

# DRAFTING OF CONTRACTS

DAY TWO OF TWO DAY SEMINAR

## SUMMARY

AGREEMENT & CONTRACT

WHY RECORD IN WRITING

COSMETICS, ESSENTIALS,

STYLE & TECHNIQUE

LOOK AT :

- FEW BASICS – DO's & DON'Ts
- CASE LAW
- EXAMPLES OF BAD DRAFTING
- INTERPRETATION

BAD DRAFTING - MAJOR SOURCE OF INTERPRETATIONAL PROBLEMS

ONE IS LEFT WITH THE TASK OF ENDEAVOURING TO ASCERTAIN FROM THE LANGUAGE EXACTLY WHAT IT WAS THAT THE DRAFTER WAS ATTEMPTING TO CONVEY

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WHAT DOES THE CONTRACT SAY ?

WHAT DOES IT MEAN ?

DOES IT MEAN WHAT IT SAYS ?

DOES IT SAY WHAT IT MEANS ?

IF NOT, WHAT IS IT MEANT TO SAY ?

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## DIFFERENT APPROACHES TO INTERPRETATION

### SUBJECTIVE APPROACH INTENTION

- THE INTENTION OF THE PARTIES IS TO BE ASCERTAINED FROM THE CONTRACT AS A WHOLE
- THE LANGUAGE USED IS NOT NECESSARILY THE ACTUAL THOUGHTS OF THE PARTIES
- CONCERNED RATHER WITH THE THOUGHTS & IDEAS BEHIND THE LANGUAGE USED, RATHER THAN WITH THE STRICT LITERAL MEANING OF THE WORDS THEMSELVES
- INTENTION AS EXPRESSED, IS NOT NECESSARILY THE SAME AS THE ACTUAL INTENTION
- THE INTENTION OF THE AUTHOR IS MORE IMPORTANT THAN HIS / HER WORDS

### LITERAL APPROACH WORDS

- TAKE COGNISANCE ONLY OF THE OUTWARD MANIFESTATIONS OF THE PARTIES' INTENTIONS & IGNORE THEIR ACTUAL SUBJECTIVE INTENTIONS
- WHAT IT STATES = WHAT IT MEANS
- WORDS DETERMINE INTENTION

### SUBJECTIVE CUM LITERAL APPROACH

- THE WORDS ARE THE PRIMARY & MAIN SOURCE OF INTERPRETATION FROM WHICH THE INTENTION OF THE PARTIES IS ASCERTAINED
- THE INTERPRETER CANNOT VENTURE BEYOND THE WORDS OF A TEXT TO DETERMINE THE MEANING THEREOF
- WORDS MUST BE UNDERSTOOD ACCORDING TO THEIR ORDINARY GRAMMATICAL MEANING

## RESULT

THE MERE FACT THAT WE HAVE TO INTERPRET THE WRITTEN WORD GIVES RISE TO :

- CONFLICT BETWEEN PARTIES
- MAJOR DISPUTES
- LITIGATION
- COURT IS LEFT TO DECIDE

## PRESUMPTIONS OF INTERPRETATION

### 1. WORDS ARE USED IN THEIR ORDINARY SENSE

CAVEAT : "ORDINARY" v. LEGAL MEANING + TECHNICAL MEANING

EXAMPLES :

"POSSESSION" – ACTUAL v. SYMBOLIC

"BENEFICIAL OCCUPATION"

"ROOF LEVEL"

### 2. WORDS ARE USED PRECISELY & EXACTLY

THERE ARE NO SUPERFLUOUS WORDS IN A CONTRACT – ACCOUNT MUST BE TAKEN OF EVERY WORD & EXPRESSION

THERE IS NO *CAUSA OMISSUS* – NOTHING IS LEFT OUT E.G. LISTS

### 3. THE SAME WORD / EXPRESSION IN THE SAME CONTRACT HAS THE SAME MEANING THROUGHOUT

DIFFERENT WORDS / EXPRESSIONS INDICATE DIFFERENT MEANINGS

EXAMPLE : DEFINITIONS - "PREMISES" = HOUSE, STOREROOM & GARDEN

“THE LESSEE SHALL KEEP THE PREMISES CLEAN & TIDY, & SHALL TAKE ALL REASONABLE STEPS TO KEEP THE HOUSE FREE FROM VERMIN & PESTS”

## **PRESUMPTIONS OF SUBSTANTIVE LAW**

- THE PARTIES HAVE CAPACITY TO CONTRACT
- NO PARTY WRITES WHAT HE / SHE DOES NOT INTEND – INTENTION = WORDS
- A PERSON IS FAMILIAR WITH THE CONTENTS OF A DOCUMENT WHICH HE / SHE SIGNS – *CAVEAT SCRIPTOR*
- THE PARTIES INTEND TO CONCLUDE A LEGALLY VALID CONTRACT
- THE PARTIES DO NOT WISH TO AMEND THE EXISTING LAW MORE THAN NECESSARY (E.G. RIGHTS TO DAMAGES)
- THE PARTIES INTEND REASONABLE & EQUITABLE RESULTS
- A CONTRACT OPERATES PROSPECTIVELY
- A PARTY ACTS AS PRINCIPAL
- RECIPROCAL OBLIGATIONS MUST BE PERFORMED SIMULTANEOUSLY
- THE CONTRACT IS UNCONDITIONAL
- PERFORMANCE MUST TAKE PLACE *IN FORMA SPECIFICA* (EXACTLY AS DESCRIBED)
- A CONDITION MUST BE FULFILLED *IN FORMA SPECIFICA*
- WRITTEN WORDS PREVAIL OVER FIGURES & OVER PRINTED WORDS IN FORMS
- ALTERATIONS ARE MADE BEFORE EXECUTION

OTHER PRESUMPTIONS - RELATE TO SPECIFIC CONTRACTS

E.G. SALE

- PRESUMED TO BE FOR CASH UNLESS AGREED & SPECIFIED TO THE CONTRARY
- FUTURE DATE FOR PAYMENT IS FOR THE BENEFIT OF THE DEBTOR

PRESUMPTIONS GENERALLY

- NO SET ABSOLUTE PRESUMPTIONS
- EVOLUTIONARY IN NATURE
- CHANGE ACCORDING TO THE TIMES
- MEANT AS AN AID TO ASSIST

DRAFTING REQUIRES PRECISION

WHAT YOU DRAFT NEEDS TO BE A CREDIT TO THE WRITER AND HELP TO THE READER

WORDS ARE PRECIOUS – DO NOT WASTE WORDS

**REDUNDANT WORDS ARE IMPRECISE**

AVOID :

REDUNDANT ARCHAIC WORDS

- WHOMSOEVER, AFORESAID, THEREWITH

REDUNDANT COUPLED SYNONYMS

- I GIVE, LEAVE AND BEQUEATH THE REST, REMAINDER AND RESIDUE

REDUNDANT MODIFIERS

- SOMETHING HAS DESCENDED DOWN OVER A PERIOD OF SEVERAL HUNDRED YEARS

BETTER : SOMETHING HAS DESCENDED OVER HUNDREDS OF YEARS

## **VAGUE WORDS**

ADJECTIVES LIKE GOOD, BAD, NICE, LARGE, IMPORTANT, SIGNIFICANT, INTERESTING

NOUNS LIKE ASPECT, ISSUE, PROCESS

VERBS LIKE DEALT WITH, CONCERNS

ARE UNCLEAR, ABSTRACT AND INCIPID

CHOOSE WORDS THAT HELP THE READER TO VISUALISE THE CONCEPTS YOU ARE DESCRIBING

The school overlooked a large measure of bad treatment against naughty children.

More precise to say : The school overlooked more than twenty complaints of discrimination against naughty children.

Religion, not culture, is dealt with in section 15 of the Act.

“dealt with” dilutes the thrust :

Rewrite : Section 15 protects freedom of religion, not culture.

## **CONNOTATION & DENOTATION**

FINDING THE RIGHT WORD MEANS FINDING THE WORD THAT HAS THE RIGHT DENOTATION AND ALSO THE RIGHT CONNOTATION

DENOTATION = LITERAL / DICTIONARY DEFINITION

CONNOTATION = CONTEXTUAL MEANING

CELEBRATE / COMMEMORATE / OBSERVE / HONOUR

- STEPS INVOLVED IN DRAFTING
- PEOPLE MAY CONCLUDE A CONTRACT ON ANY LAWFUL MATTER BY REACHING AGREEMENT ON THAT MATTER & BY DETERMINING THE PROVISIONS TO WHICH THEY SHALL BE BOUND
- BECAUSE PARTIES CONTACT MORE FREQUENTLY ON CERTAIN MATTERS, OUR LAW HAS COME TO RECOGNISE THAT CERTAIN CONTRACTS HAVE THEIR OWN UNIQUE REQUIREMENTS
- AGREEMENT OF SALE

WHAT IS ???

- A RECIPROCAL CONTRACT
- WHEREBY 1 PARTY (VENDOR / SELLER)
- PROMISES TO DELIVER
- TO ANOTHER PARTY (PURCHASER / BUYER)
- A “THING” (MERX)
- & THE PURCHASER IN RETURN PROMISES TO PAY
- A CONSIDERATION / AN AMOUNT OF MONEY TO THE SELLER

AGREEMENT OF SALE MUST PROVIDE FOR :

- DELIVERY OF THE MERX (MOVABLE OR IMMOVABLE)
- PAYMENT OF THE DETERMINED / DETERMINABLE AMOUNT OF MONEY
- RISK & BENEFIT
- OWNERSHIP & POSSESSION

FRAMEWORK

HEADING

PARTIES

SALE (CAUSA) & SUBJECT MATTER

PURCHASE PRICE

PAYMENT

DELIVERY

OWNERSHIP

RISK & BENEFIT

WARANTEES

NON-VARIATION

NO INDULGENCES

BREACH

ARBITRATION

JURISDICTION

DOMICILIA

COSTS



SOMETIMES ..... WORDING OR CLAUSES CAN APPEAR TO BE FINE ..... BUT ON CLOSER EXAMINATION ..... DO NOT PASS THE “BUT WHAT IF” TEST

SALE OF A BUSINESS – PURCHASE PRICE & PAYMENT CLAUSE

The purchase price of the business is R4 000 000,00 (Four Million Rand) and shall be paid by the Purchaser to the Seller as follows :

- The sum of R1 000 000,00 (One Million Rand) on signature hereof.
- The balance of R3 000 000,00 (Three Million Rand) shall be paid by 6 (Six) monthly installments of R500 000,00 (Five Hundred Thousand Rand), the first such installment shall be paid on 1 May 2006 and thereafter on the 1st day of each and every subsequent month until the full purchase price has been paid to the Seller.
- STANDARD BREACH CLAUSE – SPECIFIC PERFORMANCE / CANCELLATION & DAMAGES