

# DRAFTING OF CONTRACTS

DAY ONE OF TWO DAY SEMINAR

WHAT IS A CONTRACT ?

WRITTEN RECORDAL OF AN AGREEMENT

WHAT IS AN AGREEMENT ?

- A MEETING OF MINDS
- BETWEEN PARTIES
- ON A PARTICULAR ISSUE
- REGULATING PARTIES' RELATIONSHIP
- SETTING OUT RIGHTS & OBLIGATIONS

DO WE HAVE TO RECORD AN AGREEMENT IN WRITING ?

IF AN AGREEMENT CAN BE ORAL, WHY BOTHER TO WRITE IT DOWN ?

- **COMPLEX & DETAILED MATTERS**
- **DOCUMENTARY PROOF – EVIDENCE**
- **LAW REQUIRES IT**

LAW REQUIRES CERTAIN CONTRACTS TO BE IN WRITING

## 1. **INVALID UNLESS IN WRITING**

- SALE OF LAND
- Alienation of Land Act
- DEED OF DONATION
- General Law Amendment Act 1956
- DEED OF SURETY
- General Law Amendment Act 1956

## 2. VALID ONLY BETWEEN THE PARTIES IF NOT IN WRITING

- LONG LEASE OF LAND (10 years)
- ANTENUPTIAL CONTRACT

Deeds Registry Act requires these to be REGISTERED in the Deeds Office to be valid against third parties. They cannot be registered unless they are recorded in writing.

## 3. NEW LEGISLATION

- OLD CREDIT AGREEMENTS ACT – now NATIONAL CREDIT ACT - HAS TO BE IN WRITING & PROPERLY EXPLAINED

## WHAT'S INVOLVED IN THE DRAFTING PROCESS

“COSMETICS”

CONTENT / ESSENTIALS

STYLE & TECHNIQUE

### “COSMETICS”

- QUALITY PAPER
- TYPING, FONT SETTINGS
- SPACING
- PAGINATING
- PARAGRAPHING
- NUMBERING
- BOLD & UNDERLINE
- HEADINGS
- DEFINITIONS
- ANNEXURES
- PHOTOSTATS
- PRINTING
- SPELLING

## **CONTENT / ESSENTIALS**

- CAUSA (Sale, Lease, Loan)
- PARTIES & CAPACITY TO CONTRACT
- SUBJECT MATTER
- CONSIDERATION / PURCHASE PRICE
- STYLE & TECHNIQUE

AIM = TO PRODUCE A WRITTEN RECORDAL WHICH :

- GIVES EXPRESSION TO THE INTENTION OF THE PARTIES
- SECURES PERFORMANCE
- AVERTS DISPUTES & LITIGATION
- IS UNDERSTANDABLE TO & BY PARTIES INVOLVED

EXTRACT FROM DE REBUS      September 2001

“BACK TO BASICS - THE ART OF LEGAL DRAFTING” by Steve Cornelius

“The essence of legal drafting is the attempt by the drafter to convey the ideas as clearly and accurately as possible..... I believe that a person’s intelligence is displayed, not by the exuberance of his verbosity, but rather by an ability to adjust the complexity of his language to suit the intended recipients of the message.”

“A drafter must always frame any legal instrument on a level of technicality and complexity that reflects the knowledge of the average person to whom the instrument is addressed..... It is a simple task to make things complex, but a complex task to make them simple.”

“There are so many uncertainties which relate to the use of language ..... overgenerality, vagueness, ambiguity and a generalised usage of poorly defined terms .... words often have more than one meaning ..... There is also the semantic problem that words may mean different things to different people at different times and in different situations.”

“Legal drafting is a delicate process whereby the drafter treads a fine line between elaborating too much and stating too little. Somewhere in between lies the answer to proper legal drafting.”

## GENERAL BASICS

- **DO's**
- USE LOGIC
- USE GOOD GRAMMAR
- USE PLAIN ENGLISH
- BE CLEAR & CONCISE
- BE CONSISTENT
  
- **BE CAREFUL**
- PRECEDENTS
- ALTERATIONS
  
- **AVOID**
- LONG SENTENCES
- VAGUENESS
- LEGALESE
- REDUNDANCY
- IMPRECISION
- DOUBLE NEGATIVES
- PASSIVE TENSE
- CONTRADICTIONS
- OVER-REGULATION
- UNDER-REGULATION

LET'S LOOK AT :

- ▶ CASE LAW
- ▶ EXAMPLES OF BAD DRAFTING
- ▶ CLAUSES THAT LOOK FINE AT FACE VALUE

PIZANI v. FIRST CONSOLIDATED HOLDINGS (PTY) LTD 1979 (1) SA 69 (A)

Deed of Suretyship – printed forms.

Surety signed Deed, but *inter alia* left blank

“.....THE AMOUNT OF THIS GUARANTEE SHALL BE LIMITED TO R\_\_\_\_\_”

Blank space was not filled in & clause was not deleted.

COURT HELD : AMOUNT WAS NOT QUALIFIED, THEREFORE, CLAUSE IS NOT APPLICABLE. RESULT : NO LIMIT ON AMOUNT OF SECURITY !!

HOME FIRES TVL CC v. VAN WYK & ANO 2002 (2) SA (WLD)

A sent a fax to B of an Order Form. At bottom of Form it was stated “See reverse side for further conditions”. A did not fax the reverse. B placed an order and signed and returned the form

HELD : A knew that B had not seen or signed the reverse and only had itself to blame for B's ignorance. Therefore, the reverse was deemed to be *pro non scripto*.

CONSUL LTD t/a CONSUL GLASS v. TWEE JONGE GEZELLEN (PTY) LTD 2002 (6) SA 256 (CPD) Interesting, but long & complicated case

Consul supplied bottles, inside of which was treated with special gas which aid fermentation process of *cap classique* method of champagne production.

The case involved the interpretation of a “claims” clause in supply agreement which stated “All goods supplied are manufactured according to the manufacturing procedures and techniques, utilising standard raw materials”.

The Court discussed the meaning of the clause as a whole, and of the separate phrases and individual words. The clause was part of the “claims clause” and was held not to be a warranty. BUT for various other reasons the Court held that Consul was not exempt from liability.

## WE OFTEN FORGET THE IMPORTANCE OF STANDARD / BASIC CLAUSES

LENCH & ANO v. COHEN & ANO 2006 (2) SA 99 (A)

This appeal concerned the validity of the cancellation of an agreement of sale.

Normal Breach Clause : -

“If either party is in breach ..... and fails to remedy ... within 10 days ... of notice to the *domicilium* address ...”

*Domicilium* address given was X address. Lench decided to hand-deliver the letter – the letter was enclosed in an envelope which had the names & physical address of the respondents clearly typed thereon. The address stipulated was the respondents’ residence, which was situated in a town house complex.

Lench arrived at the town house complex, but could not gain access to the specific unit – no access, no guard, no response to the intercom system, no post box.

In the circumstances, Lench decided to append the letter to the main gate of the complex by taping the letter to the 2 metal posts.

Quare – whether there had been proper delivery of the breach letter ???

HELD : By choosing a *domicilium* address, the respondents had chosen an address & had taken upon themselves the risk that any notices might not come to their attention. Judge held “I am satisfied that in the circumstances, the only obvious & reasonable method of effecting delivery would have been to affix the notice to the main gate as Lench had done.”

PARSONS TRANSPORT (PTY) LTD v. GLOBAL INSURANCE CO LTD 2006 (1)  
SA 488 (A)

IMPORTANCE OF WHETHER A CONDITION IS A SUSPENSIVE CONDITION

The Court had to consider whether the wording on an insurance contract was a suspensive condition or not i.e. whether the policy of insurance comes into being only when the premium is paid or whether the policy is in existence, but the insurance company only pays out if the premium is paid.

HELD : That the appellant's failure to pay the premium on due date did not wipe out the insurance cover.

TRANSNET LTD v. RUBENSTEIN 2006 (1) SA 591 (A)

A operated the Blue Train, which it intended to privatise at some stage in the future. It entered into a contract with R in terms of which R was granted the exclusive right to operate a jewellery boutique on the Blue Train "until the final date of privatisation". A gave R 2 months notice of termination of contract.

CONDITIONS : BUT WHAT IF ???

The Court had to decide whether a contract, which was silent as to its duration, could be terminated on reasonable notice. Here, the termination date is "determinable" - on the happening of an uncertain future event.

HELD : Therefore, the contract was not terminable on reasonable notice.

JUST NAMES PROPERTIES 11 CC v. FOURIE & OTHERS 2008 (1) SA 343 (SCA)  
SALE OF IMMOVABLE PROPERTY – ALIENATION OF LAND ACT – SALE &  
PURCHASE OF IMMOVABLE PROPERTY MUST BE IN WRITING

- PURCHASER'S AGENT GOT SELLERS TO INITIAL 2 BLANK PAGES WHICH  
THE AGENT SUBSEQUENTLY COMPLETED

COURT HELD THAT THE FACT THAT THE SELLERS SIGNED BLANK PAGES  
WAS FATAL TO THE WHOLE AGREEMENT. THEREFORE THE AGREEMENT  
WAS INVALID & THEREFORE UNINFORCEABLE

SHAIK & OTHERS v. PILLAY & OTHERS 2008 (3) SA 59 (N)

AGREEMENT FOR THE PURCHASE & SALE OF MEMBERS' INTEREST IN CC

- PARTIES HAD NEGOTIATED AN AGREEMENT BUT AGREED THAT NOTHING WOULD BE BINDING UNTIL RECORDED IN WRITING & SIGNED BY BOTH PARTIES
- AGREEMENT WAS NOT SIGNED – COURT HELD THEREFORE THAT FORMALITIES HAD NOT BEEN COMPLIED WITH & THE ABSENCE OF ONE PARTY'S SIGNATURE INVALIDATED THE AGREEMENT

WALLACE v. 1662 G & D PROPERTY INVESTMENTS CC 2008 (1) SA 300 (WLD)

DEED OF SURETYSHIP – FAILED TO IDENTIFY THE PRINCIPAL DEBTOR BY NAME & THE DEBTOR'S IDENTITY COULD NOT BE ESTABLISHED WITH SUFFICIENT CERTAINTY THROUGH THE INTRODUCTION OF ADMISSIBLE EXTRINSIC EVIDENCE

THEREFORE HELD – SURETYSHIP = INVALID

GEORGE v. FAIRMEAD (PTY) LTD 1958 (2) SA 465 (AD)

MR GEORGE SUED THE HOTEL FOR DAMAGES IN RESPECT OF LOSS OF CLOTHING & PERSONAL EFFECTS FROM HIS ROOM WHILST HE WAS A LODGER IN THE HOTEL.

HE HAD SIGNED A FORM LIMITING THE HOTEL'S LIABILITY – BUT HE THOUGHT HE WAS SIGNING THE REGISTER NOT A CONTRACT

COURT HELD :

WHEN A MAN IS ASKED TO PUT HIS SIGNATURE TO A DOCUMENT HE CANNOT FAIL TO REALISE THAT HE IS BEING CALLED UPON TO SIGNIFY HIS ASSENT TO WHATEVER WORDS APPEAR ABOVE HIS SIGNATURE AND THAT BY SIGNING HE IS AGREEING TO THE CONTENTS OF THE DOCUMENT

HE HAD KNOWN THAT HE WAS SIGNING A DOCUMENT

HE HAD CHOSEN NOT TO READ IT

THE RISK LAY WITH HIM

COURT HELD THAT HE WAS BOUND TO THE TERMS & CONTENTS OF THE DOCUMENT WHICH HE HAD SIGNED



DRAFTING SKILLS ARE REQUIRED NOT ONLY FOR CONTRACTS .....

## **INFORMAL LETTER**

I hereby consent to your building plans as per the request contained in your letter dated 1 September 2002, to which building plan number 6923 is attached, subject to the following conditions :

- that the proposed wooden pergola is not unsightly;
- that the proposed upstairs section of the building facing my property is constructed of bricks and mortar and comprises no glass windows;
- that you supervise your workmen properly;
- that you paint the outside wall facing my property.

Client drafted this letter himself and now consults you as his neighbour has :

- built an ultra modern design metal pergola, which in his opinion looks hideous;
- left an opening in the upstairs section of the property which the builder advises is a part of the balcony and will remain open;
- provided no toilet facilities for the workmen and they are urinating in the hedge separating his and his neighbours property right outside his front door;
- has deviated from the building plans in that the neighbour has built right up to the boundary;
- painted the entire exterior of the building in an awful bright mustard colour which looks disgusting.

DEED OF SALE – IMMOVABLE PROPERTY – actual examples

**This sale is subject to the successful sale of the Purchaser's house situate at 2 Hill Rd, Cape Town.**

- Time period ?
- Implied that Purchaser requires funds from his sale – transfer & payment ?
- What is “successful” – sale / suspensive conditions fulfilled / registration ?

**This sale is subject to the Purchaser obtaining a satisfactory Engineer's Report on the property.**

- What does "satisfactory" mean ?
- What kind of engineer ?
- By when ?
- At whose cost ?
- What if Report shows building is structurally defective?

**The Seller warrants that there is and will be no damp problems in the house.**

- As at what date ?
- How can Seller warrant a future occurrence ? Seller's perpetual liability ?

#### **ANOTHER ACTUAL EXAMPLE OF BAD DRAFTING**

The seller and purchaser heretofore mentioned will agree as follows :

1. Immediately after the Bond has been approved, the bank will confirm in writing to this effect.
2. The seller agrees to deliver the plans of the building.
3. An engineer will be instructed to inspect the property.
4. Once the bathroom has been fixed, the seller will give a guarantee regarding damp to the purchaser.

**SOMETIMES, WHAT APPEARS TO BE FINE, DOES NOT STAND THE "BUT WHAT IF" TEST.**

## SALE OF BUSINESS CLAUSES

### PURCHASE PRICE AND PAYMENT

The purchase price of the business is R1 200 000,00 (One Million Two Hundred Thousand Rand) and shall be paid by the Purchaser to the Seller as follows :

- (i) The sum of R500 000,00 (Five Hundred Thousand Rand) on signature hereof;
- (ii) The balance of R700 000,00 (Seven Hundred Thousand Rand) shall be paid by 7 (Seven) monthly installments of R100 000,00 (One Hundred Thousand Rand), the first such installment shall be paid on 1 July 2002 and thereafter on the 1st day of each and every subsequent month until the full purchase price has been paid to the Seller.

### BREACH

In the event that the Purchaser breaches any term of this Agreement and fails to remedy such breach after being given 7 (Seven) days written notice to remedy such breach, the Seller shall be entitled to :

- (i) Sue the Purchaser for specific performance; or
- (ii) Cancel this Agreement and claim damages.

## **WHERE & HOW DO WE START THE DRAFTING PROCESS ?**

### PREPARATION

- ANALYSE CLIENT'S INSTRUCTIONS
- ESTABLISH THE CAUSA
- DRAFT A FRAMEWORK
- LIST WHAT YOU NEED TO FILL INTO THE FRAMEWORK
- START DRAFTING

## FRAMEWORK FOR SALE AGREEMENT

- HEADING
- PARTIES
- SALE (CAUSA) & SUBJECT MATTER
- PURCHASE PRICE
- PAYMENT
- DELIVERY
- OWNERSHIP
- RISK & BENEFIT
- WARANTEES
- NON-VARIATION
- NO INDULGENCES
- BREACH
- ARBITRATION
- JURISDICTION
- DOMICILIA
- COSTS

## FRAMEWORK FOR COMMERCIAL LEASE AGREEMENT

- HEADING
- DEFINITIONS
- LEASE
- COMMENCEMENT & DURATION
- RENT - AMOUNT
- PAYMENT OF RENT
- RENT INCREASES
- DEPOSIT
- ADDITIONAL CHARGES
- OPERATING COSTS
- OPTION TO RENEW
- LANDLORD'S OBLIGATIONS

- TENANT'S OBLIGATIONS
- INSURANCE
- CESSION & SUB-LEASE
- MAINTENANCE & REPAIRS
- ALTERATIONS & IMPROVEMENTS
- EXCLUSION OF LANDLORD FROM LIABILITY
- RIGHTS OF ACCESS
- DAMAGE / DESTRUCTION OF PREMISES
- SALE OF PREMISES
- TERMINATION – RESTORATION OF PREMISES
- TERMINATION – DEATH / INSOLVENCY
- BREACH
- NON-VARIATION
- DOMICILIA
- SURETYSHIP
- AUTHORITY TO SIGN
- COSTS