds v Kinsey, 1959 (4) SA 50 (FC) at p. 60A, citing both Evans v Bartlam, supra, and The Queen v Mayor of Tewkesbury, (1868) L.R. 3 Q.B. 629 at p. 635. See also the cases cited in Reynolds v Kinsey at p. 61, and the reference to Kerr on Fraud and Mistake at p. 62.

Ad (iv): It is correct to say that validation of his will by certification after his death is a circumstance over which the testator would have no control; but to continue by saying that the Legislature could never have intended such validation is a non sequitur. Ante mortem validation is also a circumstance over which the testator has no control. He cannot force a certifying officer to certify any more than he can force persons to act as his witnesses or as his proxy signatory. He has no real control over any of these persons, and it is therefore, in my submission, pointless to use the fact of 'no control' as an argument that post mortem validation was never intended (or by implication even contemplated) by Parliament. It is true that there is no express provision for such validation; but if I am correct in my view that the unus contextus rule has no place in our modern common law this does not matter. The fact is that there is no express provision that post mortem validation is not permitted.

Ad (v): It seems to me incorrect to say that formalities (i) to (v) set out in sec. 2 (1) (a) of the Act are formalities which the testator (himself) must attend to. I do not mean 'must himself perform' - this would be absurd. I think what STEYN, J., meant was that they are formalities which the testator himself had to see were done: and, this being so, the question arises, how can he see to the certification under sec. 2 (1) (a) (v) if the officer called in delays in completing the necessary enquiries for a day or a week, during which time, prior to completion of the enquiries, the testator dies? In my submission Parliament did not, and could not, have intended a will to become invalid merely because an officer over whom the testator has no control does not complete his enquiries - his bona fides and expedition being unquestioned - within a time sufficient to allow him to certify before the testator dies.

It must, however, be borne in mind that the real reason for dismissing the appeal in Nel's case was one based on wording which has since been changed, the other reasons (in my opinion) being subsidiary and perhaps not even necessary. It will be observed (p. 135F) that STEYN, J., said that he was prepared to assume that the certification would be done after the testator had executed his will, provided the will complied with the requirements of sec. 2 (1) (a) (i) to (iv).'[28]

'In Ex parte Suknanan and Another, supra, BROOME, J.P., seemed to have had some doubt as to whether the certifier under sec. 2 (1) (a) (v) had to be present when the testator signed and the witnesses attested and signed, all three of these in terms of sub-paras. (i) to (iv) (see p. 190G). The indication is not a strong one, however, and the question of the necessity of simultaneous attendance by all parties contemplated by sec. 2 was not pertinently before the Court.

In Ex parte Sookoo: In re Estate Dularie, 1960 (4) SA 249 (D) at p. 251 (top), CANEY, J., said that

'post-mortem certification is too late'

and cited Nel's case as authority. There was no independent enquiry into that question, which was not the question before the Court.

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[28] *Arendse v The Master* at 361 E – 363 H

In Soonaram v The Master and Others, 1971 (3) SA 598 (N), it was held that a will invalid for want of form at the date of the testator's death in that the certificate prescribed by sec. 2 (1) (a) (v) did not certify the authenticity of the will, could not be amended post mortem so as to cure the lack. There can be no doubt, with respect, that the judgment of HENNING, J., correctly described the certificate as defective. That finding disposed of applicant's main argument. In so far as concerned the alternative submission that the certificate could be amended post mortem testatoris the learned Judge adopted the main line of reasoning followed by STEYN, J., in Nel's case, namely, that the words 'is known' postulate a living testator. HENNING, J., equated 'is known' with 'has satisfied' to the extent that he considered that the words 'has satisfied' also postulated a living testator, the words being 'hardly appropriate when they are related to a person who is deceased' (p. 604F). With the greatest deference to the learned Judge, I am unable to accept this reasoning. A certificate reading 'the testator is known to me' carries the implication that the testator is alive at the time of certification, but a certificate reading 'I certify that I have satisfied myself as to the identity of the testator' carries no such implication. The words are equally appropriate to the situation where the testator is still alive, and to the situation where he is already dead, at the time of certification.'[29]

'The other ground relied upon by the learned Judge for denying the permissibility of post-mortem certification was that

'the Legislature could not have contemplated that a will, invalid at the testator's death, could be validated after his death, by some act performed by another, for this implies the notion of 'conditional validity', which is foreign to our law' (p. 605A).

I have endeavoured to point out above (in commenting on Nel's case) that the certification is in its very nature an act which must necessarily be performed by someone other than the testator, and, furthermore, someone over whom he has no control. To this extent Parliament itself has ordained that a 'marked' will is one having conditional validity - the validity of the will being conditional upon the performance of an act of validation by someone other than the testator.

I conclude, therefore, that the certificate required by sec. 2 (1) (a) (v) can effectively be put upon a will at any time after the testator or anyone else has satisfied the certifying official contemplated by that sub-paragraph that the ostensible testator is indeed the testator

[29] *Arendse v The Master* at 364 A – F

and that the document involved is indeed the will of the testator. It can be appended, in my view, at any time after the will has been 'marked' by the testator and signed by the witnesses.'[30]

COMMENT ON THE REASONING IN *ARENDSE v THE MASTER & OTHERS*

[40] The first aspect emerging from the thorough analysis conducted by the learned judge is that the reasoning of the Full Bench in *Nel's* case was subjected to close scrutiny. It is to be noted that *Nel's* case was however decided against the backdrop of the different wording of the underlying statutory provision, which, at the time of the decision in *Nel*, required the person affixing the certificate in terms of Section 2(1)(a)(v) to certify that ' … *the testator is known to him and that he has satisfied himself* … '. In this regard the tense used in the statute played an important role in the interpretation and conclusion reached by Steyn J, on behalf of the court, in *Nel*. This reasoning was acknowledged by Baker AJ as being sound. The wording of the statute was however changed[31] subsequently in that it was then required that the certificate reflect that the person making it ' *… has satisfied himself as to the identity of the testator and …* '. This is also the statutory position that has remained applicable in Namibia - it already having been pointed out that the provision was further amended in South Africa by Act 45 of 1992. The comprehensive discussion of the *Nel* judgment in *Arendse* will thus have to be read with this distinction in mind.

[41] While considering the decision in *Arendse* in this light it is important to note further that the judgment also acknowledges that it is a 'recognized principle of law' – also in Namibian law - that in order for a document to have the force and effect of a testator's will, it must have been validly executed prior to the testators death.

[42] Baker AJ also acknowledged that a last will and testament only becomes irrevocable and unchangeable on the death of the testator. Also this statement seems to be a correct proposition in Namibian law.

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[30] *Arendse v The Master* at 364 H – 365 B

[31] Section 1(a) of Act 48 of 1958

[43] Baker AJ – although conceding 'that a will speaks from the death of the testator' - however took issue with Dr Joubert's statement that a testament should at the time of death of the testator be completed/executed, form wise, in order to qualify as a valid will. The learned judge observed that the earliest point in time at which it can speak is the moment at which the testator dies, but that this does not mean that, at that moment, the will must be perfect and, unless it is perfect, it cannot be made perfect.

[44] I doubt whether this statement can be correct despite its logical formulation. If a testament's 'earliest moment at which it can speak' is at the time of the testator's death – that being the 'key-moment - and – if a testament also becomes irrevocable and unchangeable at that 'moment' – why should it be permissible to correct or perfect a testament after that event, ie. after the said 'key-moment'? In other words, why should it be permissible to extend the time 'to allow the will to speak' at a later stage, when the time at which it should speak, in accordance with the above mentioned general principles, has already come and gone? Implicit in this is that, at the material time, the will was, so-to-speak, 'unable to speak'.

[45] It is true - and Baker AJ was alive to this - that there is no express requirement in the section obliging the certifying officer to certify the mark of a testator in the presence of the testator and/or the witnesses at the same time that the mark of the testator and witnesses are appended. The learned judge also recognized, correctly in my view, as also pointed out by Dr. Joubert, that the procedure, for the appending of the certificate - as laid down by section 2 (1) (a) (v) - is not the same as that applicable to the signing of a will in terms of sections 2 (1) (a) (i) to (iv.) - and that sub-section (v) thus contemplates that the certificate is to be appended after the will has been signed and attested by the testator and the witnesses.

[46] But does all this mean then that the Legislature intended that a certifying officer could now simply, and in breach of the abovementioned general principles, be allowed to correct or improve a defective certification *post mortem*. I would think not. In this regard is must be of relevance that legislation is to be interpreted with

reference to the presumption that the Legislature does not intend to change the common law or the existing statute law more than is necessary.[32]

[47] As far as the court's association with the remarks of the learned author *CJ Rowland*, relating to *post mortem* certification, is concerned, it must be said that the high-water mark of that argument is the observation that the 'new' words of the section - no longer requiring the certifying officer 'to know' the testator – now merely requiring that he 'has to satisfy' himself as to the identity – apparently indicate that the Legislature 'may well have contemplated *post mortem* certification – is no stronger than recognizing that this may be a possibility of what could have been in the mind of the lawmakers.

[48] It is indeed so that section 2(1)(a)(v) contemplates an act beyond the control of the testator, but so is the willingness of any witness to sign a testament. This factor is accordingly 'neither here nor there'.

[49] The rhetorical question posed in regard to the 'purpose of the certfifcate' and the point made that there is no reason 'why the reliability of the certifier should die with the testator', fail to take into account the crucial time, at which a will should give certainty, ie. 'should speak'. Surely this could not have been intended to be 'at any time' or 'at some undetermined date in the future'.[33]

[50] Also the argument made in the course of considering the reasoning of the *Nel* judgment - to the effect that it is unlikely that the validity of a will would be left uncertain for any significant length of time, because the officers entrusted with the certification 'are all highly responsible persons' - is no stronger than the 'no control' argument made in respect of witnesses and the certifying official.

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[32]See for instance: *Du Toit v Office of the Prime Minister* 1996 NR 52 (LC) at 74B See also : Cockram *Interpretation of Statutes* (at 98-9); Steyn *Uitleg van Wette* at 16; Du Plessis *Interpretation of Statutes* at 69 – 73; see also *Prosecutor-General v Uuyuni* (POCA 4/2012) [2013] NAHCMD 67 (12March 2013) reported at http://www.saflii.org/na/cases/NAHCMD/2013/67.html at [49]

[33] See for instance : *Ex parte Nel* at 135

[51] The same goes for the observations made in regard to the formalities, which a testator himself should see to/arrange in order to have any intended will properly and validly attested to.

[52] Although I am of the view that it would be an easy matter to arrange for the simultaneous witnessing and signing/making of a mark and certification of the identity of the testator of a will – after all it is common practice nowadays to be required to provide proof of identity everywhere and for even the most mundane reasons – and were passports and even drivers licences provide acceptable proof of identity – I cannot say that this factor – although relevant in everyday practice – is one that sways the debate decisively one way or the other.

THE REASONING IN RADLEY v STOPFORTH

[53] Unfortunately the judgment is in the Afrikaans language and I have not had access to an officially translated version. I will nevertheless endeavor to reflect the salient aspects of the judgment as I have understood them and comment thereon.

[54] The learned judge of appeal commenced the hereto relevant part of his judgment[34] by observing that it is firstly necessary to accept that the Legislature knew that the estate of a person, dying without a will, will be administered - and the heirs be determined - in accordance with the common law. For those wishing to make a testament the Legislature has determined certain requirements for its validity. In the opinion of Rumpff CJ the Legislature intended that a testament be made in normal circumstances and did not provide for the eventuality where, because of extraordinary circumstances, the requirements of the statute could not strictly be complied with. Accordingly it is required that two witnesses must attest to the signature of the testator in his presence. Should the testator be sick and the testament has to be signed in his bed and if he would die after the first witness has signed but before the second witness could do so the testament would be invalid, despite the second witness appending his signature cold-bloodedly thereafter, simply because the Legislature did not make provision for such a special case. Indeed one

[34] *Radley v Stopforth* as from 529 A

cannot expect of the lawmakers to make special provision for each possible extraordinary eventuality when they set certain requirements for validity. Secondly the inference must be drawn that the Legislature has expected that a testator, who wishes to make a valid will, either knows what the requirements for the drawing up of a valid will are, or he will seek advice on this before he draws up the will.

[55] Rumpff CJ was further of the view that the Legislature was also aware that, in a general sense, a will becomes effective upon the death of the testator. In this regard the learned judge referred to *Estate Orpen v Estate Atkinson and Others* 1966 (4) SA 589 (AA) where the court with reference to Scottish law said:

‘These expressions of opinion are based not on any peculiarity of Scots law, but upon a common fundamental principle, namely,that the testator's will speaks from the date of his death."[35]

and with reference to Menochius, De Praesumptionibus, Coniecturis, Signis et Indiciis Commentaria, liber 4, praesumptio 21, nr. 19 en 26:

"Testamentum incipit habere perfectionem tempore mortis testatoris et tunc confirmatur."[36]

[56] The court then observed that the question, whether or not the certificate could be appended after the death of the testator, depended on the intention of the Legislature. It was clear to the court that the requirement of such certificate, as imported by way of section 2(1)(a)(v), was intended to be a requirement for execution and not just simply a stipulation which would permit later proof relating to identity. This is where the Legislature does not require that the certifier must certify in the presence of the testator but the manner in which the Legislature has formulated the requirement left the learned judge with no doubt that one here deals with a requirement relating to execution. This view is supported by the consequent manner in which the Legislature has utilized the present tense : (‘unless the will … is signed’; and ‘if the will is signed, a magistrate … certifies at the end thereof … ‘) which, in the

[35] At 595
[36] *Radley v Stopforth* at 528E - F

judges view, indicates a continuous process which would normally entail that the certifier would append his certificate immediately, or at least shortly after the testament was signed by the testator and the witnesses, but that he certifies at the end thereof at the latest before the testator's death.[37]

[57] The learned judge also held the view that the Legislature regarded the certificate as an amplifying act by a special official and that this amplifying act was intended to eliminate possible uncertainty because one here deals with a simple mark which cannot just be identified like any normal signature.

[58] As far as the permissibility of *post mortem* certification was concerned, as proposed by the learned author *CJ Rowland*, Rumpff CJ demonstrated with reference to his analysis of the authorities by *JL van der Merwe* and *Wassenaar* that *Rouwland* was not correct in this regard :

'Die idee dat die sertifikaat ná die dood van erflater aangebring kan word, word o.a. deur C. J. Rowland in 'n artikel in die Tydskrif vir Hedendaagse Romeins-Hollandse Reg bepleit. In band 29 (1966) verskyn hierdie artikel op bl. 135 en op bl. 144 verklaar die skrywer die volgende:

"There is, moreover, clear authority for the view that, both in Roman-Dutch and in South African law, some of the formalities for a valid notarial will could be completed after the testator's death, namely the reduction to writing of the wishes of the testator expressed to the notary before two witnesses. This fact, and the possibility of post mortem signature by the notary and two witnesses, undermines the view that all the necessary formalities for a valid will must be attended to by the testator and completed before his death."

In band 32 (1969) van dieselfde tydskrif wys J. L. van der Merwe in 'n artikel op bl. 399 daarop dat Rowland se standpunt, hierbo weergegee. nie korrek is nie en verklaar die volgende:

"Hierdie mening staaf hy met verwysing na P. Voet, Van der Linden en Van Bynkershoek. Die fout wat Rowland maak, is dat hy aanvaar dat dit 'n vormvereiste was om die notariële testament op skrif te stel - Van Bynkershoek in sy Observationes Tumultuariae 1 56 sê dan juis dat die notariële testament na die dood van die testateur op skrif gestel mag word, omdat die testament reeds voltooi is nadat die testateur sy wense aan 'n notaris en

[37] *Radley v Stopforth* at 529A -

twee getuies bekend gemaak het. Volgens genoemde ou skrywers is skrif dan nie 'n vormvereiste vir geldigheid van n notariële testament nie. Aangesien art. 2. Wet 7 van 1953. geen twyfel laat dat die sertifikaat 'n vormvereiste is nie, is dit duidelik dat Rowland se analoog nie kan opgaan nie en dat die ou skrywers hom nie staaf nie - inteendeel."

Ook blyk dit duidelik uit Wassenaar se Practyck Notariael (Utrecht, 1746) dat die notariële geskrif destyds alleen ter bekragtiging gedien het en dus bewysmateriaal en nie verlydingsvereiste was nie. In Cap. XVIII para. 3 verklaar Wassenaar soos volg:

"Vorders worden de Testamenten onderscheiden in mondelinge uiterste dispositien en schriftelyke; mondelinge zyn, wanneer den Testateur zyne uiterste wille by monde verhaald, in sulker voegen, dat den Notaris, de wille en meeninge uit den mond van den Testateur verstaan hebbende, deselve by geschrifte stelt, en den Testateur ende Getuigen voor leest, ende daar na den Testateur in tegenwoordigheit van den Getuigen vraagt, of hy wel verstaan heeft, en soo zyne uiterste wille is, ende antwoordende ja, soo wordt 't selve geschrifte bv hem Testateur ende de Getuigen neffens den Notaris ondertekent, ende in zyn Prothocol geregistreert, welke soorten van Testamenten by ons meest gebruikt worden, vid. Neostad. dec. Cur. Holl. dec. 1. in fin. Soo nochtans, dat die geschrift gemaakt wordt tot meerder versekerheit en klaarder bewys, sonder dat het geschrifte ende tekenen van den Testateur ende Getuigen daar toe nodig is: want soo het gebeurde, dat den Testateur door de siekte ofte andere noodt verhinderd worde dit alles te onderhouden, ende simpelyk by monde verklaard hadde voor Notaris ende Getuigen, wat zyne wille was, soude het soo voor goet moeten worden gehouden, vid. Vigl. & Schneidw. ad par, fin. Inst. de test. ordin. IC. Bat. Consult. 12, 13, 14. & seq. tom. 2. Coren. obs. 10. Clar. par. testament, qu 4. num. 1. soo mag ook by Getuigen bewesen worden, dat den Testateur geseit heeft, en vergeten is te schryven, als ook des Testateurs meeninge Zutph. verb. testament num. 21. hoewel in Vrankryk by arrest tot Parys is verstaan, dat 't selve by geschrift moet worden gestelt. vid. Ann. Rob. rer. jud. lib. 2. c. 10, ende ook als het Testament by geschrifte is gestelt, ende den Testateur sterft. eer het voorgelesen is, wordt niet gehouden, Zutph. d. loc. num. 18. post Sand. lib. 4. tit. 1. def. 5., vide Wesel ad Novell. Constit. Ultraject. ad art. 17. num. 4. & seqq."

Die oorspronklike woorde van die Wetgewer, n1. dat die sertifiseerder moes sertifiseer dat "die erflater aan hom bekend is", is 'n sterk aanduiding van die bedoeling om enige vorm van bedrog uit te skakel, en stem ooreen met wat o.a. Wassenaar in sy a.w. gesê het in para. 9 nl.:

"Ende dat dan Notaris ofte de Getuigen den persoon wel kennen moeten, sondering die in Testamenten worden gestelt. Ordonn. van Utrecht nopende Not art. 6. Place. van Holl.

art. 30 van den 4. October 1540. ende namentlyk als den testateur siek te bedde leit, in welken gevalle volgens de DD. ad. 1. 9. Cod. de testam. niet genoeg en is, dat den Notaris ende Getuigen den Testateur horen spreken, maar dat zy hem ook moeten sien, om daar mede alle bedenkingen van bedrog te voorkomen, dat geen ander opgemaakt persoon te bedde leit, die hem gelaat kwalyk te E konnen spreken van groote siekte. of pyn in de keel, ende geen licht te konnen verdragen, als den Testateur, die hy hem veinste te wesen. al overleden is, gelyk J. Clar. 1. 3. par. testm qu. 59. ende andere verhalen gebeurt te wesen, vide Leeuw. Pract. Not. part. 3. c. 18. num 5. ende als het een mondeling Testament is, moeten de Notaris ende Getuigen den Testateur niet alleen horen. maar ook duidelyk verstaan. wat hy seit ofte antwoord, 1. 21. par. per nuncap. C. de testam. 1. F 21. ff. eod, par. ult. Inst. eod. Zutholt. differt, in. Inst. 7. 22, 23. & seq." [38]

[59] The original wording of the section, namely that the certifier must certify *'that the testator is known to him'* was then regarded to be a strong indication that the Legislature intended to eliminate fraud and that this correlated with what was stated *inter alia* by *Wassenaar* at para 9, namely:

"Ende dat dan Notaris ofte de Getuigen den persoon wel kennen moeten, sondering die in Testamenten worden gestelt. Ordonn. van Utrecht nopende Not art. 6. Place. van Holl. art. 30 van den 4. October 1540. ende namentlyk als den testateur siek te bedde leit, in welken gevalle volgens de DD. ad. 1. 9. Cod. de testam. niet genoeg en is, dat den Notaris ende Getuigen den Testateur horen spreken, maar dat zy hem ook moeten sien, om daar mede alle bedenkingen van bedrog te voorkomen, dat geen ander opgemaakt persoon te bedde leit, die hem gelaat kwalyk te konnen spreken van groote siekte. of pyn in de keel, ende geen licht te konnen verdragen, als den Testateur, die hy hem veinste te wesen. al overleden is, gelyk J. Clar. 1. 3. par. testm qu. 59. ende andere verhalen gebeurt te wesen, vide Leeuw. Pract. Not. part. 3. c. 18. num 5. ende als het een mondeling Testament is, moeten de Notaris ende Getuigen den Testateur niet alleen horen. maar ook duidelyk verstaan. wat hy seit ofte antwoord, 1. 21. par. per nuncap. C. de testam. 1. F 21. ff. eod, par. ult. Inst. eod. Zutholt. differt, in. Inst. 7. 22, 23. & seq."[39]

[60] The learned judge of appeal was convinced that the replacement of the words ' … *that the testator is known to him* … ' by the words ' … *he has satisfied himself*

[38] *Radley v Stopforth* at 529D – 530C
[39] *Radley v Stopforth* at 530 C - E

as to the identity of the testator … ‘ did not happen with any other intention but to substitute ‘knowledge’ of the testator with the ‘ identity’ of the testator and when a certifier certifies that he has satisfied himself as to the identity of the testator, the intention was that this should mean that he has satisfied himself as to who the testator ‘is’ (and not ‘was’), while he certifies. In each case the wording of the section 2 is clear:

> ‘no will executed on or after the first day of January, 1954, shall be valid unless –‘ it complies with certain requirements. A testament cannot be executed after the death of the testator unless the Legislature has specially provided for such eccentric ‘execution’. [40]

[61] For these reasons the appeal court felt that the appeal could not succeed and that the certifier, in that instance, could not be granted leave to supplement his certificate after the death of the testator.

COMMENT ON THE REASONING IN RADLEY v STOPFORTH

[62] In regard to what was said by the Appellate Division I firstly need to signal my respectful agreement with what was stated by the learned judges of appeal in regard to the background circumstances known to the Legislature at the time of passing the Wills Act. These background circumstances also place the statute and the section in context. Such circumstances and such context are obviously relevant for purposes of correctly interpreting section 2(1)(a)(v) of the Wills Act.[41]

[63] It is indeed so that also, from a practical perspective, the certificate in terms of Section 2(1)(a)(v) will always be a supplementary step in the execution of a will and it does not take much to imagine why the certification of a mark is required and why such certificate can only be appended after a mark has actually been made.

[64] It must also be correct that the certification of a will must be regarded as a requirement for the valid execution of a will. This emerges also from the use of the conjunctive ‘and’ as utilised by the Legislature at the end of each sub-section – ie.

[40] *Radley v Stopforth* at 530 F - H

[41] See for instance *Jaga v Dönges NO; Bhana v Dönges NO* 1950 (4) SA 653 (A) at 662-4

sub-sections 2(1)(a)(i) to (iv) - which shows that a relationship between these sub-sections and sub-section 2(1)(a)(v) was intended and which use is also indicative that a certain sequence of events was intended during the execution of a will.

[65] It is important to note that also the highest court of South Africa, at the time, considered the moment of death, regarding the making of a will, as a key moment.

[66] It is further of relevance that the learned author *CJ Rowland* appears to have been mistaken in his view that the certificate can be appended *post mortem*. As was pointed out by the court in *Radley's case*, if a certificate can be appended *post mortem*, it can, as a matter of logic, also be improved upon *post mortem*. As *post mortem* certification is however founded on a misinterpretation of the old authorities any *post mortem* improvement of a certificate would similarly be founded upon a mistaken view.

[67] In addition I can find no reason to conclude that the learned Chief Justice was incorrect when he reasoned that the replacement of the words ' … *that the testator is known to him* … ' by the words ' … *he has satisfied himself as to the identity of the testator* … ' did not take place with any other intention but to substitute 'knowledge' of the testator with the ' identity' of the testator and when a certifier certifies that he has satisfied himself as to the identity of the testator, the intention of the lawmaker was that this should mean that he has satisfied himself as to who the testator 'is' and not 'was'.[42]

[68] Ultimately it emerges from this comparative analysis that actually both the courts in *Arendse* and in *Radley* came essentially to the same conclusion as to how section 2(1)(a)(v) of the Wills Act is to be interpreted, in the sense that - in terms of the ratio of *Arendse* - the certifier can lawfully put his certificate on a will as required by section 2 (1) (a) (v) of the Wills Act, 7 of 1953, as amended, at a time after signature by the testator and the witnesses but before the death of the former: it

[42]In this regard it should further be kept in mind that also Baker AJ in *Arendse – at 362G-H* - was of the view that the argument in *Nel,* based on tense, was a sound one.

need not be appended at the same time as the signatures required by sub-sections (i) to (iv). This is also the conclusion of the Appellate Division in *Radley v Stopforth*.[43]

[69] Also in my respectful view this seems to be the correct conclusion – after all it was shown that the obiter remarks, of Baker AJ, relating to the *post mortem* certification of a will, where not in accordance with the Roman Dutch authorities. Most importantly and in any event any *post mortem* certification would also not be in accordance with the underlying fundamental principle that a will should speak from the moment of the testators death: I reiterate:

'Testamentum incipit habere perfectionem tempore mortis testatoris et tunc confirmatur.'

[70] It is particularly in view of these principles and factors that the interpretation contended for, on behalf of applicant, cannot be upheld as it continues to seem 'eccentric'[44] and should be regarded as 'absurd' in an interpretational sense.

[71] In the premises I have thus come to the conclusion that the thorough reasoning and rationale of the South African courts relating to the interpretation of section 2(1)(a)(v) and thus as to permissibility of the appending or improving of a certificate in terms of section 2(1)(a)(v) of the Wills Act 1953, *ante mortem testatoris*, is sound and should be adopted also in this jurisdiction, save then for the obiter remarks made by Baker AJ in regard to the permissibility of a *post mortem* certification in terms of section 2(1)(a)(v), ostensibly based on erroneous authority.

[72] As on the interpretation of the Wills Act 1953 by these authorities the sought *post mortem* completion of the notarial certificate to be appended in terms of section 2(1)(a)(v) is impermissible the application cannot succeed and must be dismissed with costs.

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[43] At 529C

[44] *Radley v Stopforth* at 530 H

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H GEIER

Judge

APPEARANCES

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