

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

THE TROUBLE WITH LAW IS LAWYERS, OR IS IT?

Clarence Darrow once said that “the trouble with law is lawyers”. In defence of lawyers it could be said that ultimately the trouble with law is that the law is uncertain and to most people largely unintelligible. To the extent though that lawyers husband that uncertainty and opaqueness, they are undoubtedly the enemies of access to justice and very much part of the trouble with law.

VAGUENESS OF A CONTRACT DOES NOT NECESSARILY MEAN YOU CAN WALK AWAY OR DOES IT?

“It is truly astonishing how often businessmen conduct their affairs, involving at times huge financial interests, on the strength of crude and vague agreements and then rely on hope, good spirits, bona fides and commercial expediency to make such agreements work.” The quoted text is the introduction to the Supreme Court of Appeal’s judgment in the matter of *Hangar and others v Robertson* [2017] JOL 37735 (SCA).

THE TROUBLE WITH LAW IS LAWYERS, OR IS IT?

It is not unusual to find a letter written by a litigation lawyer that ends with the words, all our client's rights are reserved or the more emphatic version, all our client's rights are reserved in fact, in law and in toto.

The extravagant jargon favoured by lawyers is acknowledged as a barrier preventing ordinary people from enjoying the fullness of the rights to which they are entitled.

Clarence Darrow once said that "the trouble with law is lawyers". In defence of lawyers it could be said that ultimately the trouble with law is that the law is uncertain and to most people largely unintelligible. To the extent though that lawyers husband that uncertainty and opaqueness, they are undoubtedly the enemies of access to justice and very much part of the trouble with law.

The self-evident purpose of language is to communicate and one would then expect lawyers to adopt language most likely to convey the intended message. Instead we still find lawyers referring to last month, this month and next month as *ultimo*, *instant* and *proximo*, a code that is gobbledygook to normal folk.

And it is not unusual to find a letter written by a litigation lawyer that ends with the words, all our client's rights are reserved or the more emphatic version, all our client's rights are reserved in fact, in law and in toto.

It is an interesting exercise to challenge that lawyer on the use of the phrase as a catch-all rather than a reservation carefully and appropriately applied. Most will tell you that they are reserving their client's rights. But what need is there to reserve those rights if they are not in fact abandoned? Perhaps the inclusion of the catch-all phrase is a useful protection for lawyers who are not sure if they are abandoning rights and much like throwing salt over their left shoulder after a spill, find comfort in superstition rather than taking the time to make sure.

Lawyers also find comfort in standard openings to letters, much like a batsman's trigger movement before playing a cricket stroke. Many lawyers' letters will refer the reader to the abovementioned matter, the draftsman implicitly assuming the reader incapable of grasping that a letter announcing a subject headed in bold capitals at the top of the page almost certainly deals with that subject.

As in every trade, there is a jargon and initiates are anxious to learn that jargon and to fit in. Law is no different. Candidate attorneys strive from their first day to become proficient in legal speak. Law is different though in that the extravagant jargon favoured by lawyers is acknowledged as a barrier preventing ordinary people from enjoying the fullness of the rights to which they are entitled and in most countries around the world for which they or their ancestors fought pitched battles. It is different also in that to the outsider the jargon makes the simple incoherent and in the context of law that is a pox on the lives of ordinary people.



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THE TROUBLE WITH LAW IS LAWYERS, OR IS IT?

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Plain language, simple sentences and clear communication take a lot more effort than the use of trigger movements, jargon and superstitious add-ons.

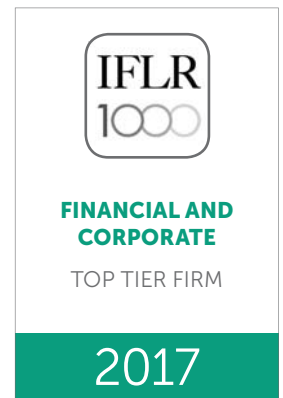
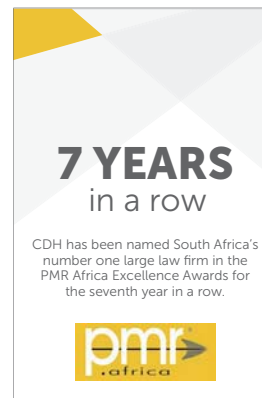
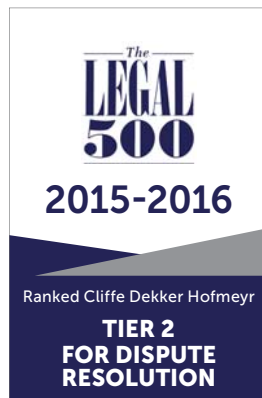
But plain language, simple sentences and clear communication take a lot more effort than the use of trigger movements, jargon and superstitious add-ons. Simple and brief never will be the default. So, if lawyers naturally default to waffle and jargon, what chance do clarity and plain language have? Market forces ultimately will decide. If the market wants to eat burgers, burgers it shall have. However, there will always be a portion of the market, significant enough to ensure the relevance of fine dining and Michelin stars. Law will be the same. For as long as there is a significant portion of

the market that demands simple brevity and precision of its lawyers, there will be lawyers prepared to work that much harder, to be that much better to satisfy that discerning slice of the market.

The trouble with law may in part be lawyers but while clients are paying and market forces operate, clients will get what they demand.

So what is your order, O discerning client? Chicken burger or Coq au vin?

Tim Fletcher



CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



VAGUENESS OF A CONTRACT DOES NOT NECESSARILY MEAN YOU CAN WALK AWAY OR DOES IT?

The appellants raised various arguments to the interpretation of the disputed clause and stated that regard must be given to all preceding correspondence which led to the signing of the June 2006 document.

According to the appellants' views, the parties had always been of a mind that the disputed clause and the share option were alternative provisions. The Respondent disputed this.



"It is truly astonishing how often businessmen conduct their affairs, involving at times huge financial interests, on the strength of crude and vague agreements and then rely on hope, good spirits, bona fides and commercial expediency to make such agreements work." The quoted text is the introduction to the Supreme Court of Appeal's judgment in the matter of *Hangar and others v Robertson* [2017] JOL 37735 (SCA).

During June 2006, the respondent (JR) in the matter entered into an agreement with the appellants in terms of which he would provide services as a consultant to the company of the appellants. The parties believed the respondent could achieve a significant improvement in the company's profitability. As a consequence thereof, the parties recorded the terms of their agreement in a document. The disputed clause in the agreement insofar as this matter was concerned reads as follows:

JR basic expenses will be reasonably covered, approx. R5,000 per week.

JR will be entitled to 10% of the PBT exceeding R10 million per financial year. This will exclude abnormal income or expenditure (eg sale of assets, abnormal bonus payments).

JR will be entitled to 10% of the net increase in the value of the company ie of the value in excess of R24 million. This will only be awarded at the time when value is realised, for example when the business is sold.

JR will be given the option to purchase up to 10% of the shares in the company, based on the current "value" of R24 million, and such option will remain open until 30 June 2009.

As at 30 June 2009, JR had not taken up the option to acquire a shareholding in the appellants' company. Thereafter, he received legal advice that the option had lapsed and could no longer be exercised. JR had, however, rendered his services as a consultant, and the company's value had substantially increased from the initially agreed value of R24 million when the contract had commenced. As a result, JR sought to exercise the disputed clause which entitled him to 10% of that net increase in the company's value. In addition, he claimed payment of 10% of the company's profit before tax for the years 2009 and 2010 up to the date his services ceased (22 December 2009).

The appellants raised various arguments to the interpretation of the disputed clause and stated that regard must be given to all preceding correspondence which led to the signing of the June 2006 document. The appellants contended, among other things, that the share option and the disputed clause were ultimately agreed to be alternative and not cumulative forms of remuneration. According to the appellants' views, the parties had always been of a mind that the disputed clause and the share option were alternative provisions. JR disputed this.

VAGUENESS OF A CONTRACT DOES NOT NECESSARILY MEAN YOU CAN WALK AWAY OR DOES IT?

CONTINUED

The court highlighted that a commercial contract seriously executed by parties with the intention of being bound thereby should not lightly be held to be unenforceable.



The court *a quo* made, among other findings, the following decision:

An order declaring the First, Second and Third Defendants liable jointly to pay to the Plaintiff 10% of any excess by which the value of the Fourth Defendant as a termination of the agreement on 22 December 2009 (calculated as the net profit before tax of the Fourth Defendant for the financial year ending on 30 June 2010, excluding any abnormal items of income or expenditure, multiplied by four), exceeded the sum of R24,000,000, such payment becoming due when either the Fourth Defendant disposes of its business or the First, Second and/or Third Defendants dispose of or realise their direct or indirect interest in the Fourth Defendant, whichever shall occur first; ..."

The Supreme Court of Appeal (SCA) summarised the dispute between the parties as the interpretation and effect of a vague clause contained in a consultancy agreement as to whether the respondent would be entitled to 10% of the net increase in the company over R24 million "only to be awarded at the time value is realised, eg when the business is sold".

The SCA dismissed the appeal. In reaching its judgment, the court highlighted that a commercial contract seriously executed

by parties with the intention of being bound thereby should not lightly be held to be unenforceable because they failed to express themselves as clearly as they could have done.

Furthermore, it held that the context in which a contract is concluded is often of great importance. It is often said that, in the interpretation of a contract, context is everything. Disputed words have to be considered in light of the relevant and admissible context, including the circumstances under which the contract came into being. In this matter, for example, the correspondence exchanged between the parties prior to the conclusion of the agreement was an important part of the admissible factual matrix.

A contract may be loosely worded but that does not necessarily mean that it is unenforceable and that you can walk away from it when it suits you. You need to consider the intention of the parties upon the conclusion of the agreement, which will include having regard to the intention of the parties leading up to agreeing to the terms and conditions. To avoid or limit the interpretation of a contract, parties must carefully review the terms and conditions put down in writing as, ultimately, the contract will be the starting block in any dispute and may lead to your demise.

Corné Lewis



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