Drafting contracts

By Patrick Stilwell

12.1 Introduction

A contract is an agreement between two or more people which creates legal rights and obligations. At common law, contracts need not be in writing; however, certain kinds of contract must, by statute, be in writing.[1]

When people enter into contracts in good faith, they have a clear purpose. In the case of a contract of sale, the seller desires to exchange a piece of property for a sum of money. The purchaser, similarly, desires to acquire the property on payment of the price. The expectation of both is that the other will perform his/her obligations faithfully and fully. They certainly do not desire, nor even anticipate, disappointment. Yet, contracts often do result in disappointment when one or both of the parties do not perform their obligations. If a property owner hires the services of a builder to build a house, he/she expects that the builder will build a house of good quality. It is also expected that the builder will complete the work within the agreed time. If the builder fails to deliver as promised, the owner may have to sue the builder. But suing may become hazardous if the terms of the contract are vague and unclear. An innocent party may even lose the case because the contract is vague or incomplete. Such situations can be avoided if the parties record the terms of the contract clearly, and in detail, in a written document.

No legal practitioner is able to prevent the other party from committing a willful breach. But it is the primary and fundamental task of a practitioner to draft a contract with sufficient clarity and completeness so as to preclude a defaulting party from escaping the effect of the breach because the contract itself is unclear or imperfect. The drafter must invoke three areas of competence to achieve this:

- ☐ knowledge of the relevant law;
- ☐ understanding and foresight of the needs of the client; and
- ☐ the ability to write clearly.

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1 Eg contracts involving the sale of land must, in terms of the Alienation of Land Act 68 of 1981, be in writing; suretyship contracts must, in terms of the General Law Amendment Act 50 of 1956, be in writing; and credit agreements must, in terms of the Credit Agreements Act 75 of 1980, be in writing. It should be noted that this is not a complete list.

12.2 The law

Drafting contracts is an intricate and technical undertaking. Learners and inexperienced practitioners should not attempt to draft even the simplest contract without a thorough knowledge of general principles of contract, the common law and statutes applicable to that type of contract. The consequences of doing so could be disastrous, as discussed below. Without such knowledge, the contract could be null and void. This has the potential for a claim of professional negligence against the drafter.

It is beyond the scope and purpose of this book to present a comprehensive treatment of the law applicable to all types of commercial contracts. What follows should, therefore, be viewed as a series of "signposts" alerting drafters of the various matters to which attention should be given. These are presented in the form of questions.

12.2.1 *Do the parties to the proposed contract have the necessary capacity?*

It is trite law that parties to a contract must have legal capacity to do so. In the case of natural persons, the parties must be adults (over the age of 21) and not under any legal disability, such as insanity or insolvency. In the case of juristic persons (such as companies, close corporations, trusts, voluntary associations and statutory bodies), contractual capacity must be conferred on the entity either in its founding document or by operation of law.

12.2.2 *Does the person who will sign the contract have the necessary authority to do so?*

A natural person entering into a contract on his/her own behalf clearly has authority to do so. The question of authority thus arises where the person concluding the contract is not acting on his/her own behalf. It arises where such person is either representing another natural person (as agent) or a juristic person. Juristic persons do not have "a body to kick or a soul to damn". All contracts concluded by them have to be executed by a natural person acting on their behalf. Companies or close corporations are usually represented by a director or member. Authority is given to such person either by the founding instrument of the entity or by special resolution. Similarly, in the case of voluntary associations, trusts or statutory bodies, authority will be conferred either by statute, the founding instrument or special resolution.

It is the duty of the drafter to check that any person purporting to represent a juristic person has the necessary authority to do so.

12.2.3 *Are the purpose and terms of the contract legal?*

The subject matter of a contract can be any human activity, as long as it is lawful and not contrary to public morality.

A contract is an agreement between two or more people, which the law will enforce. The subject matter of a contract can be any human activity, as long as it is lawful and not contrary to public morality. People can contract in respect of matters ranging from an agreement to

marry; or to act or to refrain from acting in a certain manner (such as a restraint of trade), to common commercial transactions such as sale, lease, agency or employment.

Both common-law principles and statutory provisions exist in respect of many types of contracts. Sometimes it is possible for parties to modify or even eliminate them; however, this is not always the case. In a contract of sale, the common-law imports into the contract an implied warranty against latent defects. However, it is permissible for the parties to exclude this obligation by the inclusion of a "voetstoots" clause. In terms of the Basic Conditions of Employment Act,[2] employees are entitled to certain basic rights with regard to, amongst others, hours of work,[3] payment for working overtime[4] and annual leave.[5] These are minimum rights prescribed by law and the parties may not contract out of them unless the contractual provision proves to favour the employee.[6] Any provision included in a contract which offends this rule will be null and void.

It is vital that the drafter of any contract be familiar with all law applicable to the subject matter.

It is vital that the drafter of any contract be familiar with all law applicable to the subject matter. Should he/she fail to take this into account, all or some of the terms contained in the document could be found to be unenforceable.

The purpose of this chapter is not to furnish an exhaustive list of different types of contracts and the relevant legislation applicable thereto, but rather to alert students and inexperienced practitioners to the need to familiarise themselves with the law before embarking upon the task of drawing up a contract.

The following is a list of some common commercial contracts and the statutes which influence them to some extent:

- ☐ *Antenuptial contract*
  Deeds Registries Act 47 of 1937
- ☐ *Donation*
  General Law Amendment Act 50 of 1956
- ☐ *Employment*
  Labour Relations Act 66 of 1995
  Basic Conditions of Employment Act 75 of 1997
  Skills Development Levies Act 9 of 1999
- ☐ *Money lending*
  Usury Act 73 of 1968
- ☐ *Sale of business*
  Insolvency Act 24 of 1936
  Competition Act 89 of 1998

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2 75 of 1997.
3 *Supra* s 9.
4 S 10.
5 S 20.
6 S 4.

- ☐ *Sale of land*
  Subdivision of Agricultural Land Act 70 of 1970
  Administration of Estates Act 66 of 1965
  Shareblock Control Act 59 of 1980
  Alienation of Land Act 68 of 1981
  Property Time Sharing Control Act 75 of 1983
  Sectional Titles Act 95 of 1986
- ☐ *Sale of movables*
  Sale and Service Matters Act 25 of 1964
  Credit Agreements Act 75 of 1980
- ☐ *Suretyship*
  General Law Amendment Act 50 of 1956

All contracts need to comply with the fundamental rights contained in the Bill o Rights in Chapter two of the Constitution. If any term of the contract infringes o any fundamental right, the term or the entire contract may be void.[7]

12.2.4 *Does the law prescribe any formalities in respect of this contract?*

Society regards certain kinds of contract to be very important. For this reason specific legislation has been enacted to regulate the validity of the contract de pending on the actual type of the contract. Such legislation commonly require that terms to the contract be reduced to writing and that the contract be signed b the parties.[8] According to Professor Sharrock:

> The requirement of a written record resolves itself into two basic rules: (i) the written instrument must on the face of it contain the essential terms of the type of contract in question; and (ii) the wording of the writing must be such that the identity of the parties, and the force and effect of the essential terms as well as any further material terms set out in the document are ascertainable without evidence as to what the parties said, or orally agreed to prior to signing the document.[9]

12.2.5 *Are any of the parties minors?*

If any of the parties to a contract are minors, they will have to be assisted by guardian or curator. A sale of land by a minor is valid only if the prior consent o the Master of the High Court, or the Court itself, has been obtained.[10]

12.2.6 *Are either of the parties married?*

Whenever a person, married in community of property, sells a piece (or all th share in a piece) of land or enters into a suretyship contract, the written conser of his/her spouse is required.[11]

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7 S 8(2) of the Constitution of the Rebulic of South Africa, 1996.
8 See eg the Alienation of Land Act 68 of 1981 or the General Law Amendment Act 50 o 1956 in respect of suretyship contracts.
9 Sharrock and Griesel (2001) "Drafting of Contract" *Legal Education and Department (LEAD Manual* at 26.
10 S 80(1) and (2) of Act 66 of 1965.
11 S 15 of Act 88 of 1984.

12.3 The art of drafting

12.3.1 *Preparing a checklist*

Experienced, especially specialist, practitioners are able to draw contracts with relative ease and they probably do not need to work from a checklist. Most large law practices will have a database of time-honoured precedents of most commercial contracts and the task of drawing a contract is often a simple matter of inserting variables into a good precedent. Even beginners can prepare a successful commercial contract this way. However, risks are involved. The precedent may not be up-to-date or it may not accord with current legislation or it may even be poorly structured.

While it is acceptable to use precedents, it is inadvisable to place absolute reliance on them.

While it is acceptable to use precedents, it is inadvisable to place absolute reliance on them. It must be remembered that the particulars of the parties and their special requirements are unique. It is better to use a checklist.

The following are a number of points the practitioner must consider before drafting a contract. These are presented in the form of questions and are issues the drafter must address in his/her mind in addition to the matters referred to above:

- ☐ Who are the parties to the contract?
- ☐ Have all persons interested in the subject matter of the contract been involved?
- ☐ Do the parties have the necessary capacity to contract?
- ☐ Do the contemplated signatories have the necessary authority to sign the contract?
- ☐ What are the *essentiala* of the particular type of contract? Here it is necessary to consider the common-law definition of the particular contract and to make a list of those common-law essentials.
- ☐ Are any mandatory legislative provisions applicable to it? And do they need to be incorporated into the contract?
- ☐ Do any of the common-law rules relating to the type of contract need to be modified or excluded?
- ☐ Where one or more of the parties are required to pay a contract price, should provision be made for the furnishing of security?
- ☐ Is VAT, or any other form of tax, payable in terms of the contract? And if so, which of the parties is liable to pay it?
- ☐ Is stamp duty payable in respect of the type of contract? And if so, which of the parties is liable to pay it?
- ☐ What are the specific rights and obligations of each of the parties in terms of the contract? These need to be listed in detail. Here it is necessary to consider what benefit each party is to receive and what obligations he/she will incur.
- ☐ Is it necessary for any of the parties to provide a warranty?
- ☐ Is it necessary for any common-law warranty to be excluded?

- ☐ Do either of the parties require any special rights or interests needing protection?
- ☐ What are the risks inherent in the contract for each of the parties? And do ar of these need to be provided for?
- ☐ Is it necessary to make special provision in the contract in the case of breach?
- ☐ Is it desirable to have a non-variation clause?
- ☐ Is it desirable to have a dispute resolution clause, such as an arbitratic clause?
- ☐ Is it necessary to make provision for payment of the costs and stamp duty respect of the contract?
- ☐ Do the parties wish to consent to the jurisdiction of any particular court respect of any dispute arising from the contract?

12.3.2 *The structure of a contract*

No law actually prescribes the structure of a written contract. Even those statute which require written formality fall short of prescribing the layout. This is governe by custom, convention, accumulated wisdom and individual preference.

Commercial contracts generally contain the following features, usually arrange in the order given below:

1. *A heading*: This is the label of the contract as it indicates the type of contract;
2. *A description of the parties*: Here, the full names, addresses and identi numbers (or registration numbers in the case of juristic persons) may be s out;
3. *A recital clause*: This sets out the background to, or the context of, the co tract. Two points need to be noted:
   - ☐ not all contracts have or require a recital clause. It is usually included a an aid to ascertain the intention of the parties; and
   - ☐ the recital clause is not usually a term of the contract itself. Rather, contains historical information which may assist in its interpretation. If th parties request it, a clause can be included in the main body of the co tract to the effect that the recital clause is meant to form part of the co tract for interpretation purposes;
4. *The main body of the contract*: This is the important part and here one w commonly find clauses relating to the following:
   - ☐ the nature of the contract (for example, whether it is a sale, lease agency);
   - ☐ the principal obligations of the parties;
   - ☐ any subsidiary obligations; and
   - ☐ other clauses relating to matters such as breach, non-variation, choice jurisdiction or domicilium.

5. *The conclusion/ending*: This is the part of the contract where provision is made for the date and signatures. Although it is not a legal requirement, written contracts should be witnessed. It is a habit of modern life that people generally take less care in writing their signatures than writing any other word. The signatures of some people are not more than a mere scribble and bear little or no resemblance to a recognisable name. It is advisable that witnesses be required to print their names below their signatures.

12.3.3 *Language*

The ability to communicate effectively is probably a practitioner's most useful skill.

The ability to communicate effectively is probably a practitioner's most useful skill. Given the importance of language in law, one would think that most legal writing would be clear, concise and effective. Unfortunately, this is not always the case. A great deal of current legal writing is tautological and over-burdened with outdated, useless and long-winded expressions which lack clarity. The author Edward D. Re advised: "Lawyers would do well to remember what may be called the ABC of legal writing – A for Accuracy, B for Brevity and C for Clarity".[12] Legal documents, such as contracts, are not written to amuse or please the reader. They are written to advance or protect a legal interest.

12.3.4 *Brevity*

Brevity involves the use of short sentences, paragraphs and sections. The ordinary person absorbs information much more easily if delivered in small quantities. Studies have shown that 96% of people can understand an eight-word sentence. Only 4% can understand a 21-word sentence at first reading.[13] It is not always easy to be brief as it requires extensive discipline. Drafters of contracts should check the number of words in a sentence. If it is found that the word count exceeds a dozen or so, they should opt to shorten the sentence by dividing it into two or more parts.

12.3.5 *Clarity*

Legal documents should be written in clear, plain language.

Legal documents should be written in clear, plain language. In "Drafting Legal Documents" by Barbara Child, the writer warns of a kind of folklore that haunts the legal profession "perpetuating a myth that judges prefer legalese and that lawyers who do not use it will be laughed out of court" but also that "the myth is beginning to be exposed as such".[14] Professor Sharrock conveys the following view:

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12 (1993) *Brief Writing and Oral Argument* at 1.

13 Adai (1994) "The Effective Communicator" *Professional Skills for Lawyers: A Student's Guide* at 48.

14 Adai (1994) "The Effective Communicator" *Professional Skills for Lawyers: A Student's Guide* at 54.

> plain, simple language is the essence of good drafting . . . never use a word or expression which you yourself do not fully understand. Remember the degree of sophistication of the parties: if appropriate pitch the language of the document at a level below that of the ordinary reader.[15]

Professor Sharrock also provides a list of words which commonly feature in contracts and the recommended alternative:

Sophisticated Words	Recommended Word
accord/afford	give
adjacent/contiguous to	next to
by means of/virtue of	by
constitute	appoint
covenant	agree
determine	end
effect/implement	carry out
expend	spend
in accordance with	by, under
in connection with	with, about, concerning
in lieu of	instead of
in relation to	about, concerning
in the event that	if
occasion	cause
prior to	before
remunerate	pay
subsequent to	after
title	owner
utilise	use
vendor	seller
with a view to	to
with reference/regard to	about, concerning
with respect to	on, about

15 Sharrock and Griesel (2001) "Drafting of Contract" *LAWSA: Practical Legal Training Practice Manual* at 46.

Words, such as the following, should be avoided because they are not in common use: hereinbefore mentioned; hereinafter called; hereinbelow described; heretofore; hereunto; to wit; ultimo; whatsoever; wheresoever; and witnesseth.

Professor Sharrock[16] provides the following hints regarding grammar and syntax which, if followed, will result in a clearer document. One should therefore:

- ☐ *Guard against imprecision*: Here the drafter should be particularly weary of the use of words which have more than one meaning.
- ☐ *Beware of the expression "and/or"*: The expression "A and/or B" could mean either "A or B" or "Both A and B".
- ☐ *Use the active voice rather than the passive voice*: For example "The lessee must pay the rent by the first of the month" is better than "The lessee shall pay the rent by the first of the month".
- ☐ *Avoid double negatives*: For example "The lessee may not take occupation of the leased premises if he has not paid the rent". The better way of expressing this is "The lessee may not take occupation of the leased premises until he had paid the rent".
- ☐ *Avoid long sentences*.
- ☐ *Follow the correct word order*.

12.4 Examples

Examples of a selection of headings and clauses commonly found in commercial contracts are set out as follows:

12.4.1 *The heading or label*

Contract of Sale

Note: It is not uncommon to come across headings such as "Memorandum of Agreement of Sale". This is not only tautology but may even create confusion. The words "Memorandum of Agreement" suggest that the parties have concluded a prior oral agreement and that the written instrument is merely a recording of it. Issues of capacity, authority and legality could arise, requiring a court to decide whether the document itself is the contract or whether it is merely a written recording of an earlier oral agreement.

12.4.2 *The recital*

A recital is not necessary in a straightforward commercial contract. It often occurs, however, that the actual terms of the contract will be better understood if the background circumstances to it are explained. It must be emphasised that the recital is no more than explanatory material. Recitals usually set out in contracts the terms of which would be better understood if viewed against a certain historical background.

16 Sharrock and Griesel (2001) at 47–50.

The following is an example of a recital clause:

Background

1. Before concluding this agreement, A and B were partners in a business venture called A and N enterprises.
2. They have agreed to dissolve their partnership.
3. In terms of their agreement, A will become the sole owner of the business.
4. In consideration for receiving ownership of B's share in the partnership, A has undertaken to transfer to B certain assets and to assume sole liability for payment of certain debts of the partnership.

12.4.3 *The parties*

The Parties

The parties to this contract are:

Michael Tree (Identity Number 370607 0039 080)

Presently residing at 1 Athlone Avenue, Durban-North

(who, in this contract, will be called the Seller)

and

Priscilla Fox (Identity Number 550601 6745 080)

Presently residing at 18 Makinder Road, Howick

(who, in this contract, will be called the Purchaser).

12.4.4 *The main clause(s)*

The Seller agrees to sell to the Purchaser a .....

(*Note: Here, one would have to insert a description of the property being sold. It may be a piece of land or it may be a movable item, such as a motor vehicle.*)

The item of property being sold may be described as follows:

A certain piece of land described as Sub 21 of Lot 15 of the Townlands of Pietermaritzburg

or

A 1997 model Opel Kadett motor vehicle, registration number ....., engine number ....., chassis number .....

12.4.5 *The consideration clause*

In all commercial contracts, one of the parties is exchanging an item or service of commercial value in exchange for a piece of property or payment of money. Two examples are given below. The one relates to an agreement of sale, the other to an agreement of lease.

The Purchaser agrees to pay the Seller the sum of R25 000,00 for the property described in Paragraph 1 above.

or

The Lessee agrees to pay the Lessor a rental of R2 000,00 per month for the leased premises.

12.4.6 *Method of payment (1)*

Commercial contracts usually require payment of the consideration upon delivery of the property or service. Alternatively, it may be done by way of periodical instalments.

The following are examples:

The Purchaser agrees to pay the Seller an amount of R25 000,00 for the property described in this contract.

or

The Lessee agrees to pay rent to the Lessor in the amount of R2 000,00 per month.

12.4.7 *Method of payment (2)*

The Purchaser agrees to pay the full purchase price of R25 000,00 on delivery of the motor vehicle to him.

or

The Purchaser agrees to pay the purchase price of R25 000,00 in the following way:

R10 000,00 on delivery of the motor vehicle to him and the balance in monthly instalments of R1 000,00, the first of which must be paid on 1 May 2004 and subsequent payments on the first day of every month thereafter until the full price has been paid.

or

The full purchase price on registration in his name of the said piece of land.

or

The Purchaser agrees to pay the purchase price as follows:

R10 000,00 on delivery of the said motor vehicle to him.

The balance of R15 000,00 in ten (10) equal instalments of R1 500,00 each, the first of which is payable on 1 November 2003 and all subsequent payments on or before the first day of each succeeding month thereafter until the full purchase prices has been paid.

or

The Lessee agrees to pay the rental of R2 000,00 per month, monthly in advance, which must be paid on or before the seventh day of each and every month during the currency of the lease.

12.4.8 *Subsidiary clauses in a lease*

The Lessee may not do any of the following without the Lessor's written consent:

- ☐ Make any structural alterations to the leased premises.
- ☐ Remove any trees or shrubs from the garden.
- ☐ Cede any of his/her rights under this agreement.
- ☐ Sublet any portion of the leased premises to any other person.

The Lessee must:

- ☐ Maintain the interior of the premises.
- ☐ Deliver the premises to the Lessor, at the end of the lease, in the same condition as it was in when he/she took occupation.
- ☐ Notify the Lessor of any major faults in the premises no later than 14 days after they came to his/her attention.

12.4.9 *Voetstoots clause*

This type of clause denies the Purchaser a remedy against the Seller for later defects. In colloquial language, parties believe that if an article is sold "as is", has the same meaning as voetstoots. This is not a settled point and it is prefe able to use the term "voetstoots".

> The vehicle sold under this agreement is sold voetstoots.

12.4.10 *Suspensive condition*

This type of clause is commonly found in agreements of sale where the partie intend that the agreement should not be binding unless a certain event occur Often in sales of immovable property, the Purchaser is only able to pay the pu chase price if he/she obtains a loan from a financial institution. The agreement i thus made dependent on the granting of that loan.

> The terms and conditions of this agreement will be binding on the parties only if the purchaser is granted a loan of no less than R200 000,00 by a registered bank or building society, by not later than 16 October 2002. This condition will be deemed to have been fulfilled if a registered bank or building society gives the Purchaser written notification that his/her loan application, for that amount, has been approved in principle.

12.4.11 *The VAT clause*

> If value added tax is payable by the Seller in terms of this agreement, the Purchaser will be obliged to refund the Seller such amount as it becomes payable.

12.4.12 *Breach clause*

> If either of the parties commits a breach of his/her obligations under this agreement, the innocent party shall have the following rights:
> - to cancel the agreement; and
> - claim damages he/she has suffered.
>
> *or*
>
> - to enforce the agreement;
> - claim such damages as he/she has suffered; and
> - claim any outstanding amount owing by the defaulting party in terms of the agreement.

12.4.13 *Interest clause*

> If the Purchaser fails to pay any instalment due on or before due date, he/she will be liable to pay interest on the amount of such late instalment, at the rate of 17,5% per annum calculated from the due date of payment until the actual date of payment.

12.4.14 *Jurisdiction clause*

> The parties consent to the jurisdiction of the Durban Magistrates' Court in respect of any legal action which might be instituted by either of them arising from this agreement.

12.4.15 *Arbitration clause*

It is not usual for an arbitration clause and a consent to jurisdiction clause to be embodied in one agreement because they are, to some extent, mutually exclusive. It is, however, possible for parties to agree that an arbitrator will be appointed to resolve a particular aspect of the dispute.

- ☐ In the event of a dispute arising between the parties as to their rights and obligations under this agreement; to its interpretation; or to the breach by either of them of their obligations, hereunder they agree to resolve such dispute by arbitration.
- ☐ The arbitrator shall be a person who has been a practicing advocate or attorney for a period of no less than five years prior to the date when the dispute arose and shall be a person chosen by the parties themselves.
- ☐ If the parties are unable to agree on an arbitrator they hereby mandate the Chief Executive Officer of the KwaZulu-Natal Law Society to appoint one and his/her decision will be final.
- ☐ The provisions of the Arbitration Act will apply in respect of such arbitration.

12.4.16 *The* domicilium *clause*

The parties choose as their respective *domicilia citandi et executandi* the following addresses for any legal proceedings which may be instituted arising from this agreement.

The Seller: (insert a physical address)

The Purchaser: (insert a physical address)

12.4.17 *The costs clause*

The legal costs incurred in connection with the preparation of this agreement will be borne by the parties in equal shares.

or

The Seller will be liable for all legal costs incurred in connection with the preparation of this agreement.

12.4.18 *Non-variation clause*

No amendments to or variations of this agreement will be binding unless they are reduced to writing and signed by the parties.