Aspects of practice

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Contract — variation of — effect of non-variation clause — Shifren principle followed — effect of principle of bona fides in law of contract.
Constitutional law — s 26(3) of Constitution — right not to be evicted from home without an order of court made after considering all the relevant circumstances — meaning of "all the relevant circumstances"— *Brisley v Drotsky SCA* case no 432/2000 28 March 2002, unreported.

The appellant (lessee) and respondent (lessor) had entered into a lease containing a non-variation clause. The lessor had cancelled the agreement by reason of the lessee's default and had applied for an order evicting the lessee from the leased property. In her defence, the lessee relied, *inter alia*, on a subsequent oral variation of the lease and on s 26(3) of the Constitution, which provides, *inter alia*, that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. The eviction order was granted.

On appeal, 3 questions arose for decision: (1) the ambit of the *Shifren* principle (*SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A)), in terms of which a contract containing a non-variation clause may not subsequently be varied orally; (2) in connection with the latter, the effect of the so called *bona fides* principle in the law of contract; and (3) the ambit of s 26(3) of the Constitution.

The majority of the court (*per* Harms, Streicher and Brand JJA, in a joint judgment; Olivier and Cameron JJA delivered separate, concurring judgments) held that the *Shifren* principle was trite and that no reason existed why, after almost 40 years, it should be overturned.

The court held that the purpose of a non-variation clause was to limit or eliminate disputes. The perception that such terms only benefit the economically powerful and result in contractual inequality, was a "prevailing myth"; these terms served to protect both parties. The *Shifren* principle did not create an unreasonable strait-jacket; the general principles of contract still applied If the *Shifren* principle were to be overturned, other clauses providing for a prohibition on estoppel, novation and waiver could also become vulnerable on questionable grounds. The result would be the very opposite of the principle of certainty the law of contract strove to uphold.

As to *bona fides*, the court held that, in principle, a court had no general discretion to refuse to enforce any valid contractual term. The principle of good faith did not provide an independent free floating basis for the rescission or non-application of contractual terms. Good faith was a fundamental principle of the law of contract and found expression in its various rules and principles, but it was not the only value or principle that underlay the law of contract; nor, perhaps, even the most important one.

Another value underlying the law of contract was that parties should be held to contracts they freely concluded. The courts had to weigh these occasionally conflicting principles and where necessary, make gradual adjustments. Suddenly to afford judges a discretion to ignore contractual principles they regarded as unfair or unreasonable was contrary to this gradual approach and would result in the principle of *pacta sunt servanda* being largely ignored; the enforceablity of contractual provisions would then depend on individual judges' views of what was reasonable and fair in the circumstances. The criterion will no longer be the law but rather the judge. Contracting parties would no longer be able to act upon a general expectation that in the event of a dispute between them, their contract would be enforced according to its tenor; they would have to wait and see if the individual judge considered the terms of the contract to be fair and reasonable. Where necessary, legal principles had to be adapted in the light of the Constitution.

Turning to s 26(3) of the Constitution, the court held that *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) had been wrongly decided. While a court had to consider all the relevant circumstances in deciding whether to grant an eviction order, s 26(3) did not set out what circumstances were relevant. This determination therefore fell to be made by applying the generally applicable law. Circumstances were only relevant if they were legally relevant. Section 26(3) did confer a discretion to refuse to grant an eviction order in circumstances where an owner would normally be entitled to such an order. By law an owner was entitled to an eviction order against an unlawful occupier, except if that right was limited by the Constitution, other legislation, contract or some other legal basis. An example of such a limitation was the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, which made an eviction order in the circumstances set out in that Act subject to the discretion of the court.

In the present case, the lessor was the owner of the property and the lease had been cancelled. The lessee therefore had no contractual right to occupy the property. The only legally relevant circumstances were therefore that the lessor was the owner and that the lessee was in possession of the property.

The appeal was dismissed.

Advocates — professional misconduct — advocate performing the work of an attorney by signing magistrate's court process and notice of motion — advocate providing own address as service address on behalf of client — *General Council of the Bar of South Africa v Rösemann* 2002 (1) SA 235 (C)

The respondent had signed two summonses on behalf of the plaintiffs, his clients, and caused these to be issued out of a magistrate's court. In one, he gave his own address as the service address. On two other occasions he signed notices of motion in a magistrate's court on behalf of the applicant, over the words 'applikant/prokureur vir die applikant'.

The respondent's explanation was that he had acted as the agent of his instructing attorney and that it was not improper for an advocate, duly instructed by an attorney to do so, to sign pleadings in the magistrate's court, including summonses and notices of motion. He submitted that there was no prohibition against such a practice to be found in the Magistrates' Courts Act 32 of 1944 or rules.

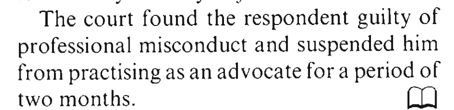
Referring to case law, the Court held that certain work was properly within the exclusive ambit of the functions of the attorney who had been instructed by his client to act for him. Such work was usually done best, and most cost-effectively, by the attorney or his clerk. The advocate's profession was a referral profession. The advocate was the specialist in forensic skills and in giving expert advice on legal matters. The attorney, on the other hand, took care of matters such as the investigation of the facts, *the issuing and service of process*, the discovery and inspection of documents, and the like. An attorney could not shuffle off these functions onto the shoulders of an advocate by simply briefing the latter to attend to them on his own, nor could it be proper for counsel to accept such a brief. There could be no objection to counsel being briefed to advise an attorney on how to deal with a specific problem which might have arisen in a particular matter or to assist an attorney in drafting a particular document, or to settle its terms. In such a case the advocate advised or assisted the attorney concerned so that the latter could the better and more effectively perform his own functions. That was a far cry from the situation where the attorney divested himself of those functions, as it were, washed his hands of them, and passed them over to the advocate to perform in his stead without any further active participation by the attorney.

In the present case the impropriety of counsel furnishing his own address as an address for the purposes of litigation was graphically illustrated. Had the defendant wished to pay the amount claimed from him, the only address which he would have found in the summonses or in the particulars of claim at which he could do so would have been the respondent's. Had he repaired to that address, the respondent would have been expected by his client to receive the payment and to account to her in due course. The position would be further exacerbated if the defendant had wished to pay the respondent in cash, and had demanded a receipt.

The respondent complained that he had been unable to ascertain whether certain of the work which he had undertaken was work which might be performed only by attorneys. The court held that he should not have needed to do so. Any responsible advocate knew, without having to ask, that certain work was normally performed by attorneys, and that it would be improper for him to accept a brief to do such work instead of the attorney, thereby relieving the attorney concerned of responsibility for the work. If he had really been in doubt, a perusal of the judgments in the case law ought to have been amply sufficient to apprise the respondent of the impropriety of his conduct.

As to the respondent's reliance on the provisions of Magistrates' Courts Rules 2(1), 6(2), 13(4)*(a)* and 52(1)*(a)* read with the definition of 'practitioner' contained in the Magistrates' Courts Act, the court held that there was no basis for the proposition that it was the intention in the Rules to do away with the long-established division of work between attorneys and advocates. Signing and issuing summonses and notices of motion in the magistrate's court and furnishing an address for the service of process was work normally performed by, and was part of the normal functions of, an attorney. Whatever other crosses it may be the lot of counsel to bear from time to time during the course of his professional life, bearing such fardels as these was not one of them; moreover, an advocate might not permit himself to become an attorney's lackey or *factotum*.

The court found the respondent guilty of professional misconduct and suspended him from practising as an advocate for a period of two months.



From the publishers

Plain Legal Language for a New Democracy

Edited by Frans Viljoen and Annelize Nienaber

Protea Book House (2001)
180 pp
Soft cover R99,95 (VAT incl)

Richard Feynman was the greatest physicist of the second half of the twentieth century. He disliked verbiage, which confused clarity of thought. In 1986 he was appointed to the committee investigating what had gone wrong with the space shuttle *Challenger*. Some engineers showed him around a space shuttle, which exhibited a high-frequency vibration problem.

They kept referring to the problem by some complicated name — a "pressure-induced vorticity oscillatory wa-wa," or something.

I said, "Oh, you mean a whistle!"

"Yes," they said; "it exhibits the characteristics of a whistle."[1]

The message of *Plain Legal Language for a New Democracy* is: "Speak clearly." That is good advice. It fits handily on a bumper sticker. What makes the book self-defeating is that it has expanded the bumper sticker into 180 pages (including lists of plain language sources, not forgetting web-pages; a list of contributors; and an index).

The book grew out of "the first academic conference and workshop on plain legal language in South Africa" (p 12), held at the University of Pretoria's Faculty of Law in mid-1999. We are not told whether there was ever a second one, but one would be surprised. The conference was addressed by heavy hitters in the field of plain language, such as Mark Adler, the chairman (*sic* — pp 36, 159, 173) of "an international movement for plain legal language" known as Clarity. (Indicating that one can use plain language, but nonetheless not have clear thoughts, Mr Adler is on other occasions referred to as the chairperson (p 13) and the president (p 12) of Clarity.)

The title of the book is indicative of the misguided thesis which underlies the project: that obscure and inaccessible legal language marked the apartheid state, whereas "[a]fter 1990, the transition to democracy made plain legal language possible" (p 10). I have not made a study of this, but it would be surprising indeed to find that dictatorships are not very well served by the plainest legal language imaginable. Also, if democracy and clarity go hand in hand, then Mr Adler's movement is ill-suited to the United Kingdom from which he hails.

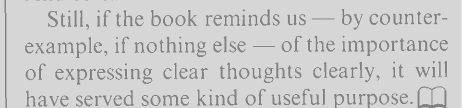
The editors themselves seem to undermine the thesis, for they quote in support of the struggle for clarity in legal language passages by Prof J C de Wet and Judge WJ Hartzenberg, neither of whom was in the vanguard of the struggle against apartheid. Also, the Labour Relations Act 66 of 1995 is held up as the paradigm example of the triumph of plain language in a democratic South Africa. Here, however, is Martin Brassey on section 197 of that Act:

"The problems of the section are to an extent linguistic — in one case, at least, a phrase is used which conveys precisely the opposite of the meaning intended. To an extent, moreover, they are structural, expressions being framed in different ways when they seemingly have the same import and antitheses being set up when none exist. Mostly, however, they are conceptual... The result is a section that yields no completely coherent meaning when construed by the conventional canons of statutory interpretation. Each construction, tentatively adopted, meets an insuperable obstacle in the language and must be jettisoned until ultimately there is nothing left but the frustration of failure."[2]

Because the message is such a simple one, it is only through liberal use of the truly platitudinous — if I may use that word, which at five syllables is perhaps pushing the outside of the envelope of plain language - that one gets to a book of this length. My favourite platitude is "The plain language continuum or scale" (p 23), which, accompanied by a diagram, no less, goes: "Difficult... Plainer... Plain".

There are also a fair number of howlers. Following hard upon a sentence which must surely register as a major earthquake on the plain language scale ("The most prominent problem with regard to the terminographical process is that all possible concepts in a given subject field are not taken into account before coinage takes place"), Mariëtta Alberts identifies as a particular problem with legal language in South Africa the fact that "often non-existing (European) concepts... are imported into African languages" (p 107). Leaving aside her identification of European concepts with non-existence, it is most unfortunate that three of her five examples of concepts which apparently do not exist in Africa are "homosexual", "gay" and "lesbian" (p 108). She also states that South Africa's legal system is "greatly influenced" by "Indigenous Law in an African context", and that in South Africa "the term 'defamation' is used for the *criminal offence*" (p 104). And so on.

Still, if the book reminds us — by counter-example, if nothing else — of the importance of expressing clear thoughts clearly, it will have served some kind of useful purpose.



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Endnotes

1 Richard P Feynman *"What Do You Care what Other People Think?" Further Adventures of a Curious Character* (1992) 185.

2 Brassey *Employment and Labour Law vol 3: Commentary on the Labour Relations Act* A8: 86.