

DRAFTING OF CONTRACTS

ONE DAY LECTURE

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 ?

CAN WE HAVE AN ORAL AGREEMENT ?

IF WE CAN HAVE AN ORAL AGREEMENT

WHY BOTHER TO RECORD IT IN WRITING ?

⇒ COMPLEX & DETAILED MATTERS

- RECORDAL OF FACTS

⇒ DOCUMENTARY PROOF

- EVIDENCE

⇒ LAW REQUIRES IT

THE 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

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

3. NEW LEGISLATION

NATIONAL CREDIT ACT

WHAT'S INVOLVED IN THE DRAFTING PROCESS ?

“COSMETICS”

CONTENT & ESSENTIALS

STYLE & TECHNIQUE

“COSMETICS” / APPEARANCE

- 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
- LEGAL DRAFTING IS AN ART

THE DRAFTER HAS TO RECORD THE INTENTION OF THE PARTIES CLEARLY
& ACCURATELY

THE DRAFTER'S SKILL LIES IN HIS ABILITY TO ADJUST THE COMPLEXITY OF
HIS LANGUAGE TO SUIT THE INTENDED RECIPIENTS OF THE MESSAGE

LANGUAGE IS COMPLICATED

WORDS ARE PRECIOUS

WORDS OFTEN HAVE MORE THAN ONE MEANING & CAN MEAN DIFFERENT
THINGS TO DIFFERENT PEOPLE AT DIFFERENT TIMES & IN DIFFERENT
SITUATIONS – “ROOF LEVEL”

GRAMMAR IS VITALLY IMPORTANT – TENSES, PLURALS

SPELLING CHANGES MEANING

“ILLEGALLY PARKED CARS WILL BE FINE” – one “D” changes meaning of word

PUNCTUATION CHANGES MEANINGS

DEFINITION OF A PANDA - EATS SHOOTS & LEAVES

EATS, SHOOTS & LEAVES - one comma alters the whole meaning !

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

- AUGUST 2010 LAW REPORT
Southern Era Resources Ltd v. Farndell 2010 (4) SA 200 (SCA)
Terms & conditions – difference
Terms setting out enforceable contractual obligations
Conditions making operation of contract dependent on uncertain future event
- AUGUST 2010 LAW REPORT
Bredenkamp & Others v. Standard Bank of SA LTD 2010 (4) SA 468 (SCA) -
Legality of unilateral cancellation of contract

- AUGUST 2010 LAW REPORT
Bedford Square Properties (Pty) Ltd v. Liberty Group Ltd & Others 2010 (4) SA 99 (South Gauteng HC) - Reasonableness of restraint of trade clause – public policy
- AUGUST 2010 LAW REPORT
Quinella Trading (Pty) Ltd & Others v. Minister of Rural Development & Others 2010 (4) SA 308 (Land Claims Court)
Impossibility of performance – unable to honour contractual obligations - foreseeability

WHY ARE THESE CONTRACTS LANDING UP IN COURT ???

- LEAVING BLANKS

SURETY DOCUMENT – AMOUNT NOT SPECIFIED

“THE AMOUNT OF THIS SURETY SHALL BE LIMITED TO R_____”

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

COURT HELD : THE AMOUNT WAS NOT QUALIFIED, THEREFORE, CLAUSE IS NOT APPLICABLE. SURETY WAS THEREFORE **UNLIMITED**

- STANDARD CLAUSES

DOMICILIUM ADDRESS

IMPOSSIBILITY OF SERVICE OF NOTICE / NO ADDRESS GIVEN

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

WHAT DO WE LEARN FROM READING CASE LAW ?

1. THINK BEFORE YOU WRITE
2. KNOWING WHERE / HOW THINGS GO WRONG
3. HOW NOT TO DRAFT
4. APPLICATION OF KNOWLEDGE & COMMON SENSE

EXAMPLES OF BAD CLAUSE IN DEED OF SALE (IMMOVABLE PROPERTY)

The seller and purchaser heretobefore 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.

AFTER DRAFTING IS COMPLETED :

- RE-READ YOUR CONTRACT
- 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 ?

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

STEPS INVOLVED IN DRAFTING

DETERMINE CAUSA – SALE AGREEMENT

WHAT IS IT ???

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 GIVE A CONSIDERATION / PAY
AN AMOUNT OF MONEY TO THE SELLER

IT FOLLOWS THAT THE AGREEMENT MUST PROVIDE FOR :

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

ONCE THE CAUSA IS DETERMINED & THE DEFINITION IS UNDERSTOOD -
PREPARE A FRAMEWORK

- HEADING
- PARTIES
- SALE (CAUSA) & SUBJECT MATTER
- PURCHASE PRICE
- PAYMENT
- DELIVERY
- OWNERSHIP
- RISK & BENEFIT
- WARANTEES

- NON-VARIATION
- NO INDULGENCES
- BREACH
- ARBITRATION
- JURISDICTION
- DOMICILIA
- COSTS

HAVING PREPARED A FRAMEWORK :

CONTEMPLATE YOUR INSTRUCTIONS

KNOW YOUR FACTS

INSERT INFORMATION

THEN START DRAFTING

BE CAREFUL OF STANDARD GENERAL CLAUSES WHICH WE TEND TO
INSERT WITHOUT CHECKING WHETHER THEY ARE APPLICABLE / WE FAIL
TO ADAPT THEM TO THE CURRENT SITUATION

CHECK APPLICABILITY OF EACH CLAUSE & RE-READ CONTRACT

OFTEN WORDING OR CLAUSES CAN APPEAR TO BE FINE BUT ON
CLOSER EXAMINATION

THE CONTRACT & EACH CLAUSE IS FINE & ACTUALLY THERE APPEARS TO
BE NOTHING WRONG WITH ANY OF THE WORDING & CLAUSES

BUT, THE FINAL CHECKING LIES IN ASKING THE “**BUT WHAT IF**” QUESTION
TO EVERY CLAUSE

FOR EXAMPLE : AGREEMENT OF SALE – EXTRACT OF A CLAUSE

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 :

1. The sum of R500.000-00 (Five Hundred Thousand Rand) on signature hereof;
2. 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.

NOTHING WRONG WITH THIS, BUT WHAT'S BEEN LEFT OUT ?

SUMMARY

PREPARATION WORK

- ANALYSE CLIENT'S INSTRUCTIONS
- ESTABLISH THE CAUSA
- GET THE FACTS
- PREPARE A FRAMEWORK
- FILL IN THE FRAMEWORK
- DRAFT
- RE-READ
- APPLY THE "BUT WHAT IF" TEST
- ANTICIPATE PROBLEMS, FIND SOLUTIONS

SPEND LOTS OF TIME PREPARING - THEN DRAFTING BECOMES EASY

ONCE YOU HAVE LEARNT HOW TO DRAFT A BASIC CONTRACT, THEN LEARN TO ADAPT YOUR KNOWLEDGE TO OTHER CAUSAE

THEN PRACTISE, PRACTISE, PRACTISE

DRAFT DRAFT DRAFT

DRAFTING IS A SKILL THAT COMES WITH PRACTISE & EXPERIENCE.