RESEARCH ARTICLE

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DUTIES OF THE CONTRACT DRAFTER

SUMMARY

A drafter of contracts (drafter) holds a unique role in the contract life cycle and functions not only as a communicator, but also as an interpreter and an expert in legal knowledge. In the process of drafting of contracts, there may be *bona fide* mistakes. The common law provides several mechanisms to protect the contracting parties against such mistakes, including overcoming ambiguous language with the application of the *contra proferentem* rule; overcoming *bona fide* or intentional mistakes reflected in the written contract by means of applying to the court for rectification, and avoiding contractual liability, where poor document design has resulted in a *iustus error*. *Bona fide* mistakes are distinguished from "indifferent draftsmanship" or failure to fulfil a drafter's professional and ethical duties. The article proposes a framework for the drafter's professional and ethical duties, including upholding the values of the *Constitution of the Republic of South Africa*, 1996; acting in the interest of the drafter's client, whilst maintaining professional and ethical standards; maintaining the expected standard of conduct; acting with honesty and integrity; acting lawfully and legally; avoiding a conflict of interest; maintaining the confidentiality of client information; maintaining professional independence; ensuring that appropriate fees are charged, and maintaining an adequate level of competencies and skills. Failure to adhere to the professional and ethical duties can have significant personal consequences for the drafter, which may include disciplinary action under the *Legal Practice Act* 28 of 2014 or even liability stemming from a breach of a statutory duty, breach of the contract between the drafter and client, or a delictual claim.

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1. INTRODUCTION

The drafter of contracts (drafter) holds a unique role in the contract life cycle. The drafter functions as a communicator,[1] which requires a level of proficiency in the use of language.[2] The drafter uses these skills to translate the agreement between the contracting parties into written form,[3] and thereby couches the intention of the contracting parties in the language of the contract document.[4] The drafter's function is, however, wider than that of a communicator and requires the drafter to have the necessary knowledge of the rules of interpretation and substantive law to effectively draft a contract.

The drafter also has an integrated role in the contract life cycle. The drafter is involved in a contract from the inception of contractual negotiations, as well as the reviewing, drafting, and ensuring correct execution of the contract. The drafter's involvement can endure after the conclusion of the contract where there may be a need for contract management, interpretation of the contractual obligations in instances of breach, or preparing any amendments to the contract.[5] A drafter can also make mistakes in the contract life cycle, with possible devastating consequences for the drafter's clients, lead to litigation, and even result in invalid contractual clauses, which raises ethical and professional questions.[6] In assessing a drafter's mistakes in the contract life cycle, a distinction is made between, first, *bona fide* drafting errors, where common law provides limited protections for the contracting parties, and, secondly, breaches of professional and ethical duties of the drafter required under the common law and in the Code of Conduct (2019).[7]

This article draws from the Code of Conduct to propose a framework for the professional and ethical duties of a drafter. The framework considers the common law protections afforded to the contracting parties for *bona fide* mistakes reflected in the contract. It also briefly highlights the potential individual consequences of the drafter failing to adhere to his or her professional and

1 Adapted from Van der Merwe 2014:35, stating that one of the benefits of clear writing is that it facilitates communication.

2 Cornelius 2001:31 notes that "[t]he essence of legal drafting is the attempt by the drafter to convey certain ideas to the eventual recipient or adjudicator of the instrument. Obviously, the drafter's aim should be to convey the ideas as clearly and accurately as possible". Although English is often the predominant language to draft a contract, other languages can also be used to draft a contract. See *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and Another* 1982 (2) SA 773 (T), where the contract was drafted in German.

3 This principle can be drawn from *Ex Parte Kock NO* 1952 (2) SA 502 (C), where the court noted that a person drafting a will must be conversant in the language in which the will is drafted. So too, a drafter must be proficient in the language in which he or she is drafting the contract.

4 If the language does not correctly or accurately reflect the intention of the parties, it may result in a mistake that may destroy the consensus in the contract. See *Brits v Van Heerden* 2001 (3) SA 257 (C):282.

5 This is typically the case when litigation occurs based on the contract document.

6 Kunz 2006:488. *Ex Parte Kock, NO*:516 noted that the drafter's knowledge did not extend far enough to equip the drafter to set out the intention of the testator in a will in clear and unambiguous language.

7 *Legal Practice Act* 28/2014:sec. 36(1).

ethical duties,[8] which may include disciplinary action under the *Legal Practice Act* 28 of 2014 (*LPA*) or damages claims that may originate from the breach of a statutory, contractual or delictual obligation.

2. THE MEANING OF "DRAFTING" IN THE CONTRACT LIFE CYCLE

The Supreme Court of Appeal has, in the past, cautioned not to draw analogies between situations that are of different natures, as such comparisons could create a dangerous precedence.[9] However, the nature of drafting legal instruments, specifically that of legislation, wills and contracts, shares certain commonalities. All three of these legal instruments create enforceable legal obligations. Although the impact of legislation is pervasive of society as a whole, Cornelius notes that wills and contracts establish a form of *ad hoc* legislation *inter partes*.[10] The approach of interpreting legislation, wills, and contracts is also similar.[11] The process of interpreting a document can be considered the precursor to drafting,[12] and thereby drafting practices in legislation, wills and contracts may overlap. These similarities in interpretation and drafting practices may provide guidance in setting the standard expected as well as the professional and ethical duties of the drafter. Based on this, it is reasonable to consider the principles found in the drafting of legislation and wills as far as it may be relevant to do so, to propose a framework for the professional and ethical duties in the drafting of contracts.

As a starting point, it is necessary to establish what is meant by the term 'drafter', as this will be foundational to determine the duties of a drafter. The term 'drafter' or 'drafting' can be viewed synonymously with a person's proficiency of language,[13] but drafting a legal instrument attaches a wider meaning than the skilful use of language. The term 'draft' in the context of

8 The phenomenon of copying-and-pasting is not necessarily limited to the drafting of a contract. *In Re Confirmation of three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ):par. 5, the court raised the following caution: "[a]pplications such as these under consideration have serious implications for all the applicants concerned, and also for the children to be born. Practitioners who copy previous applications should take care to draft papers in a proper manner, and not to just shoddily copy and paste other applications". See further examples in *Rametsi v Absa Bank Limited* 2013 JDR 2363 (GNP):par. 8; *Cele v The South African Social Security Agency* 2008 7 BCLR 734 (D); *Sibiya v Director General: Home Affairs* 2009 3 All SA 68 (KNP), and *Tekalign v Minister of Home Affairs* 2018 3 All SA 291 (ECP).

9 See *Boe Bank Ltd v Ries* 2002 (2) SA 39 (SCA), where the court cautioned to apply the application of the same principles of liability between the drafter of a will and a beneficiary with those of the liability between a broker and a bank.

10 Cornelius 2004:692.

11 Cornelius 2016:33 notes that "[i]t is generally accepted that, as far as interpretation is concerned, there is no distinction between contracts, wills and statutes".

12 Adapted from, and influenced by, Prof. S. Cornelius' lectures on the drafting of contracts.

13 See *Ex Parte Kock, NO*, where the importance of language in drafting a will was highlighted.

sec. 2A of the *Wills Act* 7 of 1953 does not refer to a rough draft, but rather to the preparation of a testamentary document for execution.[14] Drafting a testamentary document can then be said to be wider than the language used in the document. In contrast, contracts do not have any specific legislative provision explaining what is meant by the term 'drafting' but, practically, the drafting of contracts is similar to the drafting of testamentary documentation, in that the drafting process includes both the preparation of a rough draft as well as the executed version of the contract.

It can be said that the role of the drafter starts with contract negotiations, being the precursor to preparing the written document. Thereafter, the drafter is to draft the written contract utilising expert understanding and knowledge of the rules of interpretation and substantive law to ensure not only that the contract is valid and enforceable, but also that it accurately reflects the contracting parties' intentions. The drafter may also be involved post the conclusion of the contract in contract management, advising on the interpretation of the contract in the case of a dispute or to prepare any amendments to the existing contracts. The drafter's influence permeates throughout the contract life cycle and, therefore, requires closer examination of the professional and ethical duties of the drafter.

3. PROFESSIONAL AND ETHICAL DUTIES OF THE DRAFTER

3.1 Preliminary comments

Legal practitioners have traditionally been the drafters of legal instruments.[15] It is also considered best practice to ensure that legal instruments are drafted by legal practitioners, but technology and easy access to *pro forma* documents have made it easier for laypersons, often to their detriment, to draft their own legal instruments. The lack of regulatory oversight in the drafting of legal instruments has exacerbated the situation.[16] At present, two requirements regulate who may draft particular legal instruments. The first is the legislative requirement for conveyancers to prepare those legal instruments that fall within the scope of sec. 15 of the *Deeds Registries Act* 47 of 1937.[17] The second is that legal practitioners (being admitted and practising under the

14 Adapted from *Henwick v Master of the Supreme Court and Another* [1996] 4 All SA 440 (C):448: "[t]o my mind the more appropriate meaning of the verb 'draft' in this context is to prepare rather than to make a rough copy".

15 The drafting of contracts is not limited to legal practitioners, as defined under the *Legal Practice Act* 28/2014, but often contracts are drafted by non-admitted legal practitioners. Van Eck 2021:261 distinguishes between regulated legal practitioners, salaried legal practitioners, and non-salaried legal practitioners.

16 See Ellis, Lamey & Kilbourn 2021:par. 1.1.

17 *Deeds Registries Act* 47/1937:sec. 15, which reads "[e]xcept in so far as may be otherwise provided in any other law, no deed of transfer, mortgage bond or certificate of title or any certificate of registration of whatever nature, mentioned in this Act, shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer".

LPA, also referred to as "registered legal practitioners"),[18] are only permitted to prepare documents related to court proceedings in terms of sec. 33(1) of the *LPA*.[19]

It is generally accepted that legal instruments are prepared by either registered legal practitioners,[20] or those legal practitioners who are admitted under the *LPA*, but are exclusively employed by a client (also referred to as "salaried legal practitioners", "legal advisers", or "in-house counsel").[21] Both these types of legal practitioners are bound by the Code of Conduct and fall under the disciplinary oversight of the Legal Practice Council by virtue of being admitted into the legal profession under the *LPA*. However, the drafting of contracts becomes problematic when the drafting is undertaken by individuals with a legal degree who are not admitted under the *LPA* (also referred to as "non-salaried legal practitioners"),[22] or a layperson. The *LPA* does not expressly prohibit non-salaried legal practitioners or a layperson from drafting a contract.[23] The role of the drafter is further muddled with a perception that anyone, who has a reasonable command of the English language and access to the internet,[24] can draft a legal instrument. In *Raubenheimer v Raubenheimer*, for example, Leach JA expressed amazement that individuals still, in this day and age, opt to use untrained and unskilled individuals for the drafting of wills,[25] especially when, as Leach JA describes it, a will is one of the most important documents a person may sign in his or her lifetime.[26] Close synergies can be drawn from Leach JA's comments regarding the drafting of wills to that of the drafting of contracts. Although nothing from a legislative perspective prevents non-salaried legal practitioners or a layperson to draft a contract, such drafting practices should be discouraged. This article is premised on the professional and ethical duties of registered and salaried legal practitioners who undertake the drafting of contracts for their client.

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18 Van Eck 2021:261.

19 The position has changed since the inception of the *Legal Practice Act* 28/2014. *Attorneys Act* 53/1979:sec. 83(8)(a) (now repealed) permitted only admitted and registered legal practitioners to prepare "any agreement, deed or writing relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes"; "any will or other testamentary writing"; "any memorandum or articles of association or prospectus of any company"; "any agreement, deed or writing relating to the creation or dissolution of any partnership or any variation of the terms thereof", and "any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic". These requirements have been relaxed in terms of the *Legal Practice Act*:sec. 33(1), which limits litigation-related services and drafting of pleadings to those of a legal practitioner. Conceivably, any person other than a legal practitioner is free to draft a contract, provided it complies with the *Deeds Registries Ac*:sec. 15.

20 Van Eck 2021:261.

21 Van Eck 2021:261.

22 Van Eck 2021:261.

23 Ellis, Lamey & Kilbourn 2021:par. 1.1.

24 See discussion in Damn 2014:96.

25 *Raubenheimer v Raubenheimer* [2013] JOL 30045 (SCA):par. 1.

26 *Raubenheimer v Raubenheimer*:par. 1.

Registered and salaried legal practitioners are not immune to the challenges of drafting contracts. In the attempt to find more efficient ways of servicing clients, some legal practitioners may fall into the trap of a slavish use of precedence or *pro forma* documents, or the so-called copy-and-paste phenomena that have generally overwhelmed modern contract drafting.[27] This, as in the drafting of wills, could have dire consequences for the contracting parties and the individual drafter.[28] In the words of Cornelius, there are no shortcuts to drafting a contract,[29] and failure to update *pro forma* documents to meet client requirements may result in the breach of professional and ethical duties of the drafter.[30]

Against this backdrop, this article considers the drafter's professional and ethical duties against sec. 36(1) of the *LPA*, which contemplated the establishment of a code of conduct to guide the expected standards of conduct of legal practitioners,[31] which was effected in 2019.[32] The Code of Conduct sets the standard of conduct expected of legal practitioners[33] and, although it does not directly name specific duties in the drafting of contracts, it does provide a starting point with which to formulate the professional and ethical standards of legal practitioners engaged in the drafting of contracts.[34] These duties can be summarised into ten broad professional and ethical principles that are discussed below.

27 See discussion in Damn 2014:96. See also *Holtzhausen v Chetty* 2013 JDR 2771 (KZP):par. 4, where the court commented on the poor drafting of a *pro forma* document, and Roux & Strydom 2014:35, which states that "[o]ne of the areas in which the misuse of templates has become virtually epidemic is in the drafting of testamentary documents such as wills and codicils. In practice we often see wills, based on foreign templates, which use extremely outdated or completely irrelevant phrasing".

28 See *Cele v The South African Social Security Agency* 2008 7 BCLR 734 (D); *Sibiya v Director General: Home Affairs* 2009 3 All SA 68 (KNP), and *Tekalign v Minister of Home Affairs* 2018 3 All SA 291 (ECP), being examples of instances where legal practitioners re-used affidavits in litigation processes with minimal changes, bringing into question both the accuracy of the affidavit and the fees charged for the preparation of such affidavits.

29 Cornelius 2001:33 notes that "[t]aking shortcuts could mean that the process of drafting is rushed and botched, so that more time will have to be spent on correcting the instrument".

30 See discussion in Damn 2014:96-97.

31 See also Ellis, Lamey & Kilbourn 2021:par. 7.3.1.

32 Legal practitioners, in this context, means legal practitioners as recognised under the *Legal Practice Act* 28/2014, including that of attorneys, advocates and candidate legal practitioners. It does not refer to legal advisors who are outside private practice. In this regard, see Van Eck 2021:261.

33 *Legal Practice Act*:sec. 36(1).

34 Similar to the position of Zimbabwe, duties of the legal practitioner in South Africa originate from the common law (as interpreted and expanded by the courts) and from legislation. See *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (HC):57.

3.2 First principle: Upholding the values of the *Constitution of the Republic of South Africa*, 1996

The first professional and ethical principle is that a drafter must uphold the values of the *Constitution*.[35] A legal practitioner is an officer of the court and is expected to uphold the values set out in the *Constitution*, which includes the prohibition of unfair discrimination.[36] This is particularly relevant where a legal practitioner undertakes to do work for clients, and should not select, accept, or exclude clients based on discriminatory grounds. Therefore, in a contractual setting, the legal practitioner must treat his or her clients in the same way, not refuse to do work for a specific demographic of persons to the exclusion of another, and thereby may not unfairly discriminate against a person on discriminatory grounds.

Similarly, the values of the *Constitution* must be upheld when drafting the contract, and particularly the language used in the contract. The importance of upholding the values of the *Constitution* may be illustrated in two 2021 Constitutional Court judgments. In *King NO and Others v De Jager and Others*,[37] the court refused to uphold a will that bequeathed an estate's assets to male descendants to the exclusion of female descendants. Similarly, in *Wilkinson and Another v Crawford NO and Others*,[38] the court refused to uphold the provisions of a testamentary trust that distinguished between the adoptive status of descendants. The Constitutional Court has echoed similar requirements in contracts, noting that the *Constitution* would apply to contractual engagements in a form of "indirect horizontality" by means of public policy considerations in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*.[39] Failure to ensure that the language and content of a contract reflect the values of the *Constitution* would result in the contract being void. It is then one of the drafter's duties to ensure that contractual provisions comply with constitutional values.

3.3 Second principle: Ranking of duties

The second professional and ethical principle relates to the ranking of duties and loyalties.[40] A legal practitioner is subject to a variety of duties and responsibilities of several stakeholders. The Code of Conduct clarifies the ranking of the legal practitioner's duties and loyalties. Although the legal practitioner must protect the interest of his or her client, such duties are secondary to the legal practitioner's duties towards the court,[41] the interest

35 Code of Conduct:art 3.2. See also Ellis, Lamey & Kilbourn 2021:par. 7.5.
36 Code of Conduct:art. 3.2.
37 *King NO and Others v De Jager and Others* [2021] JOL 49722 (CC).
38 *Wilkinson and Another v Crawford NO and Others* 2021 (4) SA 323 (CC).
39 *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).
40 Code of Conduct:art. 3.3.1. See Ellis, Lamey & Kilbourn 2021:par. 7.5.
41 Code of Conduct:art. 3.3.1. See similar sentiments expressed in the Namibian case of *Marwa & Associates Land Surveyors v Helao Nafidi Town Council* 2016 JDR 0104 (NmO):3.

of justice,[42] the adherence to the law,[43] and "the maintenance of the ethical standards prescribed by [the Code of Conduct], and any ethical standards generally recognised by the profession".[44] The drafter's duties towards clients in the drafting of contracts are secondary to upholding the values of honesty, which is inherent to the legal profession.[45] Therefore, in drafting a contract, the interest of the client is not the only consideration that the drafter must take into account. The drafter should guard against any instruction that may have a negative impact on the drafter's professional and ethical standard as well as a negative influence on the integrity and maintenance of the law.

3.4 Third principle: Standard of conduct

The third professional and ethical principle is the maintenance of the required standard of conduct.[46] Legal practitioners must "behave towards their colleagues, whether in private practice or otherwise, including any legal practitioner from a foreign jurisdiction, and towards members of the public, with integrity, fairness and respect and without unfair discrimination, and shall avoid any behaviour which is insulting or demeaning".[47]

Our courts also found that the standard of conduct required of a legal practitioner can extend to third parties,[48] which becomes relevant in the process of negotiating a contract. During negotiations, the drafter must ensure that he or she acts in a manner that upholds the standards of integrity, fairness, and mutual respect. Insulting and demeaning behaviour holds no place in the role of the drafter nor is it acceptable in the legal profession.

Further, the drafter has both positive and negative duties towards legal colleagues representing the other contracting party. The drafter has a positive duty to draw attention to his or her colleague of a manifest error in the contract.[49] The drafter's negative duty is not to take advantage of a "colleague's inexperience" in the negotiation process.[50] However there is no duty on the legal practitioner to assist the inexperienced colleague.[51] In doing so, the drafter's duty towards his or her client must be upheld, but as Lewis cautions, "[i]f the colleague is inexperienced and ill-informed, and thus likely to accept what greater experience would reject, the [draftsperson] must not take advantage of that fact".[52] This is closely linked to the principle of honesty and integrity.

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42 Code of Conduct:art. 3.3.2.
43 Code of Conduct:art. 3.3.3.
44 Code of Conduct: art. 3.3.4.
45 See *Disciplinary Committee for Legal Practitioners v Murorua* 2015 JDR 2529 (NmS): 21.
46 Code of Conduct:art. 3.14.
47 Code of Conduct:art .3.14.
48 *Van Der Walt v Murray* 2019 JDR 1702 (FB): par. 13.
49 Lewis 1982:175.
50 Lewis 1982:175.
51 Lewis 1982:176-177.
52 Lewis 1982:175.

3.5 Fourth principle: Honesty and integrity

The fourth professional and ethical principle is that of honesty and integrity.[53] The principles of honesty and integrity are central to the legal profession, and are applicable not only to a legal practitioner's client, but also to all persons with whom a legal practitioner engages.[54] The Namibian courts described the legal practitioner as having "a special ethical duty to behave honestly".[55] It is a well-established principle that legal practitioners must at all times act with honesty and integrity, and such honesty must be demonstrated towards clients and colleagues, as well as the court.[56] Failure to uphold this standard of conduct has had various consequences, the most serious of which includes being disbarred from the legal profession. As a drafter, the legal practitioner must always act in a manner that is expected of his or her station in the legal community, which includes acting with honesty and integrity in all touchpoints of the contract life cycle.[57]

The duty of acting honestly and with integrity may be expanded within the contract-drafting context in that the drafter must avoid using or presenting any false or deceptive information in the process of negotiating or drafting of a contract. Lewis describes this as "honesty in translating oral understandings on to paper".[58] The drafter should not frame a contractual obligation in a deceptive manner so as to deceive or trick a party into accepting a term that the drafter knows is untrue or that is unduly onerous on a particular party to the contract.[59] In *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 I, Burger AJ states:[60]

> I consider it sound in principle that the party who drafts a contractual document would be blameworthy if he [or she] did so in such a way as to turn it into a trap containing onerous clauses which would not reasonably be expected by the other party. A signatory can be misled by the form and appearance of the document itself just as much as by a prior advertisement or representation. Obviously, however, each case must be decided on its own facts.

Bradfield also cautions against creating "traps for the unwary", in which peculiar or onerous clauses are hidden.[61] This may occur where contractual provisions are inconsistent with previous advertisements; provisions are included that are inconsistent with previous negotiations (in which instance, Lewis notes

53 Code of Conduct:art. 3.1. See also Ellis, Lamey & Kilbourn 2021:par 7.5.
54 Lewis 1982:2.
55 *Disciplinary Committee for Legal Practitioners v Murorua* 2015 JDR 2529 (NmS):21.
56 See *Disciplinary Committee for Legal Practitioners v Murorua*:21.
57 The court in *Disciplinary Committee for Legal Practitioners v Murorua*:21 notes that this duty of honesty should take preference over any other duty towards the legal practitioner's client.
58 Lewis 1982:174.
59 Adapted from the recommendations in Duhl 2010:1031-1032.
60 *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C):875.
61 Bradfield 2016:209. See also *Brink v Humphries & Jewell (Pty) Ltd* 2005 2 SA 419 (SCA).

that such a change must be highlighted to the other side);[62] provisions are "slipped" into the agreement unbeknown to the other side,[63] or the inclusion of an unexpected provision is unusual for the nature of the transactions.[64] Based on the standards of honesty and integrity, the drafter has a duty to avoid including 'traps' within the contract document, and must ensure that the contract is an honest reflection of the understanding and agreement between the contracting parties.[65] Insofar as the language of the contract or a provision deviates from the oral agreement or negotiations of the contracting parties, the drafter has a duty to bring the other side's attention to such a deviation.[66] This duty also applies to any addenda made to a contract.[67]

The drafter may also be guilty of improper behaviour insofar that "there is [a] provision ostensibly in favour of the other party but so couched by the [drafter] as to be void for vagueness", or for such a provision to be drafted to ensure that it would be unenforceable.[68] Lewis highlights another form of improper behaviour of a drafter, such as strategically "placing a provision in a position where it is likely to be overlooked by the other side".[69] This would be an attempt to deceive the signatory and acting to the detriment of one of the contracting parties, which is in conflict with the professional and ethical duties of honesty and integrity. This duty of honesty and integrity includes not only the proper and effective use of language, but also that of the layout and design of the contract document.

3.6 Fifth principle: Lawfulness and legality

The fifth professional and ethical principle is for the drafter to act lawfully and legally.[70] A legal practitioner must keep his or her word (or undertakings). However, in doing so, the legal practitioner must not do anything that would be considered illegal.[71] Further, "[a] legal practitioner shall not, in giving advice to a client, advise conduct that would contravene any law; more particularly, a legal practitioner shall not devise any scheme which involves the commission of any offence".[72] But, "[a] legal practitioner may give advice about whether any act, omission or course of conduct may contravene any law".[73] Therefore, the drafter should not do anything that would attempt to circumvent the law. The drafter has a duty to advise a client on any contractual provisions that are invalid or illegal, but it is also the drafter's function to ensure that the contract is fully enforceable and valid.[74]

62 Bradfield 2016:209; Lewis 1982:172.
63 Lewis 1982:172.
64 Bradfield 2016:209. Lewis 1982:173 describes an unusual provision as "one which is contrary to the general pattern in transactions of a similar nature".
65 Lewis 1982:171.
66 Lewis 1982:172.
67 Lewis 1982:174.
68 Lewis 1982:172.
69 Lewis 1982:172.
70 Code of Conduct:art. 3.4.
71 Code of Conduct:art. 3.4.
72 Code of Conduct:art. 9.2.
73 Code of Conduct:art. 9.3.
74 See par. 2 above.

To ensure that contracts are valid and enforceable, the drafter must ensure that the contract complies with any specific legislative requirements for that particular contract,[75] for example, the compliance with plain language requirements under consumer legislation.[76] Generally, the drafter is not under a duty to ensure that the contract is unduly harsh (especially when his or her client instructs certain unfair or harsh clauses to be included in the contract).[77] Lewis is of the view that there is a duty on the drafter to "prepare a fair and honourable contract".[78] This concept of ensuring fair and reasonable contractual terms is supported by consumer legislation.[79]

3.7 Sixth principle: Conflict of interest

The sixth professional and ethical principle is to avoid conflict of interest.[80] A legal practitioner must not place him- or herself in a position of conflict of interest (whether such a conflict relates to the interest of the legal practitioner or the interest of his or her client).[81] The Zimbabwean courts expressed that acting on behalf of both parties in a matter may not necessarily be unethical. However, each matter must be considered on its own merits and appropriate safeguards must be implemented to protect against falling foul of professional and ethical duties.[82] Conflict of interest may arise when the drafter acts for both contracting parties.[83] This is not necessarily unusual in the drafting of contracts. In *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd*, it was noted that this type of conflict may quite naturally arise in situations where contracting parties have an established relationship with the drafter,[84] and may also occur for the contracting parties to save costs.[85] Yet, the court still expressed doubts as to whether a legal practitioner may ever be justified to act (in the context of litigation) on behalf of both parties. In drafting contracts, certain circumstances may allow a drafter to draft a contract for both contracting parties. As with any other legal matter, it is conceivable that the drafter must disclose such a dual role to the contracting parties and

75 *Consumer Protection Act* 68/2008:secs. 48-49. Naudé & Eiselen 2014:48-1 and 48-2 (RS 2-2017) note that the *Consumer Protection Act* regulates the type of clauses that may be included in the contract (incorporation control), the outright prohibition of certain clauses from the contract (content control), and those mandatory terms that are implied into every consumer contract.

76 See *Consumer Protection Act*:sec. 22.

77 Lewis 1982:173.

78 Lewis 1982:173.

79 *Consumer Protection Act*:secs. 48-49.

80 Code of Conduct:art. 3.5, with art. 9.1.

81 Code of Conduct:art. 3.5, with art. 9.1.

82 *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (HC):57-58.

83 *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd*:57 mentions that "single transactions" such as leases and conveyancing transactions may result in a legal practitioner acting on behalf of both parties. Extrapolating this principle into the drafting of contracts, it is possible that in single contractual transactions a drafter may also act on behalf of both parties.

84 *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd*:57-58.

85 *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd*:58.

obtain their consent.[86] There is, however, a further duty of a drafter to the unrepresented contracting party,[87] summarised in the words of Page J in *Leite v Leandy & Partners* as follows:[88]

> … the practitioner who is drawing a contract between his [or her] client and an unrepresented party [is] to act fairly to both parties. If he [or she] can do so effectively by fully explaining the import and consequences of the agreement to the unrepresented party, he [or she] will discharge that duty by so doing. If, however, he [or she] cannot or may not be able to discharge that duty through his [or her] own efforts, he [or she] should recommend to the unrepresented party that he [or she] seek independent legal advice.

The drafter must accordingly act fairly to both his or her client and the unrepresented contracting party. The drafter should "avoid any likelihood of prejudice, or even the appearance of prejudice, to the other party".[89] There is also a duty on the drafter to refer a party to seek legal advice insofar as the matter is complex;[90] there is limited advantage to avoid the additional cost in involving another legal practitioner;[91] the drafter is conflicted or cannot discharge his or her duty of acting reasonably and fairly towards both contracting parties,[92] and where there is anxiety on the part of the unrepresented contracting party.[93] However, there is no duty on the legal practitioner to explain the terms of the agreement or its consequences to the unrepresented party.[94]

It is worth mentioning that, insofar as the drafter is preparing consumer contracts, the drafter may have additional duties,[95] including that of drafting the contract in plain language.[96] The use of plain language in a consumer contract may indirectly facilitate understanding and discharge the duty of explaining unclear terms to the unrepresented party. It is incumbent on the drafter to ensure that contracts are understood by the average consumer.[97] This would also be the case where the drafter is preparing a standard contract or contract of adhesion in the consumer setting.

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86 Lewis 1982:166-170. See also *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd*:59.

87 See discussion of duties towards third parties in Ellis, Lamey & Kilbourn 2021:par 7.8.

88 *Leite v Leandy & Partners* 1992 (2) SA 309 (D):320. Similarly found in the recommendations in Duhl 2010:1032.

89 Lewis 1982:167.

90 Lewis 1982:168.

91 Lewis 1982:168.

92 *Leite v Leandy & Partners*:320.

93 Lewis 1982:168.

94 Lewis 1982:169.

95 See Mould 2008:109-127.

96 See *Consumer Protection Act*:sec. 22 and *National Credit Act* 34/2005:sec. 64(2). Damn 2014:91 also notes that contract drafting includes the ability for the contracting parties to understand the terms of the contract which is a unique characteristic of drafting a legal instrument such as contracts.

97 Mould 2008:126. The requirement for plain and understandable language is also one that is found in the drafting of wills, see Cloete 2003:543.

3.8 Seventh principle: Confidentiality

The seventh professional and ethical principle is to maintain confidentiality of client information.[98] A legal practitioner must uphold both privilege and confidentiality of the affairs of his or her client.[99] The court noted in *The Road Accident Fund v Mabunda Inc (The Law Society of South Africa and Maponya Inc. Intervening Parties)* that, although obligations between a legal practitioner and client end upon the termination of their contract, an obligation remains on the legal practitioner after such termination to uphold the duty of confidentiality.[100] This principle of retained confidentiality is supported internationally in the Council of Bars and Law Societies of Europe (CCBE)'s Code of Conduct, which states that the "obligation of confidentiality is not limited to time".[101] The source of such a continued duty of confidentiality may find its origin in an implied contractual term, or in certain *Aquilian* principles.[102] In other words, "[i]f the legal duty arose from the attorney-client contract, it would be introduced by an implied term. In the case of delict, it would be imported by way of public policy".[103] Therefore, any confidential, proprietary, or privileged information, to which the drafter is privy during the drafting of contracts, must be kept confidential after the contract has been drafted, executed and performed.

3.9 Eighth principle: Professional independence

The eighth professional and ethical principle is the maintenance of professional independence.[104] Legal practitioners must "retain the independence necessary to enable them to give their clients or employers unbiased advice".[105] This is not too dissimilar to that of other legal services provided to clients, where the professional independence of the legal practitioner is central to the profession. Retaining professional independence for registered legal practitioners is well established. It is, however, questionable whether salaried legal practitioners hold complete professional independence where fully employed by a client.[106] Salaried legal practitioners require additional vigilance to ensure that employer instructions do not erode the professional independence required in the drafting of contracts.[107]

98 Code of Conduct:art. 3.6. See also Ellis, Lamey & Kilbourn 2021:par. 7.5.

99 Code of Conduct:art. 3.6. This duty would apply to confidential information acquired during the provision of legal services (which is echoed in Buisseret 2019:12 (art. 2.3.2)) but could also apply to that of a former client. See also *Van der Walt v The Magistrate of the District Court Hoopstad* 2019 JDR 1701 (FB); *Robinson v Van Hulsteyn Feltham and Ford* 1925 AD:12, and *Wishart and Others v Blieden NO* 2020 (3) SA 99 (SCA).

100 *The Road Accident Fund v Mabunda Inc and 42 Others (The Law Society of South Africa and Maponya Inc. Intervening Parties)* 2020 JDR 1815 (GP):34. See also *Wishart and Others v Blieden No and Others* 2013 (6) SA 59 (KZP).

101 Buisseret 2019:12 (art. 2.3.3).

102 *Wishart v Blieden No*:par. 75.

103 *Wishart v Blieden No*:par. 75.

104 Code of Conduct:art. 3.9. See also Ellis, Lamey & Kilbourn 2021:par. 7.5.

105 Code of Conduct:art. 3.9.

106 See discussion in Van Eck 2021:259-267.

107 See Van Eck 2021:259-267.

3.10 Ninth principle: Costs and expenses

The ninth professional and ethical principle relates to the charging of fees and expenses,[108] which is closely linked to the legal practitioner's competence and skills. In *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another*, 61 hours were purportedly taken to draft an affidavit.[109] The court found that it could not have taken such a lengthy period of time to draft the affidavit, and it was unreasonable to charge for 61 hours of work.[110] The court found that only a third of the time would be reasonable to have prepared the document.[111] A legal practitioner may charge a reasonable fee for the work done,[112] and should not incur "unnecessary expenses" for his or her client.[113] Similar principles may apply to charging for the drafting of contracts, and the drafter must ensure that he or she does not overcharge a client for unnecessary hours spent in drafting the contract.

A drafter may find him- or herself in an ethical dilemma where precedents or *pro forma* documents are used for the drafting of a contract. These precedents or *pro forma* documents may result in merely administrative completion of information or form a substantial base for the eventual contract. Generally, precedents or *pro forma* documents are used to save time for the drafter and to create greater efficiencies within the legal practice, but rarely result in the client saving costs. The drafter must consider the ethical considerations in charging the same for populating a *pro forma* document as charging for drafting a bespoke contract. The courts have alluded to similar ethical considerations in the use of precedents and *pro forma* documents in the drafting of affidavits.[114]

3.11 Tenth principle: Competencies and skills

The tenth professional and ethical principle is maintaining adequate competencies and skills.[115] A legal practitioner must "use [his or her] best efforts to carry out work in a competent and timely manner and not take on work which [he or she does] not reasonably believe [he or she] will be able to carry out in that manner".[116] This principle also requires the legal practitioner to "remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which [he or she practices]".[117] Cloete notes that a legal practitioner should be

108 Code of Conduct:art. 3.12. See also Ellis, Lamey & Kilbourn 2021:par. 7.5.
109 *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC* 2010 (5) SA 124 (CC):127-128.
110 *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC*:127-128.
111 *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC*:127.
112 Code of Conduct:art. 3.12.
113 Code of Conduct:art. 3.10.
114 See, for example, *Cele v The South African Social Security Agency* 2008 7 BCLR 734 (D):747.
115 Code of Conduct:art. 3.11.
116 Code of Conduct:art. 3.11.
117 Code of Conduct:art. 3.13.

aware of developments in the specialised area of drafting of wills.[118] Although Cloete's points relate to wills, it may be applied to the drafting of contracts generally.[119] It is an expectation that legal professionals have the necessary competence and skills to deal with any legal matter that they undertake to complete.[120] Therefore, drafters must also be competent and possess the necessary skills to effectively fulfil the function of a drafter.

The necessary competency and skills relates to ensuring a valid and enforceable contract, by utilising the adequate knowledge of the rules of interpretation and substantive law and the drafter's proficiency in language skills.[121] There is some support in saying that careless writing has a direct bearing on the ethical duties of a legal practitioner.[122] In *Margalit v Standard Bank of South Africa Ltd and Another*, the court noted that the duties of a conveyancer are to ensure that documents are correctly drawn up in accordance with the requirements of the Deed's Office.[123] The principle can be extended to the drafter, in that the drafter must ensure that contracts are correctly drafted and that such contractual documents comply with the requirements of the law. Competence may also be linked to the proficiency of the drafter in the language in which the contract is drafted. If one is to adapt the words of the court in *Ex Parte Kock NO*, one could mention that "[i]t is highly irresponsible and immoral conduct on the part of any one to hold himself [or herself] out as competent to draft a will [or a contract] in a language with which he [or she] is not thoroughly conversant".[124] Language, in this context, may include any official languages of the country or a foreign language in which the contract is drafted. The drafter's professional and ethical duty in having the necessary competency and skills in language must be distinguished from *bona fide* errors or poor drafting practices, which are discussed further in the next paragraph.

4. COMMON LAW PROTECTIONS AGAINST POOR DRAFTING

4.1 Preliminary comments

The proper use of language and reflecting the agreement of the parties in a written contract is part of the function of a drafter. The starting point of interpreting a contract is the language that is used.[125] Unfortunately, language

118 Cloete 2003:542.
119 Similarly, Jamneck 2013:3 notes that "[a]ny drafter, whether he [or she] is a legal professional, a financial adviser or simply a friend doing a friend a favour, needs a high level of knowledge of the law of succession and the law in general, and needs to show a very high level of skill when drafting a will". Such principles would equally apply to a contract drafter.
120 See Buisseret 2019:9.
121 See also similar sentiments in Damn 2014:93 who considers the State of Texas' rules related to ethical duties in the drafting of contracts.
122 See, for instance, Van der Merwe 2014:30.
123 *Margalit v Standard Bank of South Africa Ltd* 2013 (2) SA 466 (SCA).
124 *Ex Parte Kock, NO*:516.
125 Van Huyssteen *et al*. 2020:354.

is often ambiguous and unclear,[126] which may be perpetuated by poor drafting. A distinction is made between the inexperienced drafter, *bona fide* errors, or an unintentional mistake where the common law provides several protective mechanisms for the contracting parties, and "deliberate manipulation" of the contract or a situation that breaches the professional and ethical duties of a drafter (as discussed in paragraph 3.5).[127]

There are instances where the courts have noted poor drafting in their judgment that has not overstepped the professional and ethical boundaries of the drafter, such as in the matter of *Holtzhausen v Chetty*.[128] In *Briscoe v Deans*, the court noted that poor drafting of contractual provisions cannot help change the nature and effect of an unambiguous suspensive condition by converting the condition into a term of a contract.[129] The use of standard or *pro forma* documents in the drafting process may not always reflect the intention or agreement of the contracting parties. In *The Standard Bank of South Africa Ltd v Strydom NO*, the court described the scenario, where the drafter used the bank's standard documentation without having full knowledge of the agreement between the contracting parties, as "unfortunate".[130] There may also be instances in which the dispute and, consequently, the litigation are a direct result of poor use of language or poor drafting. This was the case in *Cape Clothing Association v De Kock No & Others,* where the court noted that the poor drafting of the collective bargaining agreement was the source of the dispute.[131] In *Four Wheel Drive Accessory Distribution CC v Rattan NO*, the court stated that "[a]t the heart of this action is the quality and quantity of the form and content of a written agreement".[132] There are other instances where the contract was "skilfully drafted" but, as in the case of *Powertech Industries (Pty) Ltd v Jamneck*, the particular clause was designed to be oppressive.[133]

Despite these examples, unless there is a breach in the drafter's professional and ethical duties, the contract between the drafter and the client, or the drafter is guilty of a delict, it is unlikely that the drafter will attract personal liability for poor drafting.[134] Rather, in most instances, poor drafting will have a negative impact on the contracting parties. The common law has anticipated the possibility of *bona fide* mistakes in written contracts and has several mechanisms to protect contracting parties against poorly drafted contracts. These include overcoming ambiguous language by applying the *contra proferentem* rule,[135] overcoming a *bona fide* mistake in requesting

126 Cornelius 2016:1.
127 Lewis 1982:172.
128 *Holtzhausen v Chetty* 2013 JDR 2771 (KZP):3.
129 *Briscoe v Deans* 1989 (1) SA 100 (W):103.
130 *The Standard Bank of South Africa Ltd v Strydom NO.* 2019 JDR 0975 (GP):par. 70.
131 *Cape Clothing Association v De Kock No & others* (2014) 35 ILJ 465 (LC):par. 45.
132 *Four Wheel Drive Accessory Distribution CC v Rattan NO*:206. It should be noted that the issues related to the poor use of language was eventually overturned on appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA).
133 *Powertech Industries (Pty) Ltd v Jamneck* 1993 (1) SA 328 (O):332.
134 See discussion in par. 5 (below).
135 See discussion in par. 4.2 (below).

rectification of the contract from the court,[136] and avoiding contractual liability where poor contract design has led to a *iustus error*.[137]

4.2 Overcoming ambiguous language with the *contra proferentem* rule

Ambiguous language is mostly unintentional and is often identified at the time when a contractual dispute arises. The rules of the interpretation of contracts may provide clarity to instances of ambiguous and vague terms.[138] However, the *contra proferentem* rule provides protection for the contracting parties against poor drafting, which results in ambiguous contractual language.[139] The rule states that ambiguous words would be interpreted either against the drafter or for the benefit of the party for whom the words were included in the contract.[140] Van Huyssteen *et al* note that the reason for the rule is that the drafter "should have used the opportunity to express [himself or] herself clearly".[141] It is generally accepted that the *contra proferentem* rule is used as a last resort when all other interpretation rules have been exhausted.[142]

The *contra proferentem* rule can be described as an indirect common law protection afforded to the contracting parties in instances of poor drafting of a contract, but it provides limited (if any) protection for the drafter individually. The *Consumer Protection Act* 68 of 2008 reinforces the application of the principle of the *contra proferentem* rule in consumer contracts,[143] thereby giving statutory endorsement of the rule for the protection of consumer rights. It is unfortunate that the application of the *contra proferentem* rule in contracts that are outside the scope of the *Consumer Protection Act* 68 of 2008 may be diminished when drafters remove the application of the rule by means of an express *incidentialia* in the written contract.[144] In doing so, the drafter effectively removes the common law protection afforded to the contracting parties. The drafter should carefully consider whether the exclusion of the *contra proferentem* rule would be to the benefit or detriment of his or her client.

136 See discussion in par. 4.3 (below).
137 See discussion in par. 4.4 (below).
138 See Cornelius 2016. Van Huyssteen *et al*. 2020:354-359 note that the intention of the contracting parties should first be determined, by considering the primary guidelines relating to the words and context of the contract, then consider the secondary guidelines relating to the interpretation rules and presumption and finally, consider the *quod minimum* and *contra proferentum* rule as tertiary guidelines to resolve ambiguity.
139 Cornelius 2016:189; the full name for this rule is *verba forties accipiuntur contra proferentem*.
140 Cornelius 2016:189. See also van Huyssteen *et al*. 2020:359.
141 Van Huyssteen *et al*. 2020:359.
142 Cornelius 2016:189; Van Huyssteen *et al*. 2020:359.
143 *Consumer Protection Act*:sec. 4(4)(a); Naudé & Eiselen 2014:48-2 (RS 2 -2017).
144 Van Huyssteen *et al*. 2020:332 describe an *incidentalia* as either an additional or supplementary term included into the contract by the contracting parties.

4.3 Overcoming a mistake with rectification

Mistakes happen in contracts. The common law has anticipated the possibility of correcting a common mistake in a contract by means of rectification of a contract.[145] Although the application of rectification applies to common *bona fide* mistakes of the contracting parties,[146] it may also be applicable in instances of *dolus* (or an intentional act) of one of the contracting parties.[147] Therefore, the courts may rectify a mistake in a contract that is not a true reflection of the agreement of the contracting parties.[148] Our courts have in *Ex Parte Dunn et Uxor*, for example, allowed for antenuptial contracts to be rectified, due to erroneous drafting of the applicant's corresponding attorneys.[149]

As with the *contra proferentem* rule,[150] a clearly crafted and express *incidentialia* in the contract can exclude the common law right of rectification.[151] However, Bradfield notes that a typical non-variation clause would not suffice to exclude the application of rectification in a contract.[152] If the drafter decides to exclude the application of rectification in a contract, the common law protection of the contracting parties for correcting mistakes would be diluted or removed. The drafter should carefully consider whether there are benefits to excluding the application of rectification, or whether the retention of the common law remedy would provide a so-called safety net for unintentional mistakes in contractual documents.

4.4 Poor document design resulting in a *iustus error*

Poor drafting can be fatal to a contract and may impact on the validity and enforcement of the contract.[153] The principle of *caveat subscriptor* creates a presumption that the signatory is bound to the document which he or she signed, and is, therefore, contractually liable.[154] However, our courts have limited the application of the *caveat subscriptor* principle in instances of a

145 Bradfield 2016:383; Harms 2018:311.
146 Harms 2018:311.
147 Bradfield 2016:384; *Sahle v Chuma Resources (Pty) Ltd* 2018 JDR 1868 (GJ):12. See also Van Huyssteen *et al*. 2020:193.
148 Van Huyssteen *et al*. 2020:194. The requirements for rectification are set out in *Sahle v Chuma Resources (Pty) Ltd* 2018 JDR 1868 (GJ):12, being that there must be a written agreement; the written agreement is inconsistent with the intention of the parties; there was a mistake in the drafting of the contract, and the language of what had actually been agreed to between the contracting parties. Also in Harms 2018:310-311. See also *The Standard Bank of South Africa Ltd v Strydom NO.* 2019 JDR 0975 (GP):par. 74, the application for rectification failed, because it did not reflect the true intention of the parties.
149 *Ex Parte Dunn et Uxor* 1989 (2) SA 429 (NC):431.
150 See discussion in par. 4.2.
151 Bradfield 2016:390. See also Van Huyssteen *et al*. 2020:332.
152 Bradfield 2016:390.
153 See discussion of Briggs 2019:178, providing comments on the effect of poorly drafted renewal clauses in franchise agreements.
154 Van Huyssteen *et al*. 2020:49.

iustus error,[155] contractual traps for the signatory, and misleading contractual documents.[156] Insofar as the drafter oversteps his or her professional and ethical duties, there may be personal consequences for the drafter.[157] However, often poor document design does not result in any breach of professional or ethical duties but, in cases of a *iustus error*, the common law may protect a signatory from being contractually liable.

The examples used in paragraph 4.2 also apply to unintentional poor document design, which includes instances where the contract is inconsistent with advertisements made; the contract is inconsistent with previous negotiations;[158] the contract contains an unexpected term, and the contract includes a term that is unusual for that particular transaction with no indication of the term in the headings used in the contract.[159] According to Bradfield, "if you have set a trap for the signatory you cannot rely on that person's signature".[160] The use of appropriate headings in a contract is generally viewed as a drafting mechanism to draw a contracting party's attention to a particular term.[161] There have been several cases where contractual liability has been disputed, where the contract document failed to include an appropriate heading to alert the signatory of a deeds of suretyships incorporated within credit applications (or similar types of documents).[162]

5. PERSONAL CONSEQUENCES FOR THE DRAFTER

In the words of Lewis, "[g]ood drafting is not easy",[163] but there is a distinction between innocent mistakes and poor drafting (discussed further in paragraph 4), and "deliberate manipulation" of language and the legal practitioners' failure to uphold professional and ethical duties (discussed in paragraph 3).[164] The latter may result in personal consequences for the drafter, including being exposed to a damages claim in one of three instances.[165]

155 Van Huyssteen *et al*. 2020:51.
156 Bradfield 2016:209. See also *Royal Canin South Africa (Pty) Ltd v Cooper* 2008 (6) SA 644 (SE):647 and *Brink v Humphries & Jewell (Pty) Ltd* 2005 2 SA 419 (SCA).
157 See discussion in paras. 4.2 and 5.
158 Bradfield 2016:209.
159 Bradfield 2016:209.
160 Bradfield 2016:209.
161 See the following cases, where the issue of headings and unusual clauses played a role in the contract dispute: *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA); *Royal Canin South Africa (Pty) Ltd v Cooper* 2008 (6) SA 644 (SECLD); *Diners Club SA v Livingstone* 1995 (4) SA 493 (W); *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C); *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585, and *Roomer v Wedge Steel (Pty) Ltd (Pty) Ltd* 1998 (1) SA 538 (N).
162 See above and also *Royal Canin South Africa (Pty) Ltd v Cooper*.
163 Lewis 1982:172.
164 Lewis 1982:172.
165 Potgieter, Steynberg & Floyd 2012:6-8.

A drafter's source of liability stems, first, from a statutory right under the *LPA*.[166] Should a legal practitioner breach a duty under the *LPA* and the Code of Conduct, the drafter may be subject to disciplinary action.[167] Such disciplinary action may include anything from a warning, fine, suspension or even being disbarred from the legal profession.

The second source of liability is *ex contractu,* being in instances of a breach of the contract between the drafter and his or her client.[168] The contract between a registered legal practitioner and client is a contract of mandate, which has been described as a special type of agency.[169] A contract of mandate requires the legal practitioner to perform the mandate of the client,[170] which may or may not require to act on behalf of the client to perform juristic acts.[171] Insofar as a legal practitioner undertakes to draft a contract in his or her position as a legal practitioner, the drafting of the contract would form part of the contract of mandate with his or her client. However, it is worth noting that, insofar as the contract is drafted by a salaried legal practitioner,[172] or that of a non-salaried legal practitioner,[173] the type of contract would be more akin to a *locatio conductio operis* rather than a contract of mandate.[174] A registered legal practitioner's failure to fulfil the mandate is a breach of contract,[175] and to succeed in a claim against the drafter, the client must prove that there was a contract between the client and the drafter, that there was a breach of the contract that caused damages, and that such damages are not too remote.[176]

166 Potgieter, Steynberg & Floyd 2012:7.

167 See Ellis, Lamey & Kilbourn 2021:par. 7.9.

168 Potgieter, Steynberg & Floyd 2012:8; Neethling, Potgieter & Visser 2012:7. See also *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T). See also *Bruce, NO v Berman* 1963 (3) SA 21 (T):23, "[t]he relationship of attorney and client is a contractual one and it is by virtue of that relationship that the duty arises".

169 Voet 3.3.17; *Mort NO v Chiat* [2000] 2 All SA 515 (C):520. See also Dendy & De Wet 2013:par. 125 notes that the term 'agency' has a wide range of meaning, including where one person performs a task for another under contracts of mandate. This should be distinguished from the *locatio-conductio operarum*, which generally relates to the letting and hiring of services in an employment relationship or that of an independent contractor. In this regard, see Nagel & Kuschke 2018:par. 16.01.

170 Van Zyl & Joubert 2020:par. 55. See *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA); *Honey & Blanckenberg v Law* 1966 (2) SA 43 (R):46, describing the relationship between attorney and client as one of mandate.

171 Van Zyl & Joubert 2020:par. 55.

172 Terminology explained in Van Eck 2021:261.

173 Terminology explained in Van Eck 2021:261.

174 See also Nagel & Kuschke 2018:par. 16.01, noting that a *locatio-conductio operarum* generally relates to the letting and hiring of services in an employment relationship or that of an independent contractor.

175 Neethling, Potgieter & Visser 2012:6. See examples of where the contract of mandate was breached in *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (CkH):par. 37; *Bouwer v Harding* 1997 (4) SA 1023 (SE).

176 Harms 2018:114-115.

The final source of liability is *ex delicto*,[177] which relates to unlawful, intentional and culpable actions of the drafter,[178] in which the legally recognisable interest of the client (or a third party) was negatively impacted.[179] A delictual claim is aimed at compensation,[180] and requires the five requirements for a delict to be fulfilled for liability to occur, being an "act, wrongfulness, fault, causation and harm".[181] A drafter's conduct will be tested against the drafter's duty of care.[182] The failure to meet the duty of care can be illustrated in the 2021 matters of *McMillan v Bate Chubb & Dickson Incorporated*,[183] and *Van Heerden & Brummer Inc v Bath*.[184] In both matters, the legal practitioners prepared an antenuptial agreement which was later found to be invalid, and a claim was brought against the legal practitioners who had prescribed. In *Ditedu v Tayob* 2006,[185] the court dismissed the special plea of prescription and highlighted the duty on a legal practitioner to furnish correct legal advice. In *Pretorius en Andere v Mccallum*,[186] an attorney drafted a will for a client, in which the deceased had bequeathed the estate to certain beneficiaries.[187] The attorney had signed as a witness but had failed to sign the first page of the will,[188] which is a requirement under the *Wills Act* 7 of 1957.[189] The non-compliance with a legal requirement rendered the will invalid. The attorney was held liable to compensate the beneficiary for the error.[190] Similarly, a contract drafter could also be found liable, insofar as a mistake results in damages for his or her client or for a third party.[191] In *Botha v Edward Leonard Nzabandsaba Inc Eln*,[192] the plaintiff brought a claim against the defendants (being a firm of attorneys and their directors) for damages of R1 900 000. The court had to decide whether the defendants had met the standard of conduct required of attorneys in their position, and whether there was a duty on the defendants to have warned the plaintiff of the risk and potential harm in the transaction.[193] For the purposes of this discussion, focus will be placed on the aspects related to the drafting of the loan agreements in the matter. The basis

177 Potgieter, Steynberg & Floyd 2012:6; Neethling, Potgieter & Visser 2012:7. See also *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T), a delict was not proven to determine liability.
178 Potgieter, Steynberg & Floyd 2012:6.
179 Neethling, Potgieter & Visser 2012:6.
180 Neethling, Potgieter & Visser 2012:269.
181 Neethling, Potgieter & Visser 2012:4.
182 See *Rampal (Pty) Ltd v Brett, Wills & Partners* 1980 (4) SA 817 (D).
183 *McMillan v Bate Chubb & Dickson Incorporated* (Case no 299/2020) [2021] ZASCA 45 (15 April 2021).
184 *Van Heerden & Brummer Inc v Bath* (356/2020) [2021] ZASCA 80 (11 June 2021).
185 *Ditedu v Tayob* 2006 (2) SA 176 (W).
186 *Pretorius v Mccallum* 2002 (2) SA 423 (C).
187 *Pretorius v Mccallum*:425.
188 *Pretorius v Mccallum*:425.
189 *Wills Act* 7/1953.
190 *Pretorius v Mccallum*:430-431.
191 See also general discussion in Jamneck 2013.
192 *Botha v Edward Leonard Nzabandsaba Inc Eln* (718/12) [2018] ZANWHC 79 (4 October 2018).
193 *Botha v Edward Leonard Nzabandsaba Inc Eln*:par. 39.

of the relationship between a legal practitioner and client is one of a contract of mandate.[194] In the *Botha* matter, the mandate was provided to the defendants to draft a contract, in which the securities were accurately reflected and would be executable.[195] Upon receiving the draft contract from the defendants, the plaintiff accepted it as correct and had expected the defendants to inform him of any problems regarding the matter.[196] The court eventually found in favour of the plaintiff.[197]

These cases illustrate that it is not uncommon for claims to be brought against legal practitioners, and consequently drafters. A failure to meet professional, ethical, contractual and delictual duties in the process of drafting may result in personal consequences for the drafter.

6. CONCLUDING REMARKS

The function of a drafter is threefold, *inter alia*, being a communicator, an interpreter, and an expert in legal knowledge. Lewis aptly noted that drafting is not easy,[198] and it is human nature that mistakes may, on occasion, happen. Drafting mistakes may be the result of *bona fide* mistakes and, in such instances, several common law mechanisms protect the contracting parties against such mistakes. These include overcoming ambiguous language with the application of the *contra proferentem* rule;[199] overcoming a *bona fide* or intentional mistake reflected in the written contract by means of rectification,[200] and the protections afforded by the law to avoid contractual liability where poor document design has resulted in a *iustus error*.[201]

Other than *bona fide* drafting mistakes, there are other instances of "indifferent draftsmanship" or the failure to adhere to professional and ethical standards, which may not only impact on the contracting parties, but could also have dire personal consequences for the drafter.[202] The professional and ethical duties of the drafter can be extrapolated from the Code of Conduct, in which the drafter must:

194 *Botha v Edward Leonard Nzabandsaba Inc Eln*:par. 41.
195 *Botha v Edward Leonard Nzabandsaba Inc Eln*:par. 58.
196 *Botha v Edward Leonard Nzabandsaba Inc Eln*:par. 65.
197 *Botha v Edward Leonard Nzabandsaba Inc Eln*:par. 111.
198 Lewis 1982:172.
199 See par. 4.2.
200 See par. 4.3.
201 See par. 4.4.
202 See *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A), the court used the term "indifferent draftmanship".

i. uphold the values of the *Constitution* and thereby neither act in a discriminatory fashion towards his or her clients nor perpetuate any discriminatory conduct in the process of drafting the contract;[203]

ii. look after the interest of his or her client, but such a duty is secondary to the legal practitioner's duties towards the court,[204] interest of justice,[205] the adherence to the law,[206] as well as "the maintenance of the ethical standards prescribed by [the Code of Conduct], and any ethical standards generally recognised by the profession";[207]

iii. maintain the expected standard of conduct in the drafting of the contract;[208]

iv. at all times act with the necessary honesty and integrity;[209]

v. act lawfully and legally;[210]

vi. avoid conflict of interest and fulfil third-party duties;[211]

vii. maintain confidentiality of client information;[212]

viii. maintain professional independence;[213]

ix. charge reasonable and appropriate fees and expenses for the drafting of the contract,[214] and

x. maintain an adequate level of competencies and skills.[215]

Failure to fulfil these professional and ethical duties may result in a financial consequence for the contract drafter that originates from the breach of a statutory duty,[216] or arises *ex contractu*[217] or *ex delicto*.[218] Failure to fulfil professional and ethical duties may also result in professional repercussions, in which the drafter may be subject to disciplinary actions under the *LPA*. These various duties of the drafter illustrate the integral role of the drafter in each part of the contract life cycle, as well as the importance of maintaining

203 See par. 3.2.
204 Code of Conduct:art. 3.3.1. See also similar sentiments in the Namibian case of *Marwa & Associates Land Surveyors v Helao Nafidi Town Council*:3.
205 Code of Conduct:art. 3.3.2. See discussion in par. 3.3.
206 Code of Conduct:art. 3.3.3. See discussion in par. 3.3.
207 Code of Conduct:art. 3.3.4. See discussion in par. 3.3.
208 See par. 3.4.
209 See par. 3.5.
210 See par. 3.6.
211 See par. 3.7.
212 See par. 3.8.
213 See par. 3.9.
214 See par. 3.10.
215 See par. 3.11.
216 See discussion in par. 5.
217 See discussion in par. 5 and *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T). See also *Bruce, NO v Berman* 1963 (3) SA 21 (T):23, "[t]he relationship of attorney and client is a contractual one and it is by virtue of that relationship that the duty arises".
218 See discussion in par. 5 and *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T).

the expected standard of conduct. It is up to each drafter to ensure that his or her role and function are fulfilled in the drafting of contracts. Failure to do so could have dire consequences not only for the contracting parties, but also for the drafter.

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