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Prevention is Cheaper than Cure

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GENERAL:

The Business of Deconstructing Construction Contracts

" 'When I make a word do a lot of work like that,' said Humpty Dumpty, 'I always pay it extra.' "[1]

Author: Michelle Kerr

It has long been accepted in South African law that there are no special formalities required for the making of an enforceable contract,[2] and it is not necessary for a contract to be in writing in order for it to be enforceable.[3]

What makes the reduction to writing of a contract so attractive is the supposed certainty of the terms under which the parties have contracted. This is particularly so when it comes to construction projects, which tend to have complex contractual provisions and kill more trees, when the contract document is printed in duplicate, than a typical contractor is able to plant during the entire site rehabilitation period.

Unfortunately, despite such attempts to pin them down, words are a capricious bunch and it is common to find not only conflicts between the various written terms of a construction contract but also ambiguity as to the meaning of those terms themselves.

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[1] Lewis Carroll, Through the Looking Glass, Chapter 6 – https://ebooks.adelaide.edu.au/c/carroll/lewis/looking/chapter 6.html

[2] Conradie v Rossouw 1919 AD 279

[3] Goldblatt v Freemantle 1920 AD 123

The contract is intended to create a framework, within the greater confines of the law, by which the parties govern their relationship. As such most contracts, recognising the less than law abiding nature of words in general, will make provision, to a certain extent, for these conflicts or ambiguity, by way of clauses dealing with the priority of documents or the reference of any conflicts or ambiguities to the engineer/project manager/principal agent for decision. As an example of this, one could have regard to Clause 1.5 [Priority of Documents] of FIDIC and Clause 17.1 [Ambiguities and Inconsistencies] of the NEC3 Engineering and Construction Contract.

Inevitably, however, it will transpire that one or other party has relied upon his/her understanding (not shared by the other party) of the contractual terms in performing (or not) his/her obligations, and to see the other parties point of view would result in a substantial loss. In circumstances like this, priority clauses are simply obstacles to be overcome and an unfavourable decision by the engineer/project manager/principal agent can never be sound. In such a battle, nothing is sacred, and it may even transpire that the meaning of these priority/ambiguity clauses themselves are called into question.

The interpretation of contracts, thus, takes up a considerable portion of the courts time and there is substantial common law on the technique to be used in doing so. Quite logically, the courts will start by trying to ascertain the ordinary and grammatical meaning of the term. Where this is not sufficiently helpful, the courts will then move on to look at the context these words are used in, the background circumstances of the origin and purpose of the contract and the circumstances (such as negotiations and correspondence) surrounding the agreement thereof. [4]

Some words, however, earn more overtime than others. Where the above technique doesn't quell them, contractual terms will be subjected to the classical rules of interpretation.[5] There are a number of these rules, perhaps the most well-known being the contra proferentem rule. In terms of this rule, terms are interpreted against the party who drafted them. What most

[4] Coopers & Lybrand v Bryant 1995 3 SA 761 (A)

[5] Christie's The Law of Contract in South Africa (6th Edition), LexisNexis, 2011, page 227

[6] Christie's The Law of Contract in South Africa (6th Edition), LexisNexis, 2011, page 232-234

don't know is that this is, in fact, the rule of last resort, and that the other classical rule of interpretation must first be considered.[6]

One such rule is that a court will favour the interpretation of a term, which is less inconvenient.[7] An interpretation will not be followed if it would make a mockery of a contract[8] and in interpreting the meaning of a commercial document, such as a construction contract, a court will, taking as the starting point of the interpretation the fact that the parties intended their agreement to make good business sense[9], endeavour to give it operative effect[10], commercial sense[11] or business efficacy[12].

As an example of this, one could consider the case of Alenson v A B Brickworks (Pty) Ltd[13] where Alenson sold his entire shareholding in A B Brickworks, undertaking to pay, on demand, 50% of any additional income tax which A B Brickworks might be *"obliged"* to pay for the period before the effective date of sale.

Unfortunately for Alenson, A B Brickworks was subsequently called upon to pay R 2 million (later reduced by agreement to R 1 015 500) in additional income tax. This was an event which obviously surprised Alenson, as he refused to refund A B Brickworks the promised 50% thereof, arguing that as this sum was merely agreed and not conclusively proved to be correct, A B Brickworks could not be said to have been *"inescapably obliged"* to pay it. The court held that the contract would be *"more efficacious from a business point of view"* if the contract was interpreted in favour of A B Brickworks, as it was unlikely that the parties intended to burden A B Brickworks with a requirement that it object to any assessment made by the Receiver of Revenue and require that such sum be determined by the Income Tax Special Court.

The lesson to be learnt here is that a party to a contract should always give due consideration, in light of the prevailing and background circumstances, to how a contractual term could foreseeably work in practice before, firstly, agreeing to it and, secondly, acting in terms thereof.

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[7] Sharrock, R, Business Transactions Law (6th edition), Juta & Co Ltd, 2002, page 186

[8] Concord Insurance Co Ltd v Oelofsen 1992 4 SA 669 (A)

[9] Cargo Africa cc v Gilbeys Distillers & Vintners (Pty) Ltd 1998 4 SA 355 (N)

[10] Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd 1964 (1) SA 669 (W)

[11] Man Truck & Bus (SA) (Pty) Ltd v Dorbyle Ltd t/a Dorbyl Transport Products and BUSAF 2004 (5) SA 226 (SCA)

[12] ABSA Bank Ltd v Swanepoel NO 2004 (6) SA178 (SCA)

[13] 1993 (1) SA 62 (A) in Sharrock, R, Business Transactions Law (6th edition), Jutta & Co Ltd, 2002, page 186