Overcoming Language Barriers in Contracts – A South African Perspective

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Abstract. Language forms the basis of written contracts, but the use of language may also function as a barrier to contracting parties, particularly when the parties are not proficient in the commercial language of choice, such as English in the case of South Africa. The plain language movement and specifically legislative interventions have placed significant pressure on lawmakers to reform the use of traditional legal English, and consequently, traditional drafting styles. However, many contracts continue to exhibit convoluted language, legalese and poor visual appeal, which ultimately functions as a language barrier for many people. This article examines the various language barriers that exist in contracts from a South African perspective. It does so by assessing the barriers that exist under first, the common law (or the so-called default rules), second, the use of standard contracts, and third, the resistance to the use of plain language as well as the limited application of existing plain language legislation in certain types of contractual engagements. The author proposes dismantling the language barriers by adopting both textual and visual communication devices in order to achieve clear and comprehensible language in all types of contracts. Furthermore, it is suggested that such communication devices should not necessarily be limited to consumer contracts that are legislatively required to comply with plain language requirements. It is only by dismantling existing language barriers that social justice within contracts can be achieved in a society with diverse language proficiencies, such as South Africa. Therein, this article offers insights that are relevant not only within the South African context but also for countries that may face similar language barriers characterised by multiple languages and varying language proficiencies within their populations.

Keywords: plain language; contracts; law and language; drafting of contracts.

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'For it is not enough to know what we ought to say;
we must also say it as we ought'.
Aristotle[1]

Introduction

The use and expression of language are fundamental to both society and the system of law.[2] However at the same time, as noted by eminent scholar Professor S. Cornelius, language is "inherently flexible and often ambiguous and vague."[3] The importance of language and its interaction in society and the law can be historically traced back to the pinnacle of Greek civilisation, where language played an important role in the discipline of rhetoric and oral arguments.[4] The art of rhetoric, in this context, can be described as the skill to convince a person of a certain point of view or the veracity of a statement or fact.[5] The principles of rhetoric were inherited

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1 Aristotle, *The Art of Rhetoric* 157 (2012).

2 Brady Coleman, *Are Clarity and Precision Compatible Aims in Legal Drafting*?, Singapore J. Legal Stud. 376 (1998), notes that law and language share three characteristics, namely (i) "rule-governed symbolic systems"; (ii) both are "uniquely human"; and (iii) that both are "essential to the fabric of society."

3 Steve Cornelius, *Principles of the Interpretation of Contracts in South Africa* 1 (2007).

4 Aristotle, *supra* note 1, at 19, notes that "rhetoric is a combination of the science of logic and the ethical branch of politics; and it is partly like dialectic, partly like sophistical reasoning."

5 *See also* Aristotle, *supra* note 1, at 19–75.

and eventually adapted in the Roman Empire, and consequently, they influenced the development of Western legal cultures as well as the various approaches to contemporary legal writing.[6] The shared heritage of legal cultures has resulted in the development of a unique use of language and mode of communication. In fact, legal systems have certain "linguistic features" that distinguish legal language from other forms of language.[7] Moreover, civil legal systems and common law systems each have their own unique legal heritage, which ultimately influences and impacts the linguistic characteristics and features employed in legal writing.[8] South Africa is typically considered to have a mixed legal system, which incorporates characteristic features of both the civil law and common law legal heritages and consequently, their linguistic features,[9] including influences of Latin and French.[10] However, it is important to note that the development of drafting traditions and conventions in South Africa predominantly stems from a common law influence, which will be the area of focus in this article.

Legal writing can be described as expository writing[11] and can be divided into three categories. The first category is that of discursive or persuasive legal writing,[12] which is aimed at either providing information or convincing a person of a particular legal position, point of view or statement.[13] The principle of rhetoric is identifiable in persuasive legal writing, as it is also underpinned by the persuasiveness of the argument in legal discourse.[14] The second category is litigation-related writing, which is language that is used when preparing the paperwork required in the litigation process.[15] There are, of course, other types of legal writing that form part of the third category and that are not aimed at persuading a person of a particular legal position, point of view or statement, but are rather used to create and establish legal consequences (also referred to as juristic acts or obligations).[16] This form of legal

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6 *See also* Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Ethical Issues*, 46 Tex. J. Bus. L. 89, 90 (2014), Identifies three types of writing, namely, creative writing, expository writing and legal writing.

7 Peter M. Tiersma & Lawrence M. Solan (eds.), *The Oxford Handbook of Language and Law* 13 (2012).

8 *Id*. at 13.

9 For further reading on linguistic characteristics, *see* Tiersma & Solan (eds.), *supra* note 7, at chap. 1.

10 Tiersma & Solan (eds.), *supra* note 7, at 18–19.

11 Dahm, *supra* note 6, 90.

12 Thomas R. Haggard & George W. Kuney, *Legal Drafting* 11 (2007).

13 Adapted from Dahm, *supra* note 6, 90–91. *See also* Haggard & Kuney, *supra* note 12, 11.

14 *See also* Aristotle, *supra* note 1, at 19–75.

15 Haggard & Kuney, *supra* note 12, 11.

16 Adapted from Dahm, *supra* note 6, 90–91. *See also* Heinrich Schulze et al., *General Principles of Commercial Law*, para. 3.1.1 (2019) and Dale Hutchison & Chris Pretorius (eds.), *The Law of Contract in South Africa* 8 (2017).

writing is typically found in legal instruments such as statutes, trust deeds, wills (or testamentary instruments) and contracts,[17] and can be described as either normative or obligatory legal writing.[18] Obligatory legal writing is characteristically more factual and intended to create, amend or destroy juristic obligations,[19] as well as "provide the rules that will control the behavio[u]r of the parties in the future."[20] This type of legal writing is of particular relevance in the drafting of contracts, and the principles of rhetoric would play an indirect or secondary role in drafting the written contract. This notwithstanding, rhetoric can play a more direct role in pre-contractual negotiations, which would ultimately filter through to the language used in the written contract. Therefore, rhetoric would still, albeit indirectly, have an influence on the approach undertaken and language used in obligatory legal writing.

Irrespective of the type of legal writing used, whether it is persuasive (discursive), litigation-related or obligatory (normative), effective communication is central to written communication, including contractual documents. In fact, clear and understandable language underpins the principles of rhetoric and written communication alike. Yet, legal language is not always known for its clarity and understandability. The development of legal language has been described as a "special variety of English"[21] that has a direct bearing on the way contracts are drafted. Contracts serve a specific function, which Adams describes as allocating risk and regulating the conduct of the contracting parties.[22] Written contracts that employ traditional legal language are often referred to as having utilised traditional legal drafting approaches,[23] which are typically characterized by their use of convoluted language, legalese and jargon.[24] The use of such traditional legal language can also be counterproductive to effective communication and may serve as a language barrier to the contracting parties.[25] The continued use of traditional legal language practices is further entrenched in the drafting process, in which a limited focus is placed on legal language reforms in South Africa. Cornelius notes that plain language was not a priority in South Africa prior to the advent of the

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17 Adapted from Dahm, *supra* note 6, 90–91. *See also* Haggard & Kuney, *supra* note 12, 12.

18 Haggard & Kuney, *supra* note 12, 12.

19 According to Coleman, *supra* note 2, at 376, legal language is used to create relationships between parties. This seems to be consistent with the nature of obligatory language structures.

20 Haggard & Kuney, *supra* note 12, 12.

21 Peter Butt, *Modern Legal Drafting: A Guide to Using Clearer Language* 1 (2013).

22 Kenneth A. Adams, *A Manual for Style for Contract Drafting* 1 (2017).

23 *See* Adams, *supra* note 22, at 1, who refers to this type of drafting approach as "traditional contract drafting."

24 *Id.* at 1–2.

25 Butt, *supra* note 21, at 1, notes that traditional legal language has been influenced by a variety of factors, including a combination of Latin and French influences that has resulted in its widespread usage.

South African democratic regime that commenced in 1994.[26] This is further exacerbated in a multilingual cultural South African context, wherein the country recognises eleven official languages that may function as a barrier to individuals conversing in English (which often serves as the language of choice in commercial transactions). Furthermore, it could be said that legal language reform can also, in certain circumstances, unshackle the influence of colonial heritage in approaches undertaken in the drafting of contracts and function as part of decolonisation strategy of the South African legal industry for plain and understandable language usage in contracts; However, it is important to note that the impact of language on decolonisation is not directly explored in this article. According to De Stadler and Van Zyl, there may be instances where the use of traditional legal drafting approaches may be a conscious effort to exploit a contracting party's lack of understanding,[27] but it may also be possible that drafters are simply ill-equipped with the necessary knowledge, skills or understanding to draft contracts in a plain and understandable language alternative.[28] Whatever the reason posited for poor language in contracts, the traditional legal language usages in contracts constitute an unnecessary, and often, an exclusionary, barrier to a large number of individuals in South Africa.

The plain language movement advocates reform not only for traditional legal language but also for the way language is used in the drafting of contracts.[29] In some instances, the South African legislature has supported the principle of plain language as part of its social justice reforms. This support is most notably reflected in consumer legislation such as the Consumer Protection Act of 2008 (CPA),[30] and the National Credit Act of 2005 (NCA).[31] Yet, not all forms of contracts have fully embraced plain language principles, thereby perpetuating the traditional approach to drafting contracts and often leading to litigation precipitated by language barriers in contracts.[32] This article suggests that the traditional approach to contract drafting is, in itself, a barrier to contractual language and that the use of plain language as well as principles of clear and understandable language in the discipline of rhetoric may better support a framework to achieve plain and understandable language in

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[26] Eleanor Cornelius, *Defining 'Plain Language' in Contemporary South Africa*, 44(1) Stellenbosch Papers in Linguistics 1 (2015).

[27] Elizabeth de Stadler & Liezl Van Zyl, *Plain-Language Contracts: Challenges and Opportunities*, 29 S. Afr. Mercantile L.J. 95, 96–97 (2017).

[28] De Stadler & Van Zyl, *supra* note 27, at 97.

[29] Butt, *supra* note 21, at 2–3. *See also* Cornelius, *supra* note 26, at 1.

[30] Consumer Protection Act 68 of 2008 (hereinafter "CPA").

[31] National Credit Act 34 of 2005 (hereinafter "NCA"). *See also* Cornelius, *supra* note 26, at 2.

[32] *See also* De Stadler & Van Zyl, *supra* note 27, at 96, who note that plain language is not something new that was introduced legislatively in South Africa under the CPA, but rather that it has been a part of legal and other forms of writing prior to the introduction of sec. 22 of the CPA.

contracts. Additionally, this framework may also serve as a tool to dismantle the language barriers in contracts.

1. Types of Written Contracts

Verbal, tacit and written contracts are generally considered valid in South African law, provided that the requirements for a valid contract have been met.[33] Under the Electronic Communications and Transactions Act of 2002 (ECTA),[34] the South African legislature also recognises the validity of contracts concluded electronically by means of data messages,[35] with the exception that the ECTA, and consequently electronic contracts, would not apply to the alienation of immovable property or long-term leases over twenty years in length.[36] This notwithstanding, in addressing the use of contractual language, emphasis is placed on the written form of the contract, as the written contract forms the basis of articulating language in written contracts.

In South Africa, there are generally no formalities that contracts must fulfil in order to be valid,[37] but there are two exceptions to this rule. The first exception is that legislation may, in some instances, require certain formalities for a particular contract.[38] The types of formalities that the legislature may prescribe are diverse and can, for example, require the contract to be in writing, to be signed by one or both of the contracting parties (which may include being both in writing and signed),[39] to be notarised or even to be registered.[40] It has also been accepted that non-compliance with prescribed formalities does not necessarily mean that the contract would be invalid, but that

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[33] Generally, a contract may be verbal, provided that all of the requirements for a valid contract have been met. Hutchison & Pretorius, *supra* note 16, at 6, list the requirements for a valid contract as the contracting parties having achieved consensus, the contracting parties having the necessary contractual capacity, that the contract and its performance are legal and lawful, that all of the formalities (whether formalities of the law or those formalities required by the contracting parties) have been fulfilled, and that performance should be possible and feasible. *See also* Schulze et al., *supra* note 16, at para. 3.2.

[34] Electronic Communications and Transactions Act 25 of 2002 (hereinafter "ECTA").

[35] *See discussion at* L.F. van Huyssteen et al., *Contract: General Principles*, para. 5.30 (2020). *See also* Schulze et al., *supra* note 16, at paras. 3.2 & 4.3.3, noting that contracts made by means of telefax, SMS, email or the internet would be recognized if they complied with the provisions of the ECTA and the common law requirements for a valid contract.

[36] *See also* Schulze et al., *supra* note 16, at para. 7.3.3.

[37] Van Huyssteen et al., *supra* note 35, at para. 5.20. *See also* Schulze et al., *supra* note 16, at para. 7.2. Hutchison & Pretorius, *supra* note 16, at 163.

[38] *See also* Schulze et al., *supra* note 16, at para. 7.1. and Hutchison & Pretorius, *supra* note 16, at 163.

[39] *See, for e.g.*, sec. 2(1) of the Alienation of Land Act 68 of 1981 relating to the alienation of immovable property; General Law Amendment Act 50 of 1956 which requires the surety to sign a deed of suretyship; and franchise agreements under the Consumer Protection Act 68 of 2008.

[40] For example, antenuptial agreements under the Deeds Registries Act 47 of 1937, Formalities in Respect of Leases of Land Act 18 of 1969. *See also* Schulze et al., *supra* note 16, at para. 7.1.

the consequences would be expressly stated in the legislative requirement.[41] For the purposes of this discussion, the legislative requirements for a written contract will not be discussed, but rather the focus will be placed on the second type of formality that may impact the validity of a contract, namely instances where the contracting parties themselves require certain formalities in their contractual engagement.[42] Generally speaking, the formalities required by the contracting parties would be that the contract must be in writing and signed,[43] For instance, in the *Goldblatt v. Fremantle* case,[44] the court distinguished two forms (or types) of written contracts. The first type of written contract in legal matters is usually a verbal agreement, which exists between the contracting parties; however, in this case the contracting parties subsequently agreed to reduce the agreement to writing.[45] This type of written contract is normally concluded for evidentiary purposes,[46] and failure to conclude a written contract and any defects in executing the document would not impact the validity of the verbal agreement that predated the written form of the agreement. The second type of written contract originates from instances where the contracting parties have mutually consented that the written document is the only reflection of the agreement between the parties,[47] which means that the parties intended that nothing except the written document would be their contractual agreement. In this instance, if the parties fail to conclude the written contract or the contract's execution is defective, then there would not be a contract between the parties.

The determination of the applicable written contract in a given case rests primarily on the intention of the parties,[48] which can be established by evaluating the background and surrounding circumstances. The parties' intentions could also be reflected in the written contract. Irrespective of the type of written contract that is applicable to a particular circumstance, the same principles for the drafting of the contract and the existing barriers encountered in the language of contracts would still apply. There are three broad barriers to the language in contracts that may exist: the first is the application of South African common law principles used in contractual documents; the second is the use of standard form or adhesion contracts; and the third is the effective use of plain language principles. These language barriers are discussed more fully in the paragraphs that follow below.

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41 Hutchison & Pretorius, *supra* note 16, at 164.

42 *Id.* at 163.

43 *Id.*

44 *See, for example*, *Goldblatt v. Fremantle,* 1920 A.D. 123 (S. Afr.) (hereinafter *Goldblatt* case).

45 *Goldblatt* case, *supra* note 44, at 129. *See also* Schulze et al., *supra* note 16, at para. 7.3.2.

46 *Goldblatt* case, *supra* note 44, at 129.

47 *Goldblatt* case, *supra* note 44, at 129. *See also* Schulze et al., *supra* note 16, at para. 7.3.2.

48 *Goldblatt* case, *supra* note 44, at 129.

2. First Barrier: The South African Common Law Principles

The default rules of contracts (also referred to as the common law) can often lead to inequitable results with little or no consideration paid to the language used in a contract[49] and can be traced to the dual basis for contractual liability in South Africa.[50] This means that as a primary basis for contractual liability, provided that all of the other requirements for a valid contract are present,[51] and it can be established that there is consensus between the contracting parties,[52] there will be a valid contract and parties will be bound by the contract.[53] However, there may be instances where actual consensus is absent, but the impression that consensus was achieved is created through the actions of one of the contracting parties.[54] This could occur in instances where the contracting party has made certain representations or has signed a document.[55] This would generally result in contractual liability on the strength of the secondary basis of contractual liability, in which South African courts would hold a party liable if their actions created a reasonable impression that they intended to be bound to the contract.[56] The mere act of signing a contract can create such an impression that consensus was in fact achieved. This is supported by the principle of *caveat subscriptor* (roughly translated as "let the signatory beware"),[57] which means that the person who signs the document will be bound to the content of the document irrespective of whether the signatory had read the document.[58] Furthermore, it is irrelevant whether the signatory understood the terms of the contract when they signed it. Consider, for example, the case of *Mathole v. Mothle* in which the court held the signatory contractually liable regardless of the fact that

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49 Stephen Newman, *The Application of the Plain and Understandable Language Requirement in terms of the Consumer Protection Act – Can we Learn from Past Precedent?*, 33(3) Obiter 637, 638 (2021), notes that under common law, courts had limited remedies, like misrepresentation and *iustus error*, when a contract was poorly drafted or constructed.

50 Hutchison & Pretorius, *supra* note 16, at 20.

51 *Id.* at 20.

52 Hutchison & Pretorius, *supra* note 16, at 14, 20. *See also* Schulze et al., *supra* note 16, at para. 4.1.1. Consensus is achieved if three requirements are met: (i) the contracting parties have the serious intention to be contractually bound, (ii) the contracting parties have the intention to be legally bound, and (iii) the contracting parties are aware of the other contracting parties' intention to be bound by the contract.

53 Hutchison & Pretorius, *supra* note 16, at 20.

54 *Id*.

55 *Id.*

56 Hutchison & Pretorius, *supra* note 16, at 20. According to G.B. Bradfield, *Christie's Law of Contract in South Africa* 205 (2016), by signing the contract the party "signifies assent to the contents of the document."

57 Hutchison & Pretorius, *supra* note 16, at 249.

58 Van Huyssteen et al., *supra* note 35, at para. 2.94.

the signatory had not read the contract, was not informed about its contents and that the signatory was illiterate in the language used in the contract.[59] The common law in such a case will nonetheless hold the signatory bound to the contract if the signatory creates the impression that he or she is bound to the contract.

However, there are a few exceptions to this general norm, namely in cases where the signatory did not create reasonable reliance that consensus was achieved,[60] but rather that the signatory was deceived into signing the contract. A way to escape contractual liability in these instances would rest on whether an *iustus error* exists.[61] An *iustus error* constitutes both a reasonable mistake and a material mistake. A material mistake would be one that results in the contract failing to achieve consensus On the other hand, a mistake would only be reasonable or justifiable if the other contracting party (i) misrepresented information or misled the signatory;[62] (ii) was aware that the signatory was mistaken when signing the document;[63] and (iii) ought to reasonably have known that the signatory was mistaken.[64] The existence of an *iustus error* is linked to the factual circumstances of the matter and the *caveat subscriptor* principle. Insofar as the *iustus error* has not been established in a set of facts, the *caveat subscriptor* rule would, under the circumstances, ensure that the signatory is bound by the terms of the contract. Consider, for instance, the case of *Keens Group (Pty) Ltd v. Lotter*,[65] wherein a four-page document titled "Confidential: Application for Credit Facilities" contained a provision for signatories to be bound to personal suretyship.[66] One of the directors of a company completed the particulars, signed the document and forwarded it to the plaintiff. Nothing in the document created the impression that the director was being personally bound nor did the plaintiff at any point highlight this provision to the defendant.[67] After the company had been liquidated, the plaintiff attempted to enforce the suretyship and hold the defendant personally liable on the strength of the deed of suretyship. The defendant argued that the way the document was designed, as well as the manner in which

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59 *Mathole v. Mothle,* 1951 (1) S.A. 256 (T) (S. Afr.).

60 Van Huyssteen et al., *supra* note 35, at para. 2.94.

61 *See for e.g.*, *Brink v. Humphries & Jewell (Pty) Ltd.* [2005] 2 All S.A. 343 (S.C.A.) (S. Afr.).

62 Van Huyssteen et al., *supra* note 35, at para. 2.101; Hutchison & Pretorius, *supra* note 16, at 104–06. *See* Bradfield, *supra* note 62, at 210. *See also Absa Bank Ltd. v. Trzebiatowsky & Others*, 2012 (5) S.A. 134 (E.C.P.) (S. Afr.) (hereinafter *Absa Bank* case), at para. 13.

63 Van Huyssteen et al., *supra* note 35, at para. 2.104; Hutchison & Pretorius, *supra* note 16, at 104–06. *See also Absa Bank* case, at para. 13.

64 Van Huyssteen et al., *supra* note 35, at para. 2.104; Hutchison & Pretorius, *supra* note 16, at 104–06. *See also Absa Bank* case, at para. 13.

65 *Keens Group (Pty) Ltd. v. Lotter,* 1989 (1) S.A. 585 (C) S. Afr.) (hereinafter *Keens Group* case).

66 *Id.* at 586E-F.

67 *Id.* at 586B.

the document was structured and presented to the defendant was "calculated to lead him to overlook" the fact that the defendant would be personally bound.[68] On this basis, the defendant took the view that the heading and the document itself had misled the defendant to believe that the document was merely a credit application form.[69] The court found that the defendant was not aware that he had signed a suretyship,[70] yet this was not enough to escape from contractual liability as the *caveat subscriptor* rule would bind a signatory to the document that he or she had signed,[71] and to escape from contractual liability one would have to prove that one had been misled.[72] The court, however, concluded that the suretyship was an unusual term in a credit agreement (which should have been highlighted to the defendant).[73] In this case, the defendant could escape from the deed of suretyship by successfully relying on the principle of *iustus error*.[74]

There are additional exceptions to the *caveat subscriptor* rule. According to Bradfield, the *caveat subscriptor* rule is inapplicable when one of the contracting parties sets a "trap" for the signatory.[75] Bradfield highlights three principles where the *caveat subscriptor* rule has been problematic in its application, specifically: (i) where the terms of a written contract are inconsistent with an advertisement,[76] (ii) where the terms of a written contract are inconsistent with representations made during contractual negotiations,[77] and (iii) the form and nature of the document must not mislead the signatory.[78] In addition, according to Hutchison and Pretorius, a signatory would not be held contractually liable if consensus was improperly obtained by means of "misrepresentation, duress, undue influence or commercial bribery."[79]

From a South African common law perspective, the signatory is generally considered to be bound to the contract, and there are no meaningful protections afforded to the signatory for difficult language in written contracts or the construction and presentation of the contract. There have been instances where

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68 *Keens Group (Pty) Ltd. v. Lotter, supra* note 65, at 587H.

69 *Id.* at 587I.

70 *Id.* at 589B.

71 *Id.* at 589B-C

72 *Id.* at 589D.

73 *Id.* at 592B-C.

74 *Id.* at 592D.

75 Bradfield, *supra* note 62, at 209.

76 *Id.*

77 *Id.*

78 *Id.*

79 Hutchison & Pretorius, *supra* note 16, at 249.

the construction of the contract was structured in a way that could be described as being deceptive, and in limited instances, this may function as an *iustus error* in order to avoid contractual liability.[80] However, there is seemingly nothing under the common law regulating the use of language and the layout of a written contract. As a result, the common law does not provide adequate regulation via the *iustus error* doctrine to avoid language barriers in a contract that are precipitated by traditional legal language and drafting practices.

3. Second Barrier: Standard Form Contracts

The use of standard contracts, or so-called adhesion contracts, can be described as the second language barrier to contracts.[81] These types of contractual engagements were introduced to streamline the drafting process and correspond with modern client expectations; as such, they are frequently utilised to overcome the financial restraints associated with drafting a contract anew each time.[82] Typically, the scenario wherein various standardised contract forms are used has been described as the "battle of the forms," wherein a business exchanges their standard documents whilst the other contracting party does the same.[83] There is certainly a place for standard contracts, but there is also the risk that a contracting party is placed in a "take-it-or-leave-it" scenario,[84] wherein the contracting party has little say as to the content of the contract.[85] In such a scenario, the contracting party may be placed at risk and may be pressurised to conclude a contract on terms that they may never have agreed to, or of which they were not aware. Contracts of adhesion have also been described as having the effect of diminishing the bargaining power of one of the contracting parties.[86] Contracts in

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80 Hutchison & Pretorius, *supra* note 16, at 103.

81 In *Barkhuizen v. Napier,* 2007 (7) B.C.L.R. 691 (C.C.) (S. Afr.) (hereinafter *Barkhuizen* case), para. 135, the court describes standard contracts as "[s]tandard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a "take-it-or-leave-it" basis, thus eliminating opportunity for arm's length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities."

82 Stephen Newman, *The Influence of Plain Language and Structure on the Readability of Contracts*, 31(3) Obiter 735, 736 (2010).

83 Van Huyssteen et al., *supra* note 35, at para. 3.15.

84 *See also the Barkhuizen* case, para. 135.

85 *See also the Barkhuizen* case, para. 135. A further example can be found in *Munien v. BMW Financial Services (SA) (Pty) Ltd.,* [2009] J.O.L. 23387 (K.Z.D.) (S. Afr.) para. 25. Newman, *supra* note 88, at 737, notes that often consumers do not read these standard form contracts.

86 *See Swinburne v. Newbee Investments (Pty) Ltd.,* [2010] 4 All S.A. 96 (K.Z.D.) (S. Afr.) para. 37. According to Schulze et al., *supra* note 16, at para. 4.1, one of the reasons for the CPA is to introduce the necessary protections to parties that suffer under unequal bargaining power in a contractual engagement.

this context may be open to being abused,[87] or one of the contracting parties may even be exploited, especially in situations involving language barriers. In an attempt to protect the interests of the consumer, the Brazilian Consumer Protection Code requires that the character and font sizes in relation to contracts of adhesion be such that the content of the contract is easily understood.[88] Although South African consumer legislation contains no express terms regulating a contract's font size, it does recognise the need for plain language within consumer contracts. The challenges surrounding consumer contracts may be one of the reasons plain language requirements have been introduced to protect the interests of the most vulnerable members of South African society, which will be discussed in further detail in the paragraphs that follow.

4. Third Barrier: The Use of Plain and Understandable Language

4.1. English as a Language Barrier in South Africa

The contracting parties are permitted to choose the language they wish to use in their contracts.[89] There is no prerequisite for a contract to be in a specific language, and a contract would still be valid if it utilised any of the official languages of South Africa or even that of a foreign language,[90] provided that all of the other requirements for a valid contract have been met.[91] A similar position relating to the use of language in contracts can be found in Brazil. This notwithstanding, English remains the commercial language of choice in South African contracts and the majority of written contracts are drafted in the English language. Nonetheless, the use of English as the choice of language utilised in a contract may potentially be problematic from a socio-economic perspective as English is not the primary language for the average South African. According to Statistics South Africa, English is the second most commonly used language. However, its usage is limited to a mere 16.6% of the population speaking English outside the home and only 8.1% speaking the language at home.[92] This leaves many South Africans without a workable knowledge of the English language, which (in itself) can be described as a language barrier to written contracts utilising English to express the agreement between the contracting parties. This language barrier is further perpetuated by traditional drafting practices in contracts, which may include the use of large blocks of text, wordy sections of text,[93] the use of legalese, jargon and

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87 *Barkhuizen* case, paras. 135–36.

88 Sec. III, art. 54 sec. 3 – 4 of the Consumer Protection Code (Law No. 8.078/1990).

89 Cornelius, *supra* note 3, at 3.

90 *See* S.A. Government (Nov. 2, 2021), available at https://www.gov.za/about-sa/south-africas-people.

91 *See* Hutchison & Pretorius, *supra* note 16, at 6.

92 *See* S.A. Government (Nov. 2, 2021), available at https://www.gov.za/about-sa/south-africas-people.

93 Coleman, *supra* note 2, at 379.

Latin, the use of convoluted language,[94] long and complex sentence structures and the use of archaic and often repetitive and unnecessary words.[95] These complicated drafting practices may make it impossible for the average South African to understand the language employed in the written contract. One solution to overcome the language barrier that exists in commercial contracts would be to utilise plain language principles in contracts. However, there persists a certain level of resistance towards utilising plain language in contracts, which is explored in further detail below.

4.2. Resistance to Plain Language

The principle of using plain language is not something novel or unique. In fact, the Greek art of rhetoric appears to advocate the use of language that is easily comprehensible. In the words of Aristotle "[c]learness is secured by using the words … that are current and ordinary."[96] This viewpoint echoes the sentiments of the modern plain language movement, which supports the idea that the language used in any document should be clear and understandable to the average reader of the document. In order to communicate in this fashion, Aristotle suggests "speaking (or writing) naturally and not artificially,"[97] which rings true to the core of plain language principles. This notwithstanding, modern contract language remains firmly rooted in the use of the traditional style of drafting, which is not designed to communicate effectively with all of the stakeholders involved in a contract.[98] Traditionalists are resistant to the use of plain language and instead hold onto the view that contracts can only be effectively expressed with the use of legalese.[99] Thus, possible reasons for the continued use of the traditional style of drafting include not only the fact that plain language is only a legal requirement for certain types of contracts in South Africa but also that there is a perceived stigma associated with the use of plain language in contracts. The following are some examples of preconceptions (and, to an extent, misconceptions) concerning the use of plain language in contracts:

• Often, the contracting parties do not fall within the legislative thresholds of South African consumer legislation, and consequently, many drafters disregard the

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94 Richard C. Wydick, *Plain English for Lawyers*, 66(3) Californian L. Rev. 727, 727 (1978).

95 Jay A. Mitchell, *Whiteboard and Black-Letter*, 20(4) U. Pa. J. Bus. L. 815, 816 (2018), which notes that "contracts are what we think when we think of legal documents. Dense blocks of text, technical language, defined terms are all based on precedence and intricate drafting principles." In fact, Coleman, *supra* note 2, at 378–79 notes certain traditional characteristics of legal language, including: (i) the use of "common words with uncommon meanings," (ii) the use of "Old or Middle English words," (iii) the use of Latin, (iv) the use of French words or phrases, (v) the use of "terms of art," (vi) the use of "argot," (vii) formalistic language, (viii) the intentional use of words and language with flexible meanings, and (ix) "extreme precision" in the language used.

96 Aristotle, *supra* note 1, at 160.

97 *Id.*

98 Mitchell, *supra* note 100, at 820.

99 *See* Adams, *supra* note 22, at 5.

use of plain language in such circumstances, deeming the use of plain language unnecessary. The legal industry appears to remain firmly entrenched in tradition and the traditional manner of contract drafting.[100]

• It is argued that plain language is not capable of expressing complex ideas or specialised terminology, as the terms of art, commonly found in traditional legal language.[101]

• It takes longer to draft contracts in plain language than employing the traditional manner of drafting,[102] which may be linked to many contracts having been drafted from a precedent base that often contains contractual provisions in the traditional manner of drafting.[103]

• Closely linked to the previous point, contract drafters continue to copy-and-paste contractual provisions from documents that have been already drafted using the traditional method of contract drafting, which perpetuates the issue of poor drafting and, conceivably, language barriers in contracts.[104]

• Contract drafters often resist change and consider the use of alternative language as risky in that it may be rejected by the courts, which could potentially result in exposing their clients to litigation risk.[105]

• There is a view that the use of plain language in contracts would have the real or perceived appearance of the document having been "dumbed-down."[106]

Despite the resistance to the use of plain language, the way contracts are drafted and communicated has come under scrutiny in modern contracting practices, which has taken the form of the plain language movement. However, the use of plain communication is not limited to good drafting or the use of plain language *per se*; but rather, it goes to the heart of contract theory itself. A contract, at its core, is reduced to writing to ensure that the agreement between the parties has been recorded for evidentiary purposes as well as to ensure that the contract is valid and enforceable

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100 De Stadler & Van Zyl, *supra* note 27, at 97, which notes that there appears to be a level of tension between document design and legal practice. *See also* Rabeea Assy, *Can the Law Speak Directly to its Subjects?,* 38(3) J. L. & Soc'y 376, 379 (2011).

101 Lenné Eidson Espenschied, *Contract Drafting: Powerful Prose in Transactional Practice* 110 (ABA Fundamentals, 2010).

102 Michael Hwang, *Plain English in Commercial Contracts* 32(2) Malaya L. Rev. 296, 300 (1990). *See also* the professional pressures placed on drafters that may result in traditional forms of drafting in Butt, *supra* note 21, at 21–22.

103 Hwang, *supra* note 102, at 300. This has also been referred to as the "familiarity of habit" in Butt, *supra* note 21, at 6–8.

104 De Stadler & Van Zyl, *supra* note 27, at 98.

105 De Stadler & Van Zyl, *supra* note 27, at 98; Hwang, *supra* note 102, at 300. *See also* the concept of "conservatism" in Butt, *supra* note 21, at 9–17. *See also* Espenschied, *supra* note 106, at 111.

106 De Stadler & Van Zyl, *supra* note 27, at 98, notes that there appears to be a level of tension between document design and legal practice.

(see discussion in Section 2 above).[107] In order to ensure that a written contract fulfils this purpose, the contracting parties must first and foremost understand what they have agreed to. Failure to do so may strike at the heart of a contract and render it void and invalid on the basis of the *iustus error* (see discussion in Section 3 above), or even a failure to comply with the requirement of certainty in the contract.[108] Further, the ability to understand contractual language is directly linked to the socio-economic conditions in South Africa. Although the impact of socio-economic conditions in consumer contracts has largely been addressed in consumer legislation, the socio-economic conditions permeate society as a whole and cannot be ignored when contracts are drafted, irrespective of whether the contract is a consumer contract or not. The South African contract drafter, therefore, does not have the luxury of slavishly following the traditional manner of drafting contracts. Rather, contracts should always start from the point that the contracting parties are able to understand their content. The contract drafter must ensure that the language employed is conducive to understanding and comprehension of contracts that are subject to consumer legislation and beyond.[109] In this regard, the South African legislature has already intervened, albeit in a limited manner, to address this issue, which is discussed in greater detail in the subsequent paragraphs.

4.3. Legislative Intervention

There are several legislative provisions in South Africa that refer to the use of plain language in legal contracts. These legislative interventions can be divided into three broad categories. The first category relates to the legislature's recognition that information must be communicated in a manner that the recipient can understand, but does not make specific reference to the term "plain language." Take, for example, the Basic Conditions of Employment Act of 1997,[110] the Child Justice Act of 2008,[111]

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[107] This is effectively the purpose of the writing as mentioned in Mark K. Osbeck, *What is 'Good Legal Writing' and Why Does It Matter?*, 4(2) Drexel L. Rev. 417 (2012). *See also* Hutchison & Pretorius, *supra* note 16, at 408.

[108] Hutchison & Pretorius, *supra* note 16, at 218.

[109] For effective drafting, there is a requirement of knowledge and understanding of contract theory as well as technical drafting skills, as highlighted in Eric Goldman, *Integrating Contract Skills and Doctrine*, 12 The J. Legal Writing Inst. 209 (2006).

[110] Sec. 29(3) of the Basic Conditions of Employment Act 75 of 1997 states that "[i]f an employee is not able to understand the written particulars, the employer must ensure that they are explained to the employee in a language and in a manner that the employee understands." *Also*, sec. 37(4)(b) notes that "[i]f an employee who receives notice of termination is not able to understand it, the notice must be explained orally by, or on behalf of, the employer to the employee in an official language the employee reasonably understands."

[111] Sec. 3(d) of the Child Justice Act 75 of 2008 notes that "[e]very child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary."

the Customs and Excise Act of 1964,[112] the Code of Conduct for Home Builders under the Housing Consumers Protection Measures Act of 1998,[113] the Employment of Educator's Act 138 of 1994,[114] and the Medicines and Related Substances Control Act of 1965.[115]

The second category relates to legislation that mentions the term "plain language" but does not clarify or explain what exactly is meant by the term "plain language" in the given context. Some notable examples are the Special Pensions Act of 1996,[116] the Long-Term Insurance Act of 1998 (portions of which have now been repealed),[117] the Mine Health and Safety Act of 1996,[118] and the Short-Term Insurance Act of 2008 (portions of which have now been repealed).[119]

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[112] Sec. 101B(9)(ii)(bb) of the Customs and Excise Act 91 of 1964 notes that "[a]ny person is entitled to … request the Commissioner, after having produced adequate proof of identity, to provide the particulars of the personal information held, and information as to the identity of all persons who have had access to his or her personal record … in a form that is generally understandable."

[113] Sec. 2(e) of the *Government Gazette* No. 30697 GN 71 of 1 February 2008. National Home Builders Registration Council: Code of Conduct for Home Builders under the Housing Consumers Protection Measures Act 95 of 1998 reads "[a] Home-builder must … treat all consumers fairly, regardless of their race, gender, sex, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture or language, unless any law permits otherwise."

[114] Sec. 6.1.2 of the GN 393 of 28 April 2017: Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan (Government Gazette No. 40817) to the Employment of Educator's Act 138 of 1994, reads "[w]hen communicating on matters concerning employment equity, it is important to take special care that the content is communicated in clear and easily understood language to provide the entire workforce reasonable opportunity to grasp the content and subsequent rights."

[115] Sec. 14 of the GN 859 of 25 August 2017: General Regulations to the Medicines and Related Substances Control Act 101 of 1965, reads, "professional information shall be made available for each veterinary medicine, in at least English or one official language and in type having a minimum legibility, under the headings and in the format specified in this regulation …," which must also include certain specific information as listed in this regulation.

[116] Sec. 13 of the Special Pensions Act 69 of 1996 provides that "the designated institution must give notice in plain language of the provisions of this section to every pensioner when the first monthly payment is made to that pensioner," and again uses the reference to plain language in sec. 24(1), requiring that "[t]he Board must take appropriate steps to communicate in plain language to all persons who may have an interest—(a) the right to benefits in terms of this Act; (b) the qualifications for benefits; (c) the procedure to apply for benefits; and (d) any other information that may assist a person to apply for a benefit."

[117] Sec. 3(b) of GN 165 of 23 February 2001: Policyholder protection rules under the Long-term Insurance Act, 1998 (now repealed), reads, "[d]isclosures must be in plain language and structured so as to promote easy comprehension and to avoid uncertainty or confusion. Any written or printed disclosures, including any policy or policy variation which may be issued to policyholders, must be issued in a clear and readable print size, spacing and format."

[118] Sec. 98(zm) of the Mine Health and Safety Act 29 of 1996 provides that "[t]he Minister, after consulting the Council, by notice in the Gazette may make regulations regarding … the use of plain language in documents that are required to be published, displayed or distributed in terms of this Act."

[119] Sec. 3.1(b) of the repealed policyholder rules GN 164 of 23 of February 2001: Policyholder protection rules of the Short-Term Insurance Act 53 of 2008, it requires that "[d]isclosure must be in plain language and must be structured so as to promote easy comprehension and to avoid uncertainty or confusion. Any written or printed disclosures, including any policy or policy variation which may be issued to policyholders, must be issued in a clear and readable print size, spacing and format."

The third category of legislative provisions referring to the use of plain language in contracts relates to legislation that not only mandates the use of "plain language" but also provides a definition or explanation of the process by which plain language should be achieved in the text. Take, for example, the CPA,[120] the Companies Act of 2008,[121] the Credit Rating Services Act of 2012,[122] and the NCA.[123] Pillay J. notes that certain legislative interventions, such as the CPA and the NCA, have been specifically promulgated to "reverse the historical socio-economic inequalities and adjust the imbalances."[124] Illiteracy can certainly constitute one of these inequalities and areas of discrimination in a contract,[125] and is closely linked to possible language barriers in a contract.

The South African legislature has recognised, even if to a limited degree, the importance of understanding the language in which a contract is drafted. Take, for instance, section 63(1) of the NCA, which provides that:

> A consumer has a right to receive any document that is required in terms of this Act in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document.

In other words, a consumer may receive a credit agreement in an official language that the consumer understands insofar as the contract falls within the scope of the NCA.[126] In fact, a credit provider registered under the NCA is required to submit two official languages to the regulator that will potentially be used when preparing the documentation for its company. In addition, the NCA requires prescribed forms to be used in certain instances,[127] and in the absence of such forms, the right to receive the information in plain and understandable language would apply.[128] In the case of *Standard Bank of South Africa Ltd. v. Dlamini* the court confirmed the principle of

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120 Sect. 22(2) of the CPA.

121 Sec. 6(5) of the Companies Act 71 of 2008.

122 Sec. 1(5)(b) of the Credit Rating Services Act 24 of 2012.

123 Sec. 64 of the NCA.

124 *Standard Bank of South Africa Ltd. v. Dlamini* 2013 (1) SA 219 (KZD) para. 32 (S. Afr.) (hereinafter *Dlamini* case).

125 *Dlamini* case, para. 32.

126 *See also Dlamini* case, para. 46.

127 J.M. Otto, *The National Credit Act Explained*, para. 30.3 (2015). *See also* the discussion at J.W. Scholtz, J.M. Otto & E. van Zyl, *Guide to The National Credit Act*, para. 6.2.5 (13 July 2021).

128 Otto, *supra* note 127, at para. 30.3. *See also* the discussion at Scholtz, Otto & Van Zyl, *supra* note 127, at para. 6.2.5.

receiving information in an official language. In this matter, a consumer, Dlamini, bought a motor vehicle on credit from a dealership and Standard Bank agreed to facilitate the payment on the agreement that Dlamini would repay the loan that was used to purchase the vehicle.[129] It transpired that a few days after the purchase it was concluded that the vehicle had a defect and Dlamini wanted to cancel the contract, return the vehicle to the dealership and obtain a refund.[130] The court ruled that Dlamini had returned the vehicle as a result of a defect.[131] The court also found that the dealership (being an agent of Standard Bank) did not explain the terms of the credit agreement to Dlamini.[132] Despite the fact that all of the rights as provided under the NCA would be afforded to Dlamini, the credit agreement only incorporated some of the rights afforded to Dlamini under the terms of section 121 of the NCA.[133] The act of determining what rights to include and what to exclude from section 121 of the credit agreement was described as being 'deliberate and deceptive'.[134] In other words, by only disclosing the rights contained in section 121(3)(b) in the credit agreement, an impression was created that payment must be made irrespective of whether the vehicle was defective or not.[135] The second aspect in the *Dlamini* matter is the issue of section 63 (the right to receive information in an official language) and section 64 (the right to receive information in a plain and understandable language). However, the court correctly noted that neither of these protections would be of any use to a person who is illiterate.[136] This notwithstanding, there remains an obligation on the credit provider to explain the terms of the contract to the consumer.[137]

In addition to the language that should be used, key principles can be extracted from the third category. More specifically, the definition of plain language in a South African context highlights certain elements that should be addressed for a text to be in plain language. Firstly, a person for whom the document is intended, in particular one who possesses average literacy skills and minimal experience in that industry or field, must be able to understand the content without too much effort. However, the definitions also include elements that can be used to attain plain language, including the following elements:[138]

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129 *Dlamini* case, para. 1.

130 *Id.*

131 *Id.* para. 25.

132 Id. at para. 26.

133 *Id.* at para. 41.

134 *Id.* at para. 41.

135 *Id.* at para. 42.

136 *Id.* at para. 48.

137 *Id.* at para. 49.

138 Adapted from sec. 22(2) of the CPA.

• the context, comprehensiveness and consistency of the document;[139]

• the organisation, form and style of the document;[140]

• the vocabulary, usage and sentence structure of the document;[141] and

• the use of any illustrations, examples, headings or other aids to reading and understanding.[142]

Although similar provisions regarding the 'use of plain language' are not found in the legislation of Brazil, it is worth noting, for example, that the Brazilian Consumer Protection Code provides an interesting addition, which requires standardised contracts (or contracts of adhesion) to use proper font and font size to facilitate consumer understanding and comprehension of the content of the contract.[143] This specific requirement, in fact, is not expressly provided in South African consumer legislation, other than an umbrella requirement for the correct form and style of text. Despite the protections afforded under the NCA, they are limited to only those credit agreements that fall within the scope of the NCA, although other legislative interventions, such as the CPA, provides some measure of protection in relation to plain and understandable language in other types of consumer contracts. For instance, the CPA does not explicitly require the contract to be presented in an official language, but it does provide a similar explanation of what plain language would be considered in the context of a written contract. Thus, consumer legislation in South Africa provides a skeletal framework for plain language and effective communication in contracts. Nevertheless, there are other tools available that can be used in the drafting of all types of contracts (not just those contracts that are subject to consumer legislation). Ultimately, it might be argued that there is no right or wrong way to draft a contract, but there are certain ways of drafting contracts that can be deemed better or more beneficial than others.[144] This is especially true when it comes to the total communicative value of contracts, which includes the manner in which the contract is interpreted, the textual communication structures, as well as the visual communication structures. Further discussion on this matter will be presented in Section 5 below.

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139 Adapted from sec. 22(2) of the CPA. *See discussion at* Newman, *supra* note 55, at 641–42.

140 Adapted from sec. 22(2) of the CPA. *See discussion at* Newman, *supra* note 55, at 642–43.

141 Adapted from sec. 22(2) of the CPA. *See also discussion* in P.N. Stoop & C. Chürr, *Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008*, 16(5) PER 514, 514 (2013). *See discussion* at Newman, *supra* note 55, at 644.

142 Adapted from sec. 22(2) of the CPA. See discussion at Newman, *supra* note 55, at 644–45.

143 Sec. III, art. 54 sec. 3–4 of the Consumer Protection Code (Law No. 8.078/1990).

144 The phrase was coined by Prof. S Cornelius in his drafting of contract lectures.

5. Communicative Structures for Overcoming Language Barriers in Contracts

Authors Hutchison and Pretorius note that 'there are no set legal rules or legal requirements that require contracts to be drafted in a particular way',[145] but there may be certain best practices or accepted practices in the drafting of contracts.[146] Unfortunately, the drafting of contracts has become a game of hit-and-miss, wherein several examples of poor drafting in contracts have come under scrutiny in the South African courts.[147] Even in cases where the contract drafter may have the best intentions to produce the document in plain language, this may not always be practically achieved. For example, in the case of *Jerrier v. Outsurance Insurance Co. Ltd.,* an insurance policy explicitly noted that the document was drafted in plain language document.[148] Yet, the matter went to court as the insurance policy was not as clear and understandable as what the insurer had believed.[149] In fact, the matter turned on the issue as to what provisions (that were purportedly drafted in plain language) actually meant.

The purpose of plain language, similar to that of general language principles, is to effectively convey a message, and as Professor S, Cornelius states, language is "inherently flexible and often ambiguous and vague."[150] It is then the manner in which a contract is drafted and the language used that will ultimately influence the way in which the contract is interpreted.[151] In fact, Hutchison & Pretorius note that the "main objective when drafting any contract is to ensure that a court will interpret the contract in the way the parties intended."[152] It may perhaps be worth

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145 Hutchison & Pretorius, *supra* note 16, at 408.

146 *See Id.*

147 *See, for e.g.*, *Cape Clothing Ass'n v. De Kock NO*, (2014) 35 I.L.J. 465 (L.C.) (S. Afr.) para. 45, wherein the court noted that the poor drafting of a collective bargaining agreement has led to the dispute before the court. *See also Dimension Data (Pty) Ltd. v. Pearton*, 2021 J.D.R. 2375 (E.C.P.) (S. Afr.) para. 52, wherein the court commented on the drafting of a confirmatory affidavit, as well as *Bicon Namibia Consulting Engineers & Project Managers (Pty) Ltd. v. Nkurenkuru Town Council*, 2020 J.D.R. 1513 (Nm.) para. 42, in which the court discussed the poor draftsmanship of the papers before the court. *Holtzhausen v. Chetty*, 2013 J.D.R. 2771 (K.Z.D.) (S. Afr.) para. 4, which noted an example of the poor drafting of a pro forma agreement that was used. *See also Moshoeshoe & Neotel (Pty) Ltd.*, (2017) 38 I.L.J. 252 (C.C.M.A.) (S. Afr.) para. 32.

148 *Jerrier v. Outsurance Insurance Co. Ltd.*, [2015] 3 All S.A. 701 (K.Z.P.) para. 4 (S. Afr.) (hereinafter *Jerrier* case). The insurance policy included the following language "[t]his is a plain language document, ensuring that it is easy to read and conveys the details of your facility in the clearest possible way."

149 *Jerrier* case, para. 4.

150 Cornelius, *supra* note 3, at 1.

151 According to Prof. S. Cornelius (at the University of Pretoria, South Africa) in his lectures on the drafting of contracts, the process of drafting contracts cannot occur in isolation but must follow a thorough understanding of the rules of interpretation. After all, without first understanding how to interpret a contract, the contract drafter will not be in a position to appreciate how to construct and draft the contract.

152 Hutchison & Pretorius, *supra* note 16, at 428.

relying on the work of Cornelius in order to address the manner in which the use of language in the contract drafting process may impact the manner in which one communicates and conveys a message.[153] When Cornelius' three levels of analysis are applied to discourse, the following model emerges:

1. The first level of discourse is the locutionary act,[154] which Cornelius describes as the "act of saying."[155] In the context of written contracts, this may be described as the actual process of drafting a contract.[156] In the context of contract drafting, it may very well be comparable to the act of using language in a written contractual document and is relatable to the use of plain language principles in a contract.

2. The second level of discourse is the illocutionary act.[157] Cornelius describes this as "what is done in the act of saying."[158] In the context of written contracts, this may be described as the language, style and sections of contracts.[159] This level may very well point towards the use (or lack of use) of plain language in a contract.

3. The third level of discourse is the perlocutionary act.[160] Cornelius describes this as "what is done as a result of the act of saying."[161] In the context of written contracts, this may be described as the consequence of using or the lack of using such language in a contract. In essence, the act of drafting and consequently entering into a contract would essentially create legally enforceable obligations (or juristic acts).[162] In this regard, the consequences may include the perpetuation of language barriers in a contract or, insofar as plain language is legislatively prescribed, compliance with the law.

The traditional manner of drafting contracts has mostly focused on the language employed in contractual terms.[163] To effectively incorporate provisions that are easily understood, the drafter must consider the overall communicative value of the contract. In order to achieve this goal, sufficient focus must be placed on the language employed in a contract, commonly referred to as textual communication.[164]

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153 Steve Cornelius, *The Complexity of Legal Drafting*, 4 TSAR 692, 692 (2004).

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id*. at 693.

160 *Id.*

161 *Id.*

162 *Id.*

163 Many texts seem to focus on the manner in which language is employed. *See, e.g.*, Hutchison & Pretorius, *supra* note 16, at 428–31.

164 Textual communication structures include, for example, the language used, vocabulary, grammar and syntax, and punctuation usages.

This includes the manner in which language and grammar are employed in a document as well as the correct usage of the English language.[165] In doing so, the proper use of language would remove ambiguity and vagueness from the text, thereby reducing the risk of contractual provisions being struck down by the courts for a lack of certainty or clarity.[166]

Textual communication structures are used to ensure that the language is clear and understandable to the reader,[167] and are frequently the focus of plain language, which forms part of the linguistic elements of drafting. Newman refers to this as "linguistic readability."[168] The focus of the linguistic elements includes aspects such as grammar, tenses,[169] the correct use of personal pronouns,[170] the length of the sentences,[171] avoidance of legalise and jargon,[172] the use of active voice or direct language,[173] and the use of cross-references in the text.[174]

Textual communication structures are comparably closely linked to the Aristotelian view of rhetoric, in which crafting a proper speech is not too dissimilar to preparing a written contract.[175] Aristotle notes that the use of style and language constitutes an integral part of rhetoric, and similarly, it can be said that it forms a foundation for effective textual communication.[176] Textual communication structures are, however, only one part of effective communication in a contract.

The second part relates to the way the contract is constructed and presented, which can be referred to as visual communication.[177] De Stadler and Van Zyl refer

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165 Newman, *supra* note 55, at 637, also refers to linguistic typographical readability. *See also* Hutchison & Pretorius, *supra* note 16, at 428–31.

166 Coleman, *supra* note 2, at 387, identifies ambiguity as instances where one word has two possible meanings.

167 Coleman, *supra* note 2, at 387. Cornelius, *supra* note 26, at 3, also describes this as "texlinguistics."

168 *See* Newman, *supra* note 88, at 741.

169 *Id.*

170 *Id.*

171 *See* Newman, *supra* note 88, at 742. Hutchison & Pretorius, *supra* note 16, at 428.

172 *See* Newman, *supra* note 88, at 743.

173 *See* Newman, *supra* note 88, at 743. Hutchison & Pretorius, *supra* note 16, at 428.

174 *See* Newman, *supra* note 88, at 744.

175 Aristotle, *supra* note 1, at 157.

176 *Id.*

177 Visual communication structures include, for example, the density of text, the use of tabulation structures, the overall visual appeal of the document, font size and colour, and the type of font that is used in the document. Newman, *supra* note 55, at 639–40 highlights certain South African cases that took into account the manner in which the contract was structured, for example, *Keens Group Co (Pty) Ltd. v. Lötter,* 1989 (1) S.A. 585 (C) (S. Afr.) [*Keens* case], *Diners Club SA (Pty) Ltd. v. Thorburn,* 1990 (2) S.A. 870 (C) (S. Afr.) (hereinafter *Thorburn* case), *Diners Club SA (Pty) Ltd. v. Livingstone,* 1995

similarly to the concept of "document design,"[178] whereas Newman refers to its "typographical readability."[179] This often includes consideration of the use of the type of font,[180] size of font,[181] colour of the text,[182] the presentation of the text in the document,[183] the use of headings and the like,[184] font sizes, and can be likened to Aristotle's view that elements of rhetoric include the 'proper arrangement of the various parts of the speech' as well as the form of delivery of the message.[185] Structuring written documents in a manner that makes them easy to read, understand and comprehend forms an essential part of the communicative structure of written documents and consequently contracts. This is effectively the way in which the final document is presented to the stakeholder and includes the use of headings, font types, colour and size of text that is employed in the document. Structuring a document in a way to mislead a signatory is problematic.[186] Bradfield notes that this may occur, for example, in instances where:

• a clause that is unusual for the type of contract that is being entered into is included in a contract;[187]

• an unexpected term is found in a contract;[188]

• important clauses are written in small font;[189] or

• the text of a document is constructed in such a way as to hide an important clause.[190]

The legislature has emphasised the importance of the role of structural presentation in plain language drafting in consumer legislation by noting that "the use of any illustrations, examples, headings or other aids to reading and understanding"

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(4) S.A. 493 (W) (S. Afr.), *Roomer v. Wedge Steel (Pty) Ltd.,* 1998 (1) S.A. 538 (N) (S. Afr.) (hereinafter *Roomer* case), *Langeveld v. Union Finance Holdings (Pty) Ltd.,* 2007 (4) S.A. 572 (W.L.D.), and *Mercurius Motors v. Lopez*, 2008 (3) S.A. 572 (S.C.A.) (S. Afr.).

178 De Stadler & Van Zyl, *supra* note 27, at 97.

179 Newman, *supra* note 88, at 738.

180 *Id.* at 739.

181 *Id.*

182 *Id.*

183 *Id.*

184 *See* Newman, *supra* note 88, at 740–41. Hutchison & Pretorius, *supra* note 16, at 428.

185 Aristotle, *supra* note 1, at 157–58.

186 Bradfield, *supra* note 62, at 209.

187 *Id.*

188 *Id.* at 210.

189 *Id.* at 209.

190 *Id.*

would have a direct bearing on determining whether a document is in plain language or not.[191] The structural presentation will also have a direct bearing on its interpretation. For example, a small font size is not favourable for the reader's engagement and functions as a deterrent against reading the contract.[192] There are also instances in which emphasis is placed on a term (such as the use of a bold font), which will stand out to the reader.[193]

One of the few South African cases wherein the court has directly commented on the manner in which a contract was drafted and how this may be a barrier to justice under section 22 of the CPA, can be found in the KwaZulu High Court in *Four Wheel Drive Accessory Distribution CC v. Rattan NO*, which noted that the heart of the matter related to "the quality and quantity of the form and content of a written agreement."[194] In this matter, Rattan's vehicle was being repaired, and he was provided with another vehicle to use during this time.[195] Rattan was required to sign a document called B2, which was found during the trial to be in very small print and difficult to read.[196] In fact, the court noted that the agreement could only be read with a magnifying glass.[197] Although the vehicle was insured for 72 hours, Rattan would, according to clause 3 of B2, insure the vehicle against damage thereafter and ensure that the vehicle was returned in the same condition in which it was received.[198] However, in the interim, on 30 November 2012, Rattan was fatally shot while driving the vehicle causing damage to the vehicle.[199] As a result, it was impossible for Rattan to comply with the terms of the agreement, such as getting additional insurance coverage for the vehicle within 72 hours and returning the vehicle in the same condition in which it was received.[200] The focal point of interest in this case was the manner in which the court applied the requirements of plain language under the CPA.[201] The court found that the B2 document was not in plain language and essentially deprived Rattan of his rights under the CPA.[202]

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191 Sec. 22 of the CPA and sec. 64 of the NCA.

192 Newman, *supra* note 88, at 739.

193 *Roomer* case, at 543G-I.

194 *Four Wheel Drive Accessory Distribution CC v. Rattan NO*, 2018 (3) S.A. 204 (K.Z.D.) (S. Afr.) para. 1 (hereinafter *Rattan* case).

195 *Rattan* case, para. 3.

196 *Rattan* case, para. 25.

197 *Rattan* case, para. 27.

198 *Rattan* case, para. 3, 26.

199 *Rattan* case, para. 5.

200 *Rattan* case, para. 30, the court noted that this related to the common law principle of *lex non cogit ad impossibilia* (being that a person cannot be held accountable to do something that is impossible to do).

201 Sec. 22 of the CPA.

202 *Rattan* case, para. 61–62.

This matter was the first to deal directly with how the failure to employ plain language may impact the validity of the contract under section 22 of the CPA. However, on the issue of plain language and its contravention of section 22 of the CPA, on appeal, the Supreme Court of Appeal found that the evidence that was presented in the case did not sustain the court's *a quo* finding.[203] In fact, the Supreme Court of Appeal noted that the agreement did not fall within the scope of the CPA and therefore could not be a determination as to its validity in terms of section 22 of the CPA.[204]

Although the issue related to the use of plain language in the *Four Wheel Drive Accessory Distribution CC v. Rattan NO* case was overturned, the court's *a quo* approach is indicative that the courts are willing to consider how the manner in which visual communication structures are used may influence the validity of the contract. Therefore, it can also be argued that the lay-out and presentation of a contract are important in the drafting of a contract. If done improperly, there is a possibility that it could lead to instances of *iustus error*.[205] In order to draft contracts effectively and to achieve the use of plain language so as to overcome language barriers in a contract, the drafter must consider both the textual and visual communication structures.[206] This would have a direct bearing on the manner in which the reader views and interprets a contract. The South African legislature has understood this principle and incorporated requirements for both textual and visual communication in legislation that has defined the term plain language.[207] Taking into account both the textual and visual communication of a contract, it can be said that there are a number of mechanisms that would influence the total communicative value of a written contract. These mechanisms include readability, interpretation, linguistics, typography and the structural presentation of the contract.

Conclusion

Boshoff notes that "language serves as the indispensable tool of the law."[208] The use of plain and understandable language in contracts continues to be viewed as being optional rather than a requirement for the drafting of contracts. This is particularly

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203 *Four Wheel Drive Accessory Distributors CC v. Rattan NO,* 2019 (3) S.A. 451 (S.C.A.) (S. Afr.), para. 31 (hereinafter *Rattan* Appeal case).

204 *Rattan* Appeal case, para. 31.

205 Newman, *supra* note 88, at 741. *See also examples at Brink v. Humphries & Jewell (Pty) Ltd.*, 2005 2 S.A. 419 (S.C.A.) (S. Afr.) 425–26 (hereinafter *Brink* case); *Royal Canin South Africa (Pty) Ltd. v. Cooper*, 2008 6 S.A. 644 (SECLD) (S. Afr.) 646–47; *Thorburn* case; *Keens Group v. Lötter*, (1989 (1) S.A. 585 (C) (S. Afr.) (hereinafter *Keens Group* case).

206 Adapted from Karen Mika, *Visual Clarity in Contract Drafting*, 70 Clarity 52 (2013), that makes the distinction between visual and verbal clarity.

207 *See* para. 4.3 (above).

208 A Boshoff, *The Secret Life of Legal Language*, 2 TSAR 379, 379 (2004).

true in instances prescribed by the legislature to require the use of plain language as well as the ever-increasing international pressures to develop user-friendly and understandable documentation in all industries. In order to assess whether the language used in a contract passes the muster of plain language requirements, Stoor and Chürr suggest that the contract be evaluated not only against in-house styles and assessments but also through the utilisation of software programmes in order to ensure that the contract meets the requirements of plain language.[209]

The process of drafting contracts in plain language goes to the root of contractual theory, and it is the responsibility of the contract drafter to ensure that the purpose of a contract is fulfilled, namely that the written contract is understood by the contracting parties and that it is enforceable in law. Failure to achieve a certain level of understanding could negatively impact the validity of such contracts. This is often found in cases involving *iustus error* or where the requirement for clarity in a contract has not been achieved due to the type of contract language employed by the drafter. Therefore, notwithstanding legislative requirements, a contract drafter must ensure that the contract not only expresses the intention of the parties but does so in a manner that is clear and understandable to the contracting parties. Consequently, it is argued that the use of plain language should be employed in all contractual drafting to comply with a contract drafter's duties and achieve the objectives of a written contract, and failing to do so may serve to perpetuate language barriers in contracts.

The process of drafting contracts in plain and understandable language is communicative in nature and cannot simply be a one-size-fits-all approach. Contracts exist to convey a message and must be approached in a way that takes into consideration the overall communication and understanding of the contract through employing one or more of the communicative mechanisms discussed in this paper.[210] Each document must be assessed by its own merits as well as by the ability of the intended audience to understand the contract in order to determine whether it has been drafted in language that is understandable or not. The drafting of contracts should therefore be approached with respect to their total communicative value, taking into account the ability of all stakeholders, including the contracting parties, lawyers and judicial officers, to understand and interpret the document.[211] It is then perhaps time to heed the counsel of the philosopher of ancient Greece and retire the use of legalese and other artificial language structures (or, as Aristotle put it, "disguise the writer's art and ability") in written contracts in preference for plainer and more understandable alternatives.[212] It is only by using language that is accessible that these

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209 Stoop & Chürr, *supra* note 146, at 535, 614.

210 Mitchell, *supra* note 100, at 830.

211 Cornelius, *supra* note 26, at 16, argues that traditional language practices hold no place in the contemporary South African framework.

212 Aristotle, *supra* note 1, at 160.

social justice imperatives will be achieved and that the inequality in language barriers in contractual engagements can be overcome.

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