2013 Journal for Juridical Science 38(2):1-16

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Exclusion of liability in wills

Summary

A high level of skill is required from will drafters when drafting wills. Our courts have recognised that will drafters who make mistakes may be liable towards disappointed beneficiaries for their negligence in the drafting or execution of wills. Applications in terms of section 2(3) of the *Wills Act* 7 of 1953 point to the possibility that this liability may be even wider and, consequently, drafters are trying to protect themselves by inserting so-called 'disclaimers' in wills. The purpose of this article is to discuss these disclaimers and to determine whether it is possible for a will drafter to exclude this liability. Wills are unilateral legal acts and it is, therefore, not possible for such documents to include provisions of a contractual nature that are adjudicated by the measure of consensus reached. A testator may, however, of his own free will, include wording in his will that exempts the drafter, but care has to be taken with the formulation of this wording. The attention of the testator has to be drawn to such wording when using a standard form will and it remains to be seen whether the informed testator will sign such a will.

Die uitsluiting van aanspreeklikheid in testamente

'n Hoë vlak van vaardigheid word van testamentopstellers verwag wanneer testamente opgestel word. Ons howe erken dat testamentopstellers wat foute begaan aanspreeklikheid teenoor teleurgestelde begunstigdes mag opdoen vir hul nalatigheid in die opstel of verlydingsproses van testamente. As gevolg van aansoeke ingevolge artikel 2(3) van die *Wet op Testamente* 7 van 1953, bestaan die moontlikheid dat aanspreeklikheid selfs wyer mag strek en gevolglik poog testamentopstellers om hulleself te beskerm deur sogenaamde uitsluitingsklousules in testamente in te sluit. Die doel van hierdie artikel is om hierdie uitsluitingsklousules te bespreek en om ondersoek in te stel na die vraag of dit inderdaad vir 'n testamentopsteller moontlik is om aanspreeklikheid uit te sluit. Testamente is eensydige regshandelinge en dit is dus nie moontlik om bedinge van 'n kontraktuele aard wat gewoonlik op sterkte van die mate van *consensus* bereik, beoordeel word, daarin in te sluit nie. 'n Testateur kan egter, uit sy eie vrye wil, bewoording in sy testament insluit waardeur hy die testamentopsteller kwytskeld van aanspreeklikheid, maar daar moet omsigtig met hierdie bewoording omgegaan word. Die aandag van die testateur moet ook op sodanige bewoording gevestig word wanneer 'n standaardvorm testament gebruik word en dit bly onseker of die ingeligte testateur so 'n testament sal onderteken.

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1. Introduction

In recent years, the increase in litigation involving not only the content, but also the formal validity of wills indicates that there may be serious problems with regard to the care that is being taken in the drafting and execution process. Not only have wills drafted by testators themselves without expert help[1] been the subject of many a case recently, but those that were drafted and executed with so-called professional help have also made an appearance in our courts.[2] In many of these cases, the beneficiaries were apparently unaware of the fact that they could hold the will drafters, who had caused the loss to the beneficiaries, liable for their negligence or incompetence; otherwise, many more cases might well have appeared before our courts. Nevertheless, it would seem that certain sections of the will-drafting community have become aware of their possible liability and are attempting to institute indemnity against these claims by adding so-called 'disclaimers', 'exclusion clauses' or 'exemption clauses' to their standard will forms.

The aim of this contribution is not to investigate the desirability of a claim against a negligent will drafter,[3] nor to determine factors to be proved for such a claim, as it has been held by our courts that negligent will drafters are liable for their negligence and that delictual claims may be instituted against them.[4] The aim of this contribution is rather to investigate the question as to whether it is possible to exclude liability for loss caused by negligent will-drafting. In the process, the use of so-called 'disclaimers' or 'exemption clauses' added to wills will be investigated. The article further investigates whether it is possible for a testator to exempt a drafter of a will from liability for negligent will-drafting in some other way.

1 See the facts of *Macdonald v The Master* 2002 5 SA 64 (O); Van *Wetten v Bosch* 2004 1 SA 348 (SCA); *Smith v Parsons* 2010 4 SA 378 (SCA); *Van der Merwe v The Master* 2010 6 SA 544 (SCA); Taylor v Taylor 2012 3 SA 219 (ECP); *Reichman v Reichman* 2012 4 SA 432 (GSJ). See also the SCA's scathing remarks on drafters in R*aubenheimer v Raubenheimer* 2012 5 SA 290 (SCA):292D-F.

2 See the facts of *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C); *Giles v Henriques* 2008 4 SA 558 (C); *Diehl v The Master* [2008] 4 All SA 430 (T); *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA).

3 See the discussion below and *Tshabalala v Tshabalala* 1980 1 SA 134 (O); *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (C); *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C); *BOE Bank v Ries* 2002 2 SA 39 (SCA); *Pretorius v McCallum* 2002 2 SA 423 (C); Cloete 2003:540. However, see Sonnekus 2004:649 for arguments against such a claim.

4 *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (C); *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C); *BOE Bank v Ries* 2002 2 SA 39 (SCA); *Pretorius v McCallum* 2002 2 SA 423 (C).

2. The drafter's duty

It is well known that the drafting of a will is not an easy task and should be approached with caution.[5] Any drafter, whether he[6] is a legal professional, a financial adviser or simply a friend doing a friend a favour, needs a high level of knowledge of the law of succession and the law in general, and needs to show a very high level of skill when drafting a will.[7]

It is also trite law that a testamentary beneficiary who is "disappointed"[8] because of the loss of his inheritance due to a lack of skills on the part of the will drafter may institute a claim against such drafter for his loss.[9] This delictual claim is based on the legal duty to ensure that the beneficiary's expectations are not frustrated.[10] South African courts and authors[11] were apparently reluctant to allow such liability at first, but it has now become settled law. In *BOE Bank Ltd v Ries*,[12] the Supreme Court of Appeal clearly recognises such a delictual claim.[13] Sonnekus,[14] despite indicating that our courts have proposed liability on the part of will drafters,[15] argues that a consistent application of the principles of South African law should militate against such liability of will drafters, as beneficiaries do not have guaranteed claims to an inheritance simply on the basis of their relationship to a deceased. He argues that the beneficiary has no legally protected *spes* to inherit such as the "anwartschafrecht"[16] known to German law and should, therefore, not be able to claim against a will drafter if the drafter was negligent in ensuring the proper execution of the will. Although it may be true that South African law has different underlying principles, this argument does not take into account the fact that the beneficiary would have been guaranteed his inheritance had the will been properly

5 Pace & Van der Westhuizen (Loose leaf publications):138-139, paragraph A79; Jamneck 1992:467; Schoeman 1997:352, 356; Cloete 2003:540; Cornelius 2004:699.

6 In this article, the reference to the male gender automatically includes the female.

7 Pace & Van der Westhuizen (Loose leaf publications):64, paragraph A42; Cloete 2003:542; *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C):969.

8 For lack of a more descriptive term, the term used by other authors will be employed in this instance. Sonnekus 2003:341 uses the very descriptive Afrikaans: "ontgogelde erfenisverwagters".

9 For a list of articles and cases discussing the principle, see Cloete 2003:541. For a contrary view, see Sonnekus 2003:341-342 and 2004:623.

10 *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C) 971A. For a discussion of the basis of this liability, see Sonnekus 2004:623 *et seq.* and, in particular, Sonnekus 2004:631-640.

11 See the discussion by Wunsh 1996:47-49, 57-59; Hutchison 2000:189 and cases discussed by these authors.

12 2002 2 SA 39 (SCA) 46E-47A.

13 See the discussion of the case by Neethling & Potgieter 2002:474-475.

14 Sonnekus 2003:341-342 and, in particular, Sonnekus 2012:179-180.

15 He refers to *Tshabalala v Tshabalala* 1980 1 SA 134 (E):141C-D.

16 "Aanwartschafrecht" can be translated as a "guaranteed inheritance claim" – author's own translation.

executed – in other words, had the drafter not been negligent. The initial *spes* that the beneficiary may have had becomes a proper right once the testator dies and his will (if properly executed) comes into effect.

Our courts have not followed the route suggested by Sonnekus, but have held that will drafters may be held liable. In *Pretorius v McCallum*[17] (decided in 1995, but only reported in 2002), the court held an attorney liable for the beneficiaries' loss as a result of his failure to comply with testamentary formalities,[18] and in *BOE Bank v Ries*[19] the Supreme Court of Appeal accepted clearly that such delictual liability exists.[20]

The approach of our courts in holding will drafters liable for their negligence corresponds with the approach to a will drafter's liability in many other countries. In England, for example, it is recognised that a solicitor who accepts instructions from his client to draw up a will not only assumes responsibility towards his client, but also owes a duty of care to the prospective beneficiaries.[21] This duty was also extended to non-solicitors who accept responsibility for the drafting of wills.[22] Liability for

17 2002 2 SA 423 (C). The facts were that the plaintiff claimed damages from an attorney who had caused the will to fail by merely initialling (as opposed to signing) the first page as a witness. An exception was lodged to the plaintiff's particulars of claim alleging that no cause of action was disclosed. The exception was dismissed and the court held that, in our law, the claim was perfectly competent.

18 For a discussion of *Pretorius v McCallum* 2002 2 SA 423 (C), see Neethling & Potgieter 2002:474; Pace & Van der Westhuizen (Loose leaf publications):139, paragraph A79.

19 2002 2 SA 39 (SCA) 46A-C. The facts were briefly that an insurance broker in the service of the appellant had arranged an appointment with the respondent's husband (Mr Ries) in order to give him forms with which he was to replace an insurance beneficiary's name with that of his wife (the respondent). Mr Ries, however, never met the appointment nor did he react to messages from the broker that he had to sign the forms and, as a result, the respondent did not receive the proceeds from the policy after his death. She consequently instituted a claim for economic loss against the appellant and the broker. For an in-depth discussion of the *BOE Bank v Ries* case, see Neethling & Potgieter 2002:473-478.

20 2002 2 SA 39 (SCA) 46 *et seq*. Although this case did not concern the drafting of a will, it is analogous in the sense that a professional broker's liability was at issue. To establish such a delictual claim, the elements of a delict must, of course, be proven. As it is not the focus of this article, a discussion of the elements of delictual liability is not repeated in this instance, but the view of the courts that such liability exists if the elements are proven, is accepted. For an in-depth discussion of these elements, see Neethling & Potgieter 2002: 473-478.

21 See, in general, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575; *Ross v Caunters* [1979] 3 All ER 580; *White v Jones* [1993] 3 All ER 481; *Esterhhuizen v Allied Dunbar* [1998] 2 FLR 668; *Bacon v Howard Kennedy* [2000] WTLR 169; *Sifri v Clough & Willis* [2007] WTLR 1453; Wunsh 1996:46 *et seq.*; Frost *et al.* 2009:27; Barlow *et al*. 2011:303. paragraph 13.01.

22 *Esterhhuizen v Allied Dunbar* [1998] 2 FLR 668.

a failure to discharge this duty is based on the tort of negligence and will drafters are held liable for loss.[23]

The principle of liability of a negligent will drafter was also recognised by Australian,[24] Scottish[25] and Canadian[26] courts, where the precedent set by *White v Jones*[27] was followed.

From the factual examples that have come before South African courts, it is clear that liability exists not only when the drafter makes mistakes as to the content of the will, even if it is properly executed, but also when the will is not properly executed.[28] Following the promulgation of section 2(3) of the *Wills Act*,[29] it became possible to ask the court to order the Master to accept a document that had not been properly executed as a valid will.[30] Some of these applications were successful, but in others the beneficiaries were disappointed. In *Bekker v Naudé,*[31] the Supreme Court of Appeal held that a section 2(3) application can only be successful if the testator has personally drafted the document in question. After this decision, most section 2(3) applications focused, and will in future focus, on documents that were not drafted by the testator personally, but have been defectively executed by the testator.[32] This, of course, results in an even greater chance that a drafter may be sued by a disappointed beneficiary and the size of the claim may vary, depending on which of two possible scenarios has to be considered:

- The drafter did not ensure that a document drafted by himself for the testator was properly executed, in that no steps were taken to execute the will. It may be reasonably deduced from *Bekker v Naudé* that the court will not order the Master to accept such a document where no attempt at execution (such as a signature) by the testator appears on the document, since it was not drafted by the testator himself. In this case, the will would be regarded as invalid and a beneficiary mentioned in such a will would stand to lose the entire inheritance. The beneficiary

23 Frost *et al*. 2009:27; Wunsh 1996:57.
24 *Hill trading as RF Hill & Associates v Van Erp* (1997) 71 ALJR 487; *Queensland Art Gallery v Henderson Trout* [2000] QCA 93.
25 *Davidson v Bank of Scotland* [2002] PNLR 740.
26 *Earl v Wilhelm* (2000) 183 DLR (4th) 45.
27 [1993] 3 All ER 481.
28 *Pretorius v McCallum* 2002 2 SA 423 (C).
29 *Wills Act* 7/1953. Section 2(3) was brought into the *Act* by the *Law of Succession Amendment Act* 43/1992.
30 *Horn v Horn* 1995 1 SA 48 (W); *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C); *Henwick v The Master* 1997 2 SA 326 (C); *Ex parte De Swardt* 1998 2 SA 204 (C); *Ex parte Williams: In re Williams' Estate* 2000 4 SA 168 (T); *Ndbebele v Master of the Supreme Court* 2000 2 SA 102 (C); *Ramlal v Ramdhani's Estate* 2002 2 SA 643 (N); *Bekker v Naudé* 2003 5 SA 173 (SCA).
31 2003 5 SA 173 (SCA) at 179E. For a discussion of the case, see Sonnekus 2003:337-348; Wood-Bodley 2004 222-230; Jamneck 2009:114-119.
32 See Jamneck *et al.* 2012:76; Wood-Bodley 2004:227.

might also incur the cost of litigation, if an attempt at a section 2(3) application was made in facts similar to those of the *Bekker* case.

- The drafter did not ensure that a document drafted by him and partially executed complied with all the requirements for the proper execution of a will. For example, the testator signed the will, but only one witness signed or the witnesses who signed did so afterwards and not in the presence of the testator.[33] In this case, a section 2(3) application may be successful,[34] and the drafter may be held liable for the cost of such application. It is possible that the cost of such an application may be covered by the estate; in that case, the beneficiaries will still suffer loss, as the size of the estate will diminish and result in a smaller inheritance for them.[35]

One, therefore, wonders what the results would have been if the disappointed beneficiaries had claimed for their loss from the drafters of these wills. Let us consider some examples.

- Scenario 1

  Bekker v Naudé[36] serves as an example. The deceased and the applicant (his second wife) had approached a bank and given oral instructions to a bank official about the drafting of their will. The official used a standard will form and made a few changes to it, upon which it was sent to the testators. However, they never signed this document. It is not mentioned whether the bank official took any steps to follow up on whether the will had been signed, but for our purposes let us assume that this was not done. In the section 2(3) application, the court held that the document could not be accepted as a valid will, as it had not been drafted by the testator personally. The resultant invalidity of the will and intestate succession of the estate would presumably have led to a substantial loss for the second wife; this points to liability on the part of the bank for the loss suffered by the 'disappointed' beneficiary, provided it could be proved that all elements for delictual liability were present.[37]

33 See the facts of *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA).

34 Provided, of course, that all the requirements for the application of section 2(3) are satisfied. See *Ex parte Maurice* 1995 2 SA 713 (C) 715; *Bekker v Naudé* 2003 5 SA 173 (SCA).

35 On the position in English law, see Frost *et al*. 2009:50. The arguments there may be applied locally.

36 2003 5 SA 173 (SCA).

37 For a discussion of the elements, see Neethling & Potgieter 2002:473-478. For a full discussion of the delictual liability with a view to the facts in *Bekker v Naudé* 2003 5 SA 173 (SCA), see Knoetze & Mukheibir 2004:129-137.

- Scenario 2

  In *Henriques v Giles,*[38] the SCA ruled that wills that had been cross-signed by the testators could not be accepted in terms of section 2(3) of the *Wills Act*, because they had been drafted by the testators' accountants and not personally by the testators. Despite being asked for a section 2(3) order, the court ordered the rectification of these wills.[39] This was a clear case of negligence on the part of the drafters, as they were present when the testators had inadvertently signed each other's wills and had not ensured that the execution had been done correctly. At the very least, they should be liable for the cost of the litigation to have the wills rectified.

The case of *Diehl v The Master*[40] is an interesting one. It raises the question of how wide the duty of care recognised by the allowance of claims by the disappointed beneficiary should be. In this instance, a dispute arose concerning the validity of a will which, *ex facie* the document, appeared to be valid. It was alleged that the attorney who had drafted the will had left it with the deceased for his signature. The deceased and one witness signed it in each other's presence, but the second witness was not present at the same time.[41] On the evidence, the court found that this was not the case and that the second witness had indeed been present; therefore, the will was valid. The question is whether the drafter's duty is so wide that he is expected to ensure that all parties are present when execution takes place in order to avoid litigation such as this, or whether he may simply leave the will with the testator as was the case in this instance. In this particular case, because the drafter was an attorney, the answer is that he should have ensured that all parties were present, as due diligence is required of him by virtue of his profession. The door is, therefore, open for the attorney's liability on these facts, if the will had been found to be invalid.

Many examples of liability as a result of erroneous content of a will may be found in our case law. It suffices to examine a fairly recent such example, namely *Raubenheimer v Raubenheimer*.[42] In this case, the will was drafted by a financial adviser and both the validity and the content thereof were contested until the Supreme Court of Appeal was reached. The content of the will was so vague that the court had to interpret the will in order to decide whether a usufruct or a *fideicommissum* had been intended. *In casu*, the court held that the testator did not intend to give his wife no more than a usufruct over the property, but neither did he intend to give her unrestricted ownership. The court held that a *fideicommissum* had

38 2010 6 SA 51 (SCA).

39 For a discussion of the case and criticism of the court's approach, see Jamneck 2009:502 *et seq.*

40 [2008] 4 All SA 430 (T). See also the facts of *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA):293F-I.

41 Simultaneous presence of the testator and the two witnesses is required by section 2 of the *Wills Act* 7 of 1953.

42 2012 5 SA 290 (SCA).

been created although the fideicommissary was not identified. The drafter was clearly to blame for this vagueness. Under these circumstances, the surviving spouse can surely be identified as the disappointed beneficiary, on the one hand, as she did not inherit unrestricted rights to the property in question, but, on the other hand, the children did not receive unrestricted ownership of the property either, as they had hoped.[43] Both the spouse and the children also had to litigate right up to the Supreme Court to fight for their rights.

It is clear from the above that numerous factual situations may give rise to claims against drafters by 'disappointed' beneficiaries. Although the cases mentioned were not heard on the basis of the liability of the will drafter, there is no reason why the beneficiaries in these cases could not claim their patrimonial loss from the drafters concerned. These 'disappointed' beneficiaries all suffered loss, not only in the content cases, but also in the unsuccessful section 2(3) application cases. Even in the successful section 2(3) cases, the beneficiaries suffered loss as they had to approach the High Court at great expense and should, therefore, have been able to claim for their loss.

Following the *McCallum* and *Ries* cases, it was clearly established that legal practitioners and banks or financial institutions are at considerable risk of being held liable for loss incurred by disappointed beneficiaries. As these institutions and practitioners realised that they could be held liable for their will-drafting mistakes, it followed naturally that they would try to protect themselves against such claims by their clients.[44] As a result, examples of so-called 'disclaimers' started appearing in the standard will forms used by certain institutions and supplied to their clients over the past few years.

3. 'Disclaimers'

3.1 Introduction

In both the law of contract and the law of delict, 'disclaimers', 'indemnity clauses' or 'exemption clauses' are well known.[45] These clauses are used

43 This again raises the question of the extent of the liability, a topic which falls beyond the scope of this article.

44 It needs to be emphasised that examples of 'disclaimers' have only been found in wills supplied to their clients by banks. The author of this article found no such clauses in examples obtained from certain attorneys.

45 These clauses attempt to exclude a party's delictual or contractual liability for negligence. An example may read as in *Reyneke v Intercape Ferreira Mainliner (Pty) Ltd* [2013] ZAECGHC 47: "Disclaimer All persons entering Intercape coach/bus and/or property owned by Intercape or under its control, do so entirely at their own risk and the liability of Intercape is excluded for any loss or damages (including consequential or special damages or loss of profits), loss of life, bodily injury or damage to or loss of property, of whatsoever nature and howsoever caused and whether or not caused by any form of negligence of Intercape, its

in an attempt to exclude liability of parties in various situations. Similar clauses have, however, recently made an appearance in wills in an attempt to avoid liability to the 'disappointed beneficiary', as discussed earlier. As a starting point, we will investigate the wording of these clauses and their aim, based on the assumption that it is indeed possible to include such clauses in wills. Once the aim of these clauses has been explained, their validity in the light of the nature of wills will be investigated and a possible solution to the problem of how exemption for liability may be addressed will be suggested.

3.2 The wording

The following clause may be found in standard will forms supplied by certain financial institutions:

> Disclaimer
> By signing this will it is accepted that ....., as drafter of this will, cannot be held[46] liable for:
>
> (a) Any consequences resulting from the inclusion of any inaccurate information in this will supplied for the drafting thereof.
>
> (b) The validity of this will should the original, or a copy thereof, have been altered in any way whatsoever either before or after the signing thereof.

After this paragraph, which appears at the end of the will, the testator and witnesses are expected to sign the will.

It is clear that the intention of this 'disclaimer' is, first, to exempt the drafter from liability should the wrong beneficiary's name or the wrong benefit be mentioned in the will. Secondly, it attempts to indemnify the drafter should the testator in any way interfere with what appears in the will – in other words, should the testator decide to make amendments on his own without the assistance of the drafter.

Let us assume that this exemption clause or 'disclaimer' is valid and simply examine its content.

The first part of the 'disclaimer' attempts to exclude liability for the inclusion of 'inaccurate information' supplied by the testator. This clause,

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directors, its officers, servants, agents or any other person acting on behalf of Intercape, arising out of or connected in any way with the conveyance or non-conveyance by Intercape of any passenger or persons and/or the property of any passengers or persons." See Hutchison *et al.* 2012:238-239; Stoop 2008:496-509; Loubser *et al.* 2013:196; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Johannesburg Country Club v Scott* 2004 5 SA 511 (SCA).

46 In some examples the word 'held' is omitted.

therefore, constitutes an attempt at exonerating the drafter for liability for mistakes made in the content of the will and attempts to enter into an agreement with the testator.[47] Although it may seem reasonable for the drafter to attempt to exclude liability on the grounds of inaccurate information supplied to him by the testator, the professional practitioner may be expected to verify the correctness of information supplied and may find that he is not exonerated in this case. A professional practitioner may, therefore, find that he is unable to avoid this liability, as a high standard of skill will be reasonably expected of him by the Council of the Law Society of South Africa.[48] This standard of skill is also required of anyone who drafts a will for a fee which, in modern times, includes virtually all will drafters.[49]

The second part of the 'disclaimer' attempts to exonerate the drafter from his duties with regard to the execution of amendments made to the will. Interestingly enough, it does not attempt to exclude liability should the drafter be negligent in ensuring that the will is properly executed in the first place. If the will has been altered before the signing thereof, the drafter should either ensure that the amendment is also signed as required by the *Wills Act*[50] or should supply a new document with the testator's desired amendment included and then ensure that this new document complies with the formalities of the *Act*. After all, it is the drafter's duty to ensure that all formalities are complied with when the will is returned to him, even if he has simply given the testator instructions on how to comply with such formalities.[51] If the will is not returned to him, it is his duty to follow up with the client and ensure that the will is returned. Of course, if despite the insistence of the drafter, the testator does not return the will to him, it cannot be said that the drafter has acted negligently and he cannot be held liable. According to Cloete,[52] the diligent legal practitioner should also ensure that his client's will is regularly updated. If this duty is fulfilled, the drafter will be able to include any amendments made by the testator on the original will in a new will and should thus be covered by his actions without any need for a disclaimer.

It, therefore, appears that the 'disclaimer', as it stands, poorly worded as it is and in the light of the fact that our courts usually lean towards a narrow interpretation[53] of loosely worded exemption clauses,[54] will not hold up to scrutiny.

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47 See the discussion below.
48 See rule 89.30 of the Rules of the Law Society made under the *Attorneys' Act* 53/1997:section 74.
49 See Cloete 2003:540.
50 Wills Act 7 of 1953:section 2.
51 Cloete 2003:543.
52 Cloete 2003:544.
53 Stoop 2008:503.
54 As the focus of this article is not the merits or interpretation of exemption clauses, the approach of the courts will not be scrutinised for current purposes. For a full discussion of exemption clauses, see Stoop 2008:496-509.

3.3 Validity of disclaimers in wills

It is thus clear that the 'disclaimer, as it stands, assuming that it is valid, cannot exempt the drafter. The next question that needs to be answered is whether a disclaimer in a will, if properly worded, can exonerate a drafter from liability.

To answer this question, one has to establish the exact nature of a 'disclaimer' or 'exemption clause'. Stoop[55] defines exemption clauses as follows:

> Exemption clauses are contractual terms that aim to limit, alter or exclude the liability, obligations or remedies of a contracting party (contractant) that normally emanate from a contract. These clauses thus concern any agreed deviation from the ruling law with regard to contractual or delictual liability that affects the rights, obligations, duties and procedural remedies normally emanating from a specific contract.

This definition points to the first problem concerning the inclusion of such clauses in wills. A will is a *unilateral* legal act[56] and not an agreement between two parties such as a contract. Furthermore, when our courts consider the enforceability of exclusion clauses, they investigate the **consensus** between the parties to the contract,[57] and there can be no question of consensus where a will is concerned. As a matter of fact, the law of succession frowns upon most types of contracts that involve succession.[58] It is, therefore, submitted that the testator cannot agree with the drafter to exempt him from liability in the will itself.

Consequently, the answer to our initial question is that one cannot insert a contractual clause in a will, or use wording similar to that of a contract. The 'disclaimer', as found in the cited example and others, seems to lean towards this type of wording and should, therefore, not be accepted as a valid exemption of the drafter. Since the nature of the relationship between the drafter and the testator could possibly offer a solution, this aspect will be considered next.

4. Mandate

When a testator approaches a legal practitioner or financial institution for the drafting of a will, he is entering into a legal relationship with such practitioner on the basis of a *mandatum*.[59]

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55 Stoop 2008:496.
56 Van der Merwe & Rowland 1990:15; Corbett *et al.* 2001:35.
57 See *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Mercurious Motors v Lopez* 2008 3 SA 572 (SCA); Stoop 2008:497-499.
58 *Pacta successoria* or contracts in which the parties attempt to regulate the devolution of an estate are not recognised in South African law. Such contracts may only be found in antenuptial contracts (Jamneck *et al.* 2012:230, 237).
59 Bobbert 2001:6.

> Lasgewing of mandaat (mandatum) is 'n ooreenkoms tussen een party (die lasgewer of mandator) en 'n tweede party (die lashebber of mandatarius) waarvolgens die lashebber onderneem het om 'n opdrag of 'n regshandeling namens en ten behoewe van die lasgewer uit te voer. Beide die lasgewer en die lashebber verkry kontraktueel sekere regte en verpligtinge wat uit die lasgewingsooreenkoms voortvloei.[60]

In theory, it should, therefore, be possible for the parties to this *mandatum* to agree to an exclusion clause.

English writers[61] argue that it is possible to limit the drafter's liability through the mandate (called a 'retainer' in English law) by the client. The argument is that, since the liability for the breach of his duty is owed by the drafter to the client and there is no direct relationship to the beneficiary, the duty owed to the beneficiary "cannot be greater than that owed to the testator, through whom the beneficiary's claim arose". It would seem that the English courts may agree with this submission.[62] More emphasis is, however, placed on these retainers in English law than in our law. Furthermore, these retainers are construed to the benefit of the client should ambiguity exist.[63]

In South Africa, most instructions to draft a will for a client are received in the course of an oral consultation during which the practitioner will make notes in order to draft the will.[64] A formal *mandatum* is usually not concluded and, consequently, no exclusion clause or disclaimer is placed on record. Some financial institutions or financial advisers do, however, expect their clients to complete a standard form containing information on their marital status, assets, liabilities and instructions as to how the estate should devolve. Some of these forms do contain a clause stating that the testator agrees that the adviser/institution will follow his instructions in the drafting, that proper advice has been given and that any instruction from the testator in conflict with the advice given should be followed. The forms do not, however, appear to make provision for the case where instructions are not followed or where the drafter makes mistakes in ensuring that the execution is done correctly. It would, therefore, appear that no exclusion clause is usually included in this mandate, but that attempts are then made to include such a clause in the will itself, as discussed above.

Even if the English argument is followed and an exemption clause is included in all mandates and even if the beneficiary is bound by such an

60 Bobbert 2001:8.

61 Frost *et al*. 2009:77.

62 See the reference in Frost *et al.* 2009:77 to *White v Jones* [1993] 3 All ER 481 and *Esterhhuizen v Allied Dunbar* [1998] 2 FLR 668.

63 *Hurlingham Estates Ltd v Wilde & Partners* [1997] 1 Lloyd's *Rep 525; Gray v Buss Murton* [199] PNLR 882 QBD; Barlow *et al*. 2011:304, paragraph 13.02.

64 See, for example, the facts of *Bekker v Naudé* 2003 5 SA 173 (SCA). This is the practice in most law offices and financial institutions, although some do have a mandate form that the client is expected to complete.

exemption clause to the same extent as the testator, this exclusion would appear in a separate contract which might have been mislaid or destroyed by the time the testator dies and, therefore, does not offer the best solution.

5. Solution?

In light of the above, it may be concluded that the will drafter and especially the professional will drafter, finds himself in a rather precarious position. Not only is a rather high level of skill and diligence expected of him, but it would seem that he cannot easily exclude liability for mistakes inadvertently made. He cannot add a 'disclaimer' to a will he is drafting for a client, nor can he rely on an exclusion clause added to the mandate entered into with the testator unless he carefully preserves such document.

What solution can be proposed if the drafter wishes to protect himself? In some European systems of succession law, the liability of a will drafter may be limited because of a system of registration of wills in a central registry or the practice of having the will recorded by a notary. In countries such as the Netherlands, Italy and France, the chances of a will being invalid are limited by the required formalities and central registration.[65] Such a system does not exist in South Africa, however, and many wills are drawn up by non-legal practitioners with limited legal knowledge. It is not only these drafters who need to protect themselves; even legal practitioners and financial institutions feel the need to be protected against mistakes.

It is clear that a professional drafter can never be exempted from executing his duties properly or from gross negligence, but is it possible for him to protect himself against minor infringements and is it possible for the non-professional to protect himself? It is submitted that the only possible clause that may be added to a will in an attempt to achieve this goal should take the same form as the clause exempting an executor or trustee from providing security to the Master or exempting beneficiaries from collation. An example of such a clause usually reads:

> I exempt every executor and trustee, whether appointed under this will or assumed or substituted, from the furnishing of security to the satisfaction of the Master for the due and faithful performance of his/her duties as such.

Where the intention is to exclude liability, the following clause is proposed:

> I exempt ... (the drafter) of this will from any liability towards any person or organisation of whatever nature for damage or loss suffered as a result of the drafting or the execution of this will, whether directly or indirectly caused by any action or omission by ... (the drafter), its employees or representatives.

65 See Hayton 1998:165, 238, 255; Garb (ed) 2004:219, 356, 435.

The wording should be carefully chosen and headings such as 'disclaimer', 'liability' or 'exclusion' should be avoided so as not to create the impression of a contractual provision. It remains to be seen, of course, whether the informed testator will sign a will where this declaration of exemption is included. At the risk of drawing contract law into the equation again, one may argue that rules analogous to those of contract law and those pertaining to the protection of the consumer[66] should apply. The drafter should, therefore, be obliged to draw the attention of the testator to such a clause, and the wording of the clause should not be too vague or ineffective.[67] If a fully informed testator does sign a will that includes this clause, he is making a unilateral declaration of his intention, and his beneficiaries will be bound by such declaration.

66 *Consumer Protection Act* 68/2008:section 49(1) provides that attention should be drawn to potentially detrimental clauses.

67 *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 5 SA 180 (SCA):186 paragraph 14.

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