INTERPRETATION OF CONTRACTS - *(John Carr-Hartley, Managing Partner)*

Parties often arrive at their lawyers' office with a dispute about a contract which the parties have drawn themselves, or which has been prepared by someone else but was not considered by their attorney before it was signed. This often has dreadful and costly consequences.

The law regards written contracts as the sole memorial of the agreement entered into between the parties (the parol evidence rule), and it is only in limited circumstances that a Court will allow background facts to be given as an aid to the interpretation of a contract. In addition, parties would also be well served when signing contracts to remember another legal principle, that being *pacta sunt servanda*, in terms of which the Courts will enforce contracts entered into freely and voluntarily even where they are one sided or make no business sense to one of the parties.

In the case of **Hinton v Fair Deal Wooden Windows (Pty) Ltd 2006 (1) BLR 142 HC**, Her Ladyship Justice Sarkodie-Mensah Ag J stated that "it is irrespective of whether or not the contract is unusual or unbusiness-like, when the language is clear, the Court cannot change the terms to make it better for one of the parties."

Over the course of time, Courts have developed a set of rules which guide the interpretation of contracts. The most fundamental of these rules are the following (i) the language used in a contract should be given its ordinary grammatical meaning, and if the result is clear and unambiguous it will be assumed that those words accurately reflect the intentions of the parties; (ii) words used in a contract must be interpreted in the context of other provisions in the document and the nature and purpose of the transaction as a whole; (iii) if giving the words used in the contract their ordinary meaning would lead to an absurdity or to a result which the parties could not have intended, the Court can depart from the literal meaning in order to give effect to the parties' intention; and (iv) if the words read in context are capable of more than one meaning, background circumstances may be used to determine the probable common intention of the parties.

It is also worth noting that it is also a general rule of interpretation of contracts that if the words do give rise to ambiguity or are capable of more than one meaning, the Court will interpret the contract against the party who was responsible for the drafting or preparation of the contract. This is known as the *contra proferentem* rule.

When parties prepare contracts they almost inevitably believe that the contract which they have prepared is clear and correctly records their agreement. However, parties are often infatuated by the impending deal and often do not take the time to consider what other interpretation could be accorded to the words that they use. When the deal is going well (and most do) there is often no need to refer back to the contract. It is, however, when a deal goes bad and one party is looking for a way out of the contract that different contentions on the interpretation of the words used usually becomes an issue.

If the deal is worth preparing a written contract, then it is usually worth taking advice on the contract upfront. This may not prevent disputes or litigation arising from the contract, but it may be the difference between success or failure when a dispute does arise. Always bear in mind another maxim "*caveat subscriptor*" which provides that a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be to his liking he has no one to blame but himself.