

**“The impact of section 22 of the Consumer Protection Act  
68 of 2008 on drafting principles in the South Africa law of  
contract”**

**by**

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## Summary

In this dissertation, the impact of section 22 of the Consumer Protection Act, 68 of 2008 on the drafting of contracts in South Africa is investigated.

It was shown that there has been a great shift internationally to the drafting of consumer documents in plain language. Some jurisdictions even have statutory guidelines for drafting in plain language. The benefits of drafting in plain language were also mentioned.

The South African plain language drafting situation is quite unique, with the question of what the characteristics of an ordinary consumer are, posing to be the most important question in determining specific plain language guidelines for South African consumers. It was found that there are potentially more than one type of “ordinary consumer”, depending on the type of commercial transaction being entered into.

Although no statutory plain language drafting guidelines have been published in South Africa, it was suggested that our common law rules of interpretation are a valuable starting point when looking for guidelines for better drafting.

This dissertation concludes that two sets of guidelines be developed for at least two levels of commercial transactions. Firstly, the international guidelines of Kimble should be incorporated into our law for consumer contracts relating to more complex consumer transactions. Secondly, another set of guidelines relating to the use of illustrations, examples, headings or other aids to reading and understanding, as envisioned by the CPA, should be developed for use in everyday consumer contracts where the typical consumer is illiterate or falls into the so called “vulnerable consumer” category.

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## 1. Introduction

Plain language has been a topic of discussion of many academics and lay persons alike for the last few years.<sup>1</sup> It has been decisively confirmed that all persons have the right to information and documentation in plain and understandable language.<sup>2</sup> Although much has been written on the right to plain and understandable language, especially within the legal profession<sup>3</sup>, there are still no clear guidelines as to how exactly plain language will be measured or assessed. Stoop confirms this by stating that “in South Africa no objective guidelines have been published in order to proactively assess whether a document is really written in plain language”.<sup>4</sup>

Tiersma claims that,<sup>5</sup> the plain language movement as we know it today began as early as the late 1800’s, with writers such as Sherman<sup>6</sup> stating:

“Literary English, in short, will follow the forms of the standard spoken English from which it comes. No man should talk worse than he writes, no man writes better than he should talk.... The oral sentence is clearest because it is the product of millions of daily efforts to be clear and strong. It represents the work of the race for thousands of years in perfecting an effective instrument of communication”.<sup>7</sup>

Thus, the idea of plainer language is neither foreign nor new.

South Africa has, however, been slower to climb onto the plain language bandwagon. Although some earlier legislation, such as the Long-term Insurance Act<sup>8</sup>, the Short-

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<sup>1</sup> For example local academics and attorneys such as Stoop PN (*Plain language and the assessment of plain language* (2011) Int J Private Law 4 no 3; Stoop, Chür “*Unpacking the right to plain and understandable language in the Consumer Protection Act, 68 of 2008*” (2013) (16) 5 PER / PELJ; De Stadler E (editor of the *Juta Consumer Law Review*, with monthly contributions on the use of plain language in legal documents); Louw E (*Plain language, consumerism and reform of South African contract Law* (2012) Lambert Academic Publishing).

<sup>2</sup> Legislation such as the Consumer Protection Act, 68 of 2008, The National Credit Act, 34 of 2005 and the Companies Act, 71 of 2008 confirm this right.

<sup>3</sup> For example, Frank B “*Simply unclear – Is the Legislature an obstacle to plain language?*” (2012) 517 De Rebus 44; Louw E “*Simply legal*” (2011) 515 De Rebus 22; Van Eck M “*Guidelines for writing in plain language*” (2012) 521 De Rebus 21.

<sup>4</sup> Stoop PN (*Plain language and the assessment of plain language* (2011) Int J Private Law 4 no 3).

<sup>5</sup> Tiersma P (2014) *The Plain English Movement*, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (accessed on 20 March 2014).

<sup>6</sup> Sherman, a professor of English literature at the University of Nebraska, wrote *Analytics of Literature: A Manual for the Objective Study of English Prose and Poetry* in 1893. In this work, Sherman showed that the typical English sentence has shortened over time and that spoken English is a pattern for written English.

<sup>7</sup> Sherman, LA (2013) *Analytics of Literature a Manual for the Objective Study of English, Prose and Poetry*. London: Forgotten Books. (Original work published 1893) pp. 312-3.

<sup>8</sup> Long-term Insurance Act, 52 of 1998.

term Insurance Act<sup>9</sup>, the Promotion of Access to Information Act,<sup>10</sup> and the Electronic Communications and Transactions Act<sup>11</sup> all featured the use of, and to a limited extent the promotion of, plain language, it was only with the promulgation of the National Credit Act<sup>12</sup>, the Consumer Protection Act<sup>13</sup> and the Companies Act<sup>14</sup> that the principles of plain language became more firmly entrenched in South African law, by also stating plain language as a requirement for specific documents.

This study will focus on the requirements of Section 22 of the Consumer Protection Act which provides that consumers have the right to information in plain and understandable language. According to section 22(2) of the said Act

“a notice, document or visual presentation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual presentation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual presentation with undue effort, having regard to:

- (a) the context, comprehensiveness and consistency of the notice, document or visual presentation;
- (b) the organisation, form and style of the notice, document or visual presentation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual presentation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.”

The Act goes further to say that the Commission may publish guidelines for methods of assessing whether a notice, document or visual presentation satisfies the plain language requirement set by the Act. The Commission has, to date, published no such guidelines. This creates cause for concern and could lead to a lot of frustration when

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<sup>9</sup> Short-term Insurance Act, 53 of 1998.

<sup>10</sup> Promotion of Access to Information Act, 2 of 2000.

<sup>11</sup> Electronic Communications and Transactions Act, 25 of 2002.

<sup>12</sup> National Credit Act, 34 of 2005, hereinafter referred to as “the NCA”.

<sup>13</sup> Consumer Protection Act, 68 of 2008, hereinafter referred to as “the CPA”.

<sup>14</sup> Companies Act, 71 of 2008.

having to determine whether a notice, document or visual presentation complies with the requirements laid down by the CPA.

The intention of this study is to provide some clarification on what exactly plain language drafting in South Africa should entail and also to ultimately provide clear guidelines for drafting consumer documents in South Africa.

## **2. Defining the research question**

### **2.1 Definition of the research problem**

The primary aim of this study is to investigate the meaning of the term “plain and understandable language” as it is defined in section 22 of the CPA. The study will also aim to come up with practical drafting principles to incorporate plain legal language in agreements in the South African context.

In order to effectively address this problem, the following questions will be answered. Firstly, this study will investigate just exactly what plain language is and how the plain language movement developed globally. The impact of this movement gaining international popularity will also be assessed.

Secondly, this study will look at the history of the Plain Language Movement in South Africa. Here the implementation of the plain language requirement in legislation and the requirement that certain documents be drafted in plain language will be discussed. There will also be a brief look at additional challenges faced by the South African legal community when it comes to the drafting of plain language consumer contracts.

Next the proper definition of “*ordinary consumer of the class of persons for whom the notice, document or visual presentation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services*”<sup>15</sup> will be explored. The aim is to attempt to specifically answer the question of who is considered to be “ordinary consumer” in South Africa.

In the fourth place this study will briefly relate the current South African drafting principles and also look to our common law of interpretation for some drafting guidance.

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<sup>15</sup> Section 22(2) of the Consumer Protection Act, 68 of 2008.

Finally the international plain language guidelines will be considered, where after some clear suggestions on the plain language principles that should be adopted in South African drafting will be made.

## **2.2 Delineation and limitations of the study**

The following issues and questions will fall outside of the ambit of this study:

An investigation of the exact meaning of “a consumer” will not form part of this study. According to the Oxford dictionary,<sup>16</sup> a consumer is a person who buys a product or service for personal use. The definition of a consumer contained in section 1 of the CPA, elaborates on the dictionary definition of a consumer and will be accepted in this study:

“Consumer in respect of any particular goods or services, means –

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction, concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable.”

The specific plain language requirements of the NCA and the Companies Act will also fall outside the scope of this study. The requirements stated in these Acts correspond greatly to the requirements set in the CPA, but a comparison or exposition will not form part of this study.

Lastly, this study will not consider the possible plain language requirements applicable to the drafting of legislation. It will also not investigate the Constitutional rights to equality and access to information<sup>17</sup> and its impact on legal drafting principles in South Africa.

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<sup>16</sup> Soanes C (2002) *South African Pocket Oxford Dictionary* South Africa: Oxford University Press.

<sup>17</sup> Section 32(1) of the Constitution of South Africa Act 108 of 1996.

### 3. The development and impact of the plain language movement globally

#### 3.1 What is plain language?

Kimble defines plain language to mean language that is clear and readily understandable to its intended readers.<sup>18</sup> Plain language is exact and to the point. The Center for Plain Language confirms that a document is in plain language if the target audience can read it, understand what they read, and confidently act on it.<sup>19</sup>

To summarise, a communication is in plain language if it meets the needs of its audience—by using language, structure, and design so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it.<sup>20</sup>

#### 3.2 Why use plain language?

Mark Twain famously once said: “I didn't have time to write a short letter, so I wrote a long one instead.”<sup>21</sup> Unfortunately, this has been the trend in legal drafting for many years. Legal drafting became known for its verbosity, perplexity and exclusivity. Judge Learned Hand<sup>22</sup> addressed this matter by stating that “[t]he language of law must not be foreign to the ears of those who are to obey it.”<sup>23</sup>

There are numerous benefits when using plain language in legal and other documents. These benefits include getting the message across in the shortest possible time, more people understanding a document written in plain language and there is a smaller chance of a document being misunderstood.<sup>24</sup> A further benefit of an understandable document is that when people understand what is required of them, they are more likely to do what is required of them.

In an essay by Stephens,<sup>25</sup> she explored the benefits for businesses of using plain language in their documents. She found that the use of plain language improves the effectiveness and efficiency of a business by providing certainty and eliminating

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<sup>18</sup> Professor Joseph Kimble, a law professor and major role player in the plain language movement in the United States in resolution adopted in 1992 by the Legal Writing Institute.

<sup>19</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

<sup>20</sup> Cheek A “*Defining plain language*” (2010) 64 *Clarity: Journal of the International Association Promoting Plain Legal Language* 5.

<sup>21</sup> Quote by Mark Twain, <http://www.goodreads.com/quotes/21422-i-didn-t-have-time-to-write-a-short-letter-so> (accessed on 20 September 2014).

<sup>22</sup> Billings Learned Hand, 27 January 1872 – 18 August 1961) was a United States judge and judicial philosopher.

<sup>23</sup> Legal Quotes, [www.plainlanguage.gov/resources/quotes/legal.cfm](http://www.plainlanguage.gov/resources/quotes/legal.cfm) (accessed on 18 March 2014).

<sup>24</sup> Benefits, <http://www.plainlanguage.gov/whyPL/benefits/index.cfm> (accessed on 5 August 2015).

<sup>25</sup> Stephens C The benefits for businesses using plain language <http://www.plainlanguagenetwork.org/stephens/bzneeds.html> (accessed on 5 August 2015).



unnecessary costs due to ineffectiveness in business communication. It is submitted that this would also apply to legal practitioners who draft contracts. When contracts are drafted in plain language, such contracts should be more effective and efficient by making issues clearer and easier to understand for the users of the document. Less time will be spent by practitioners explaining difficult concepts to clients and more time doing their job.

Stephens further proposed that the use of plain language increases the competitiveness of and confidence in the business using plain language. The use of plain language drafting in a law firm may in itself be a marketing tool as it may inspire new clients to use a specific firm based purely on its reputation to produce documents that are understandable. Clients also generally have more confidence in a firm or practitioner that produces documents that they can understand, as understandable documents empower clients.

The financial benefits of writing in plain language are tremendous. Eagleson<sup>26</sup>, gives an idea of the amount of money that can be saved through the use of plain language. In Australia, the Victoria Government saved the equivalent of \$400 000 a year in staff salaries, by rewriting just one legal document in plain English. In the United Kingdom the British Government saved over \$28 000 000 since the start of its reviewing of forms process in 1982. Since the process began, the Government scrapped 27 000 forms and redesigned 41 000 forms. In Canada the Alberta Government also has clear evidence that the use of plain language saves money.<sup>27</sup> By using plain language in its documents its staff were able to process these forms much faster and thereby saving an amazing amount of almost \$3 500 000.

Plain language does not only increase savings, but also sales. The Royal Insurance of Canada had a 38% increase in sales when plain language was used in its homeowners' insurance policies.<sup>28</sup>

Perrin<sup>29</sup> gives the following summary of the benefits of plain language drafting for a law firm:

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<sup>26</sup> Eagleson RD (1990) *Writing in Plain English* Australia: Australian Government Publishing Service.

<sup>27</sup> Mowat C "Alberta Agriculture saves money with plain language" (1997) 38 *Clarity* 6.

<sup>28</sup> Stephens C (1996) Why use plain language in the legal profession 19 *Rapport* <http://www.plainlanguagenetwork.org/Rapport/rap19.html> (accessed on 14 October 2015).

<sup>29</sup> Perrin T (1990) *Better writing for lawyers* Toronto: Law Society of Upper Canada.

"A reason to write well which should satisfy your senior partner is this: You'll be more convincing and win more cases in court. Your drafting will be tighter (and shorter) and actually more litigation proof. You'll make your clients happier, do a better job and -- as a side benefit -- make more money."

The bottom line is: plain language makes sense.

### **3.3 A brief history of the international plain language movement**

The literacy of most ancient societies evolved along class lines.<sup>30</sup> It was only the holy men and elders that were able to read and write. The commoners had to rely on these leaders to provide them with guidance regarding the written word.

In 1362 the Statute of Pleading<sup>31</sup> was enacted in England. This piece of legislation can be considered as the first to address the issue of the use of plain language. Its main aim was that all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue."

According to Tiersma<sup>32</sup>, legal documents were mainly in French and Latin, not in English, which was considered to be the language of the dominated. Lawyers and the like, however, continued to make use of French and Latin in legal documents, as was the case until very recently in South Africa as well. The first major struggle in the plain language movement was to get legal texts translated from French or Latin to English. This state of affairs prevailed for several centuries. During the 1700s the literature of the time played a central role in what would come to be the plain language movement.<sup>33</sup> In the book *Gulliver's Travels*, written in 1762, Jonathan Swift says the following about lawyers:

"It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have

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<sup>30</sup> Lagerfeld S "The Reading Revolution" (1986) 10(2) Wilson Quarterly 104.

<sup>31</sup> *Statute of Pleading* (1362), 36 Edw. III c. 15.

<sup>32</sup> Tiersma P (2014) *The Plain English Movement*, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (accessed on 20 March 2014).

<sup>33</sup> Macbeth S (2009) A brief history of plain language, presented to the Fourth Biennial Conference of the Plain Language Association International, Opening Plenary, 27 September 2009 [www.plainlanguagenetwork.org/conferences/2002/history/history.pdf](http://www.plainlanguagenetwork.org/conferences/2002/history/history.pdf) (accessed on 18 April 2015).

wholly confounded the very essence of truth and falsehood, of right and wrong...”<sup>34</sup>

Literacy was on the rise, but it was only in the early 1900s that more people had access to schooling in their mother tongue. In an article that appeared in the New Yorker magazine, Lehman<sup>35</sup> states: “In 1900, only six percent of American eighteen-year-olds had a high school diploma, by 1960, seventy percent did...”

Another technological advancement caused literacy to rise during approximately the same time. In 1875, the Universal Postal Union was created under the treaty of Berne. This treaty brought about a flat-rate “penny-postage” system.<sup>36</sup> This “penny-postage” system resulted in ordinary people from all over Europe, Canada and America being able to communicate with each other through the use of postal mail. In 1876 about 2500 Europeans wrote letters, this increased to 25 000 by 1913.<sup>37</sup>

The modern plain language movement started in the 1970s, first internationally and later locally. In 1963, Mellinkoff<sup>38</sup> already pointed out the many inconsistencies of traditional legalese. During the 1970s an American journalist named Chrissie Maher teamed up with another journalist named Martin Cutts and together they made an effort to publicly expose and humiliate officials and bureaucrats who used verbose and unnecessary formal language.<sup>39</sup> In 1978, Richard Wydick published the book “Plain English for Lawyers”.<sup>40</sup> This book is now in its fifth edition and has been widely used to teach law students the art of legal writing. In the United Kingdom, a solicitor named John Walton founded the organisation “Clarity”<sup>41</sup> in 1983 after a plea by consumers

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<sup>34</sup> Swift J (1726) *Gulliver's Travels* United Kingdom: Benjamin Motte (amended 1735) chapter 4.5.

<sup>35</sup> Lemann N “*Dumbing Down: Did progressivism ruin or public schools?*” (2000) The New Yorker 25 September 2000.

<sup>36</sup> Treaty of Berne, concerning the formation of a general Postal Union, [http://avalon.law.yale.edu/19th\\_century/usmu010.asp](http://avalon.law.yale.edu/19th_century/usmu010.asp) (accessed on 6 May 2015).

<sup>37</sup> Macbeth S (2009) A brief history of plain language, presented to the Fourth Biennial Conference of the Plain Language Association International, Opening Plenary, 27 September 2009 [www.plainlanguagenetwork.org/conferences/2002/history/history.pdf](http://www.plainlanguagenetwork.org/conferences/2002/history/history.pdf) (accessed on 18 April 2015).

<sup>38</sup> Mellinkoff D (1963) *The Language of the Law* United Kingdom: Little, Brown & Co.

<sup>39</sup> Macbeth S (2009) A brief history of plain language, presented to the Fourth Biennial Conference of the Plain Language Association International, Opening Plenary, 27 September 2009 [www.plainlanguagenetwork.org/conferences/2002/history/history.pdf](http://www.plainlanguagenetwork.org/conferences/2002/history/history.pdf) (accessed on 18 April 2015).

<sup>40</sup> Wydick RC (2005) *Plain English for Lawyers* (fifth edition) Durham: Carolina Academic Press.

<sup>41</sup> Butt P and Castle R (2001) *Modern Legal Drafting: A Guide to Using Clearer Language* Cambridge: Cambridge University Press.

who could not understand lease agreements. The organisation's aim was, and still is today, to encourage the legal profession to use good, clear English.<sup>42</sup>

Plain language eventually found its way into the United States Legislature, with President Carter signing an executive order in 1978 requiring that all Federal regulations be "as simple and clear as possible".<sup>43</sup> A decade later, President Bill Clinton signed a formal Memorandum on Plain Language and this memorandum became effective on 1 June 1998. The memorandum required that all Executive Departments and Agencies use plain language<sup>44</sup>. The Plain writing Act<sup>45</sup> was enacted on 13 October 2010. This Act requires that all US Government documents for use by the public must be written in plain language. More recently, President Obama also issued an Executive order titled "Improving regulation and regulatory review". This order, amongst other objectives, requires that regulations be accessible, consistent, written in plain language and easy to understand.<sup>46</sup> Various US states have followed suit and enacted plain language legislation.<sup>47</sup> The United States is considered to be one of the leaders in the use of plain language in its federal and legal documents.<sup>48</sup> Numerous Law schools in the United States have plain language drafting courses as part of their curriculum. It is my opinion that reform of the private sector, which include law firms, have to start at university level at least, if not earlier.

In other countries, such as the United Kingdom and Australia, plain language was also becoming more prevalent. In Australia, NRMA Insurance was among the first corporations to join the plain language movement. It introduced its "Plain English" car insurance policy in September 1976.<sup>49</sup> In 1982, the United Kingdom adopted a plain English policy for government forms.<sup>50</sup> Also the United Kingdom new rules for civil procedure greatly simplifies the language used in court procedure<sup>51</sup>. Government also

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<sup>42</sup> Butt P and Castle R (2001) *Modern Legal Drafting: A Guide to Using Clearer Language* Cambridge: Cambridge University Press.

<sup>43</sup> Tiersma P (2014) *The Plain English Movement*, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (accessed on 20 March 2014).

<sup>44</sup> Locke J (2004) A history of plain language in the United States Government, 2004, <http://www.plainlanguage.gov/whatisPL/history/locke.cfm> (accessed on 20 March 2014).

<sup>45</sup> *HR (House of representatives) 946 Plain Writing Act of 2010 (USA)*.

<sup>46</sup> P Butt, *Modern legal drafting: A guide to using clearer language*, Cambridge University Press, 2013

<sup>47</sup> For example, *New York Plain English Law N.Y. Gen. Oblig. SS 5-702, Pennsylvania Plain language consumer contract Act 73 SS 2201-2212* and the *Florida readable language in Insurance Policies Law 627.4145*.

<sup>48</sup> Plain language community around the United States, <http://www.plainlanguage.gov/usingPL/US/index.cfm> (accessed on 2 September 2015).

<sup>49</sup> Asprey MM (2003) *Plain Language for Lawyers* Sydney: Federation Press 35.

<sup>50</sup> Asprey MM (2003) *Plain Language for Lawyers* Sydney: Federation Press 14.

<sup>51</sup> United Kingdom CPR – Rules and Directions, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules> (accessed on 2 September 2015).

undertook to rewrite the tax laws of the UK, to make it clearer and easier to understand, without rewriting the law<sup>52</sup>. This project was started in 2001 and finally finished in 2010 with the rewriting of The Taxation (International and Other Provisions) Act 2010.

There is also a growing awareness of plain language in Canada. According to Waddell,<sup>53</sup> various steps have been taken to incorporate the use of plain language in Canada. The province of British Columbia has a Plain Language Institute and also enacted plain language legislation. In Alberta there is a law requiring that all financial documents must be written in plain language. In addition, the federal and provincial ministers of Consumer and Corporate Affairs issued a Statement on plain language to promote the use of plain language in consumer contracts on the basis that “businesses providing clear information to consumers will be ones to develop loyal and satisfied customers, the business efficiency will increase, that plain language makes it easier to train staff and reduces customer complaints”.

The 13<sup>th</sup> of October is celebrated globally as International Plain Language Day.<sup>54</sup> The purpose of International Plain Language Day is to celebrate the achievements of those persons around the world who are working to make materials available to the public that are clear, concise, usable, and written in plain language. International Plain Language Day was the brainchild of Cheryl Stevens, a plain language advocate. Since its initial proposal, plain language professionals around the world have given their support to the International Plain Language Day. The day is currently celebrated in South Africa, as well as Canada, the United States of America, Sweden and New Zealand.<sup>55</sup>

Globally there is a move toward the use of plainer and clearer language, especially in the drafting of legal documents for use by consumers. Various jurisdictions, including South Africa, now have legislation requiring the use of plain language in consumer documents.

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<sup>52</sup> Tax law rewrite, <http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/rewrite/> (accessed on 2 September 2015).

<sup>53</sup> Waddell I The case for plain language legislation, <http://www.revparl.ca/english/issue.asp?art=950&param=143> (accessed on 2 September 2015).

<sup>54</sup> International plain language day, <http://blogs.loc.gov/law/2011/10/international-plain-language-day/> (accessed on 2 September 2015).

<sup>55</sup> International plain language day, <https://www.facebook.com/internationalplainlanguageday> (accessed on 2 September 2015).

## 4. Consumer protection and plain language assessment in South Africa

### 4.1 The plain language movement in South African law

In South Africa, the implementation of the plain language movement was a bit slower than in the rest of the world. Although the Constitution<sup>56</sup> paved the way for the use of plain language in consumer contracts, it was only with the promulgation of the Long- and Short-term Insurance Acts,<sup>57</sup> that the legislature started to incorporate plain language into legislation.

Since the inception of the Long –and Short-term Insurance Acts there has been a definite movement toward plain language in legislation, especially legislation relating to consumers. Not only are these Acts written in plainer language, they also make provision for the drafting of consumer documents in plain language.

Rule 3(b) of the Policyholder protection rules, issued under section 62 of the Long-term Insurance Act<sup>58</sup> determines that:

“Disclosures must be in plain language and structured so as to promote easy comprehension and to avoid uncertainty and 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 Promotion of Access to Information Act<sup>59</sup> was even translated into plain language for the sake of understanding by consumers.<sup>60</sup>

The South African National Credit Act was the first piece of South African legislation to include a definition of plain language. According to section 64 of this Act<sup>61</sup>:

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<sup>56</sup> Constitution of the Republic of South Africa, 1996. Section 9 of the Constitution, which forms part of the Bill of Rights, addresses the matter of equality. Section 9(1) states that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. To be equal in terms of consumer law, there should be a common understanding of consumer contracts, which can possibly be attained by translating consumer documents into plain and understandable language. The premise is thus that the Constitutional requirement of equality was one of the first building blocks in the creation of effective consumer law that requires that consumer documents be understandable even to the vulnerable consumer and as such placing that consumer on equal footing with more sophisticated consumers.

<sup>57</sup> Long-term Insurance Act, 52 of 1998 and the Short-term insurance Act, 53 of 1998.

<sup>58</sup> Long-term Insurance Act, 52 of 1998.

<sup>59</sup> Promotion of Access to Information Act, 2 of 2000, hereinafter referred to as “PAIA”.

<sup>60</sup> The plain language version of the Promotion to Access of Information Act.

<sup>61</sup> South African National Credit Act, 34 of 2005.

“The producer of a document that is required to be delivered to a consumer in terms of this Act must provide that document-

- (a) in the prescribed form, if any, for that document; or
- (b) in plain language, if no form has been prescribed for that document.

(2) For the purposes of this Act, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to

- (a) the context, comprehensiveness and consistency of the document;
- (b) the organisation, form and style of the document;
- (c) the vocabulary, usage and sentence structure of the text; and
- (d) the use of any illustrations, examples, headings, or other aids to reading and understanding.”

The Consumer Protection Act<sup>62</sup> contains the exact same plain language requirement in section 22 of the Act.

In addition to the above Acts, the Companies Act<sup>63</sup> provides for the use of plain language in documents produced or provided to a potential investor, a company’s creditor or potential creditor, a holder of a company’s securities, a member of a non-profit company, an employee of a company or a representative of any employees of a company.<sup>64</sup> It goes on to define plain language exactly as defined in the NCA and the CPA.

Much has been written about plain language in South African law and many short courses on the subject are currently presented.<sup>65</sup> It seems that the time is right for plain language in legal documents in South Africa. Legislation is even being translated

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<sup>62</sup> Consumer Protection Act, 68 of 2008.

<sup>63</sup> Companies Act, 71 of 2008.

<sup>64</sup> Section 6(4) of the Companies Act, 71 of 2008.

<sup>65</sup> Courses presented on plain language at the University of Cape Town <http://www.lawatwork.uct.ac.za/about-lawwork/> (accessed on 20 April 2015); Courses on plain language presented by the Plain language Institute <http://www.plainlanguageinstitute.co.za/services.php> (accessed on 20 April 2015).



into comic strips<sup>66</sup> to ensure that the target audience of the legislation understands exactly what the legislation intends.

Although South Africa was slow to buy into the plain language movement, we are now already cited<sup>67</sup> to be on the forefront of the plain language movement in the international legal community.

#### **4.2 Who is an ordinary consumer?**

It is my opinion that the most important aspect in developing South African plain language guidelines is the formulation of a definition for the ordinary consumer. It will be nearly impossible to properly draft plain language documents if the drafter does not know who the intended audience of the specific document is. The CPA defines an ordinary consumer as a person of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the goods or services in question.

In South Africa specifically, the determination of who an ordinary consumer is poses unique challenges. Barnard<sup>68</sup> says that providing a realistic answer to this question is complicated by the fact that South Africa has eleven official languages and quite a large group of the population falls within the definition of a vulnerable consumer set out in section 3 of the CPA.<sup>69</sup> Section 3(1)(b)(iv) of the Act specifically states that one of the aims of the CPA is:

“...reducing and ameliorating any disadvantage experienced in accessing any supply of goods or services by consumers –

- (i) who are low-income persons or persons comprising of low-income communities;
- (ii) who live in remote, isolated or low-density population areas or communities;
- (iii) who are minors, seniors or similarly vulnerable consumers;

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<sup>66</sup> For example the Labour relations Act, 66 of 1995 and the Domestic Violence Act, 116 of 1998.

<sup>67</sup> Macbeth S (2009) A brief history of plain language, presented to the Fourth Biennial Conference of the Plain Language Association International, Opening Plenary, 27 September 2009 [www.plainlanguagenetwork.org/conferences/2002/history/history.pdf](http://www.plainlanguagenetwork.org/conferences/2002/history/history.pdf) (accessed on 18 April 2015).

<sup>68</sup> Barnard J (2014) In search of the “ordinary consumer”, and information in plain language, in a multilingual, multicultural South Africa: Where does the vulnerable consumer fit in? (Extract from a paper presented at the University of Pretoria International Consumer Law Conference 25-27 September 2014) Juta Consumer Law Review August 2014, <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-august-2014/> (accessed on 4 September 2015).

<sup>69</sup> Section 3(1)(b) of the Consumer Protection Act, 68 of 2008.



- (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.”

It seems that Barnard is correct in her assessment of the current situation regarding the ordinary consumer, as the majority of the South African population falls somewhere in the above categories relating to the so-called “vulnerable” consumer.

There are two factors which need to be considered for the purposes of defining who an ordinary consumer is: firstly, average literacy, and secondly, the level of experience of the consumer in relation to the goods and services in question. The first factor in describing an ordinary consumer is the determination of the “average literacy” of such an ordinary consumer. Unlike the NCA,<sup>70</sup> the CPA does not bestow the right of receiving consumer contracts in any one of the 11 official languages<sup>71</sup> of South Africa on consumers. It is thus assumed for purposes of this dissertation that average literacy relates to the comprehension by the consumer of English as a commercial language.

There are various factors that influence the comprehension of English as a commercial language by consumers. Level of education, social standing and geographical location, as is also provided for in section 3 of the CPA, are but some of these factors. Other factors include prior commercial knowledge of the user of the document, cognitive abilities and the amount of exposure that a person receives to English in the home environment. The majority of South Africans only speak English as their second or third language. Although English is the most commonly spoken official and commercial language in South Africa, it is only the fifth most spoken home language. In addition, there are also provincial variations in predominant languages in South Africa<sup>72</sup>. According to the 2011 census the predominant languages by province are:

- Eastern Cape – isiXhosa (78.8%), Afrikaans (10.6%)
- Free State – Sesotho (64.2%), Afrikaans (12.7%)
- Gauteng – isiZulu (19.8%), English (13.3%), Afrikaans (12.4%), Sesotho (11.6%)

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<sup>70</sup> Section 63(1) of the National Credit Act, 34 of 2005.

<sup>71</sup> Section 6(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>72</sup> Statistics SA, 2011 Census.

- KwaZulu-Natal – isiZulu (77.8%), English (13.2%)
- Limpopo – Sesotho (52.9%), Xitsonga (17%), Tshivenda (16.7%)
- Mpumalanga – siSwati (27.7%), isiZulu (24.1%), Xitsonga (10.4%), isiNdebele (10.1%)
- Northern Cape – Afrikaans (53.8%), Setswana (33.1%)
- North West – Setswana (63.4%), Afrikaans (9%)
- Western Cape – Afrikaans (49.7%), isiXhosa (24.7%), English (20.3%)

Would the above figures then imply that the level of comprehension of consumers of English as a commercial language may differ based on their geographical location? Not only geographical location as envisioned by the CPA, but also the provincial location within South Africa?

Stephanie Pretorius<sup>73</sup> investigated the true literacy of the South African population. Her research uses the 2012 General Household Survey<sup>74</sup> as a starting point. According to the GHS 92.2% of South Africans could read and write in 2012, but according to Pretorius, the issue lies in how this literacy is defined and measured. According to the report, the reported literacy rate is qualified as the self-reported ability to read and write short sentences. The article quotes Surette van Staden, a co-national research co-ordinator for the Progress in International Reading Literacy Study 2011.<sup>75</sup> She says it is dangerous to use such a loose categorisation for literacy. “The ability to read and write short sentences is perhaps an indication of functionality, if anything,” said Van Staden.

Pretorius also looks at the results achieved by learners in the Annual National Assessment in the same year. The results are quite alarming, as 42.3% of grade 9 learners did not even meet the basic requirements in the test designed to test the learner proficiency in their first language. Based on the aforementioned it could only be assumed that more than half of our population is functionally illiterate. The question may be asked: How will we be able to determine the definition of an ordinary consumer

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<sup>73</sup> Pretorius S “SA’s real level of literacy” (2013) Citizen 29 August 2013.

<sup>74</sup> StatisticsSA 2012 General Household Survey, <http://www.statssa.gov.za/publications/P0318/P03182012.pdf> (accessed on 5 September 2015), hereinafter referred to as “GHS”.

<sup>75</sup> The Progress in International Reading Literacy Study (Pirls) is an international comparative study of the reading literacy of young students.

with average literacy skills, if we cannot even determine the average literacy of our population? And then, based on the assumption that half of our population is functionally illiterate – how do we draft consumer contracts to provide for such large scale illiteracy?

The second factor in the determination of who an ordinary consumer is, is the level of experience of the consumer in relation to the goods or service in question. It could be argued that most consumers, regardless of their literacy skills, have at least some experience in everyday commercial transactions such as buying groceries or airtime for cell phone usage. The level of experience of a consumer in more complex commercial transactions, such as acquiring complex financial products, will depend on the level of sophistication of the consumer in question. Factors that influence the level of sophistication of a consumer are, amongst others, the level of education of the consumer, the amount of exposure such consumer has had to complex commercial transactions and the income level of the consumer. It is assumed that consumers of complex commercial transactions normally have a higher level of sophistication than consumers of everyday commercial transactions. Based on the aforementioned, it is safe to say that the definition of an ordinary consumer will depend solely on the type of commercial transaction being entered into by the consumer. There would thus be different types of ordinary consumers for different types of transactions.

The problem arises when consumers of greater sophistication enter into everyday commercial transactions. The contracts drafted for such transactions will have to be drafted at the level of the indigent consumer and as such may frustrate the more sophisticated consumer for its lack of sophistication.

As there is no current case law available in South Africa on the determination of an ordinary consumer, we are compelled to look at foreign and international law as is provided for in the CPA<sup>76</sup> in an attempt to clarify just exactly what an ordinary consumer is.

The EU Unfair Commercial Practices Directive<sup>77</sup> “takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and

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<sup>76</sup> Section 2(2)(a) of the Consumer Protection Act, 68 of 2008.

<sup>77</sup> Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives

circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices”. The directive further states that the test to determine what an ordinary consumer is, is not a statistical one, but that courts should exercise their own judgement, having regard to the case law of the Court of Justice, to determine the typical reaction of an average consumer in a given case.

The starting point of the definition in the directive is a “reasonably well informed consumer”, whereas the consumer described in the CPA is a consumer with minimal experience in relation to the goods or services acquired. Consequently, the main premise of the EU Unfair Commercial Practices Directive definition of a consumer is based on a more sophisticated consumer and as such differs vastly, firstly, from the definition of an ordinary consumer contained in the CPA and, secondly, from the actual and typical consumer in South Africa. The typical consumer of countries such as the United States of America and the United Kingdom is generally more sophisticated and consumer law in these countries take the typical level of sophistication of consumers in these countries into account and as such a direct comparison between these countries and South Africa will in all probability not be of great value. However, some value may be added by considering the directive’s test to determine who an ordinary consumer is. According to the directive, courts should exercise their own judgement when having to decide, on a case by case basis, who an ordinary consumer is. Applying this guideline in South Africa, together with the constitutional value of equality, may lead to the constructive expansion of the common law relating to the definition of an ordinary consumer.

Upon a thorough investigation of the international position, it is clear that no current foreign or international case law defining the term ordinary consumer exists. This may be due to the fact that consumer law is a relatively new field of law and has only received proper international recognition during the last ten years.

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97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).

### 4.3 Another roadblock for plain language drafting in South Africa

Better drafting of consumer contracts starts with the education of drafters of such consumer contracts. Although plain language drafting courses form part of the curriculum of many international universities and law schools, this is not the case in South Africa. The little exposure that law students get to drafting of documents when they attend the Practical Legal Training<sup>78</sup> is not nearly sufficient to entrench the principles of plain language drafting.

In addition, the poor level of primary and secondary education in South Africa poses a tremendous threat, not only to plain language drafting, but to the legal profession in general. How can we educate attorneys to draft in plain language if their basic comprehension of the language in which they need to draft documents is at a very low level?

It is not the aim of this study to solve the above problem in relation to defining the ordinary consumer. The reader should just be aware that the determination of the definition of an ordinary consumer is but one piece of the plain language puzzle in South Africa.

## 5. South African drafting and interpretation principles

Currently no clear set of legal drafting guidelines, regardless of it being plain language guidelines or not, exist in South Africa. Drafting know-how was historically handed down from one generation of senior legal practitioners to the next. These guidelines were often shrouded in complexity and verbosity. The use of precedents and the lack of understanding by drafters of the content they were drafting created unnecessarily long and complex legal documents that few were, and unfortunately still in a lot of cases are, unable to understand. Regrettably this practice was also not very successful, as is evident from the abundance of reported cases<sup>79</sup> on the interpretation of legal documents.

In order to provide some unique South African drafting guidelines, the common law principles in respect of the interpretation of contracts must be considered. Our

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<sup>78</sup> Compulsory Practical Legal Training, presented by Legal Education and Development, a requirement for admission as an attorney in South Africa.

<sup>79</sup> For example in *Blackburn v Blackburn* 1920 CPD 13, *Minister of the Interior v Machadodorp Investments* 1957 (2) SA 395 (A), *Cinema City v Morgenstern Family Estates and other* 1980 (1) SA 796 (A), *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A), *Imperial Group (Pty) Ltd v NCS Resins (Pty) Ltd* 2007 JOL 19493 (SCA) and more recently *Air traffic and navigation services v Esterhuizen* 2014 ZASCA 138 (SCA).

common law contains various presumptions of interpretation, which, when effectively employed, could serve as valuable guidelines for proper drafting and also proper plain language drafting.

In the discussion below I will look at these presumptions of interpretation and how they could be employed as rules for drafting, and possibly plain language drafting, in the South African context. I will also relate these presumptions to the provisions contained in the CPA.<sup>80</sup>

### **5.1 Words are used in their ordinary sense<sup>81</sup>**

It is presumed that the words used in the text were used in their ordinary sense and should thus be assigned their ordinary meaning.<sup>82</sup> Jansen, JA<sup>83</sup> in *Cinema City V Morgenstern Family Estates and others* said:

*“...the first step to interpreting a contract is to read it. This entails attaching to each word that ordinary meaning (of the several that the word will undoubtedly bear) which the context seems to require and applying the common rules of grammar (including syntax). Thus we may arrive at a prima facie meaning of each word, phrase and sentence.”*

In addition, if the parties belong to a certain business or trade it is presumed that the parties used their words in a sense commonly understood in that business or trade.<sup>84</sup>

When this presumption is turned into a drafting guideline, drafters are compelled to draft their contracts by using words in their ‘ordinary sense’ as the word is understood by the user of the document. In *Cash-In CC v OK Bazaars 1929 Ltd*,<sup>85</sup> Scott J held:

*“...the first step in construing a contract must always be to determine the ordinary grammatical meaning of the words used by the parties.”*

Section 22(2)(c) of the CPA determines that drafters should consider their use of vocabulary and sentence structure when drafting documents in plain language. The vocabulary referred to here is that which the intended user of the contract or document

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<sup>80</sup> Section 22 of the Consumer Protection Act, 68 of 2008.

<sup>81</sup> Cornelius SJ (2007) *Principles of the interpretation of contracts in South Africa* (second edition) Durban: LexisNexis.

<sup>82</sup> *Cinema City v Morgenstern Family Estates and others* 1980 (1) SA 796 (A) 803G.

<sup>83</sup> *Cinema City v Morgenstern Family Estates and others* 1980 (1) SA 796 (A) 803G.

<sup>84</sup> Cornelius SJ (2007) *Principles of the interpretation of contracts in South Africa* (second edition) Durban: LexisNexis.

<sup>85</sup> *Cash-In v OK Bazaars 1929 Ltd* 1991 (3) SA 353 (C) 361 G.

will be able to understand and therefore the ordinary meaning of the words employed. When familiar words are used in their ordinary sense, the capacity for misunderstanding words or terms is greatly limited. The chance of a consumer struggling to understand a term where the words used in the term are known and understood by them is very little, compared to when the words used in the term are foreign.

Drafters should also take notice of the specific cultural background and level of education of the intended consumer that they are drafting a document or contract for. To some people certain terms may only mean one thing, but to others there may be an additional meaning due to cultural or educational background. For example, the word “brother” may mean different things to different cultural groups in South Africa. In the traditional white South African culture the word is taken to mean your male blood relative from the same parents, thus your sibling. Generally, in the traditional black African culture, the word is taken to mean fellow humans, irrespective of the cultural or racial background.<sup>86</sup> Different interpretations such as these may impose difficulty on part of the indigent consumers to fully understand the reach of the transaction that they are entering into by signing a document or contract.

## **5.2 The same word or expression in the same contract has the same meaning<sup>87</sup>**

This presumption of interpretation dictates that where the same word or expression is used in different places in the same contract, that word or expression is generally taken to have the same meaning throughout the entire contract.<sup>88</sup> For example, in a contract for the use of technology the word RAM will refer to “random access memory”. The word will mean the same throughout and will not mean a male sheep or a device for battering or forcing something elsewhere in the contract.

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<sup>86</sup> African Ethics, Stanford Encyclopaedia of Philosophy (2010) <http://plato.stanford.edu/entries/african-ethics/> (accessed on 22 October 2014).

<sup>87</sup> Cornelius SJ (2007) *Principles of the interpretation of contracts in South Africa* (second edition) Durban: LexisNexis.

<sup>88</sup> *Minister of Interior v Machadodorp Investments 1957 (2) SA 395 (A)*.



One of the general content guidelines published by Cheek<sup>89</sup> and referred to below says “*Always use the same word to mean the same thing*”. Using words for the same thing consistently promotes plain language and consequently proper drafting.

By using this presumption as a guideline for drafting, drafters are required to keep their drafting consistent and uniform, as is also required in section 22(2)(a) of the CPA, which states that regard should be had to the context, comprehensiveness and consistency of the relevant document.

Section 22(2)(c) further determines that drafters should consider their use of vocabulary, usage and sentence structure – it should always be relevant to the level of literacy and skill of the intended user. The use of synonyms should be restricted to creative writing - there is really no place for creative writing in law.

### **5.3 Different words or expressions indicate different meanings<sup>90</sup>**

Where different words are used for something that would normally allow words to be used interchangeably, it is presumed that the words have different meanings. For example, when the word “purchase” is used to define the action of buying something from someone, a drafter should not randomly interchange it with the words “acquire” or “buy” as these words may have a different meaning attributed to them in terms of the context of the text.

This presumption of interpretation follows on the presumption that the same word or expression in the same contract has the same meaning. Upon using this presumption as a drafting guideline, drafters will ensure that they use exact words for every different type of provision in the document or contract. This should lead to clearer drafting and effectively also to plain language drafting.

A common sight in complex contracts is the use of a number of synonyms for a specific term, for example, the phrase “null, void and no force and effect whatsoever”. The overuse of words only confuse consumers, creating the impression that the burden imposed is even more onerous than it seems. In the above example it would have been sufficient to use one of the words: null, void or unenforceable.

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<sup>89</sup> Cheek A “*Defining plain language*” (2010) 64 *Clarity: Journal of the International Association Promoting Plain Legal Language* 5.

<sup>90</sup> Cornelius SJ (2007) *Principles of the interpretation of contracts in South Africa* (second edition) Durban: LexisNexis.



Section 22(2)(c) requires drafters to consider the vocabulary, usage and sentence structure of the relevant document. In terms of this provision, the vocabulary, usage and sentence structure should always be relevant for use by the intended audience.

The level of experience and literacy of the intended user of the document or contract should be taken into consideration when using words interchangeably or when adding additional synonyms. Plain language drafters will appreciate the fact that using synonyms creates confusion for the average consumer. Care should be taken to use the simplest form of a word to describe an action, event, right or obligation in an agreement to be used by consumers.

#### **5.4 There are no superfluous words in a contract<sup>91</sup>**

It is presumed that all the words contained in a contract were meant to be included in the contract and thus effect should be given to these words as far as possible, unless it would lead to a nonsensical result.

One of the golden rules of plain language drafting is to omit superfluous material.<sup>92</sup> Determining what would constitute such superfluous material is dependent on the level of experience and literacy of the intended consumer. It is clear that drafters need to become experts on the level of understanding of the intended users of the documents that they are drafting. Drafters should never assume that these intended users have knowledge of the standard terms of certain transactions.

Using this presumption of interpretation as a guideline for plain language drafting discourages the use of legal jargon and redundant content. For example, the very common phrase “by signing this agreement the signatory agrees to the following...”<sup>93</sup> The very signing of the agreement confirms the agreement by the parties and as such the entire statement is pointless. Another example may be found in a clause dealing with the severability of the provisions. Very often such clauses are worded as follows:

“Except as expressly provided to the contrary herein, each paragraph, clause, term, and provision of this AGREEMENT, and any portion thereof, shall be considered severable. If for any reason, any provision of this

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<sup>91</sup> Cornelius SJ (2007) *Principles of the interpretation of contracts in South Africa* (second edition) Durban: LexisNexis.

<sup>92</sup> Cheek A “*Defining plain language*” (2010) 64 *Clarity: Journal of the International Association Promoting Plain Legal Language* 5.

<sup>93</sup> Courtesy of Prof SJ Cornelius via email on 28 April 2015.

AGREEMENT is held to be invalid, contrary to, or in conflict with any applicable present or future law or regulation in a final, unappealed ruling issued by any Court in a proceeding to which [insert name] is a party, that ruling shall not impair the operation of, or have any effect upon, such other portions of this AGREEMENT as may remain otherwise intelligible, which shall continue to be given full force and effect and bind the parties hereto.”

A possible plain language translation of the above may read as follows:

“If any provision of this Agreement is declared invalid for any reason, the rest of the Agreement will remain binding on the parties, unless the rest of the Agreement cannot be enforced without the invalid provision.”

When legal jargon and unnecessary statements of fact are avoided the document immediately becomes less complex and verbose. This in itself is a great step forward in reaching the aims of the CPA, specifically regarding section 22(2)(a) which addressed the comprehensiveness of documents.

This presumption also links to the provisions of section 22(2)(d) which requires the use of illustrations, examples, headings and other aids to reading and understanding. Using this presumption as a drafting guideline creates a balancing act. Drafters will have to be vigilant of adding only the information required to make the document or contract understandable to its intended user and also be cautious of not adding too much information.

### **5.5 No words have been left out<sup>94</sup>**

Based on the previous presumption it follows, that because it is assumed that the parties carefully selected the words included in the contract, they did not leave out any words that should have been included in the contract. The contract is thus deemed to be the entire agreement by the parties and everything required to understand the contract was included in the contract. For example, if a cell phone contract makes provision for “data charges”, the contract should define exactly what these data charges are. It may not be presumed that all the consumers will know what data charges are.

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<sup>94</sup> Cornelius SJ (2007) Principles of the interpretation of contracts in South Africa (second edition) Durban: LexisNexis.

Section 22(2)(d) requires the use of illustrations, examples, headings and other aids to reading and understanding. This section reinforces the presumption that only those words that are necessary have been included in a specific document or contract.

The aim of section 22 is to provide the specific user of a standard form contract or document with the opportunity to fully understand the implications of entering into a specific transaction. Documents or contracts are therefore required, in terms of the Act, to be consumer relevant and user friendly. It is of utmost importance that drafters include all the words necessary, and only those words, to help the consumer understand the consequences of entering into any given contract.

## **6. Suggestions on plain language drafting**

### **6.1 International guidelines**

Various writers<sup>95</sup> have published plain language guidelines and in some other jurisdictions we even find statutory plain language provisions.<sup>96</sup> According Kimble,<sup>97</sup> the starting point for writing in plain language is to design and write the document in question in a way that best serves the reader. He says that a drafter's main goal is to convey his or her ideas with the greatest possible clarity. Kimble goes further and says that a drafter should resist the urge to sound formal, should omit unnecessary detail and use examples where necessary to explain the text. In addition, Kimble<sup>98</sup> gives valuable guidelines with regard to the design, organisation, sentence composition and words used in plain language drafting.

The Center for Plain language<sup>99</sup> proposes a 5-step checklist<sup>100</sup> to determine if a document complies with its plain language requirement. This process involves identifying and describing the target audience, structuring the content of the document to guide the reader through the content, writing the content in plain language, using information design to help readers understand and testing the content with target groups of the intended user.

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<sup>95</sup> Cheek, A; Williams, G; Butt, P; Stoop, PN et al.

<sup>96</sup> *Connecticut General Statutes 2012 sections 42-152: Standard of plain language (CT Gen Stat SS 42-152 (2012)).*

<sup>97</sup> Kimble J (2002) The elements of plain language, <http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm> (accessed on 5 August 2015).

<sup>98</sup> Kimble J (2002) The elements of plain language, <http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm> (accessed on 5 August 2015).

<sup>99</sup> The Center for plain language is a non-profit organisation in the United States that help government and businesses write more clearly.

<sup>100</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

It is clear that the structure, content and design of a document should be understandable to its intended audience in order to comply with international plain language requirements. Each of these elements will now be individually discussed. Two additional elements, the identification of the target audience and testing of the document, as required by the Center for Plain Language, will also be discussed.

#### 6.1.1. Target audience

The first step in the plain language drafting process is described by the Center for Plain Language<sup>101</sup> as identifying and describing the intended target audience. This is arguably the most important step in the plain language drafting process, as all the subsequent steps of the process will be based on the result of this step. In the South African context, the CPA makes provision in its plain language section for “an ordinary consumer of the class of persons for whom the notice, document or visual presentation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services”.<sup>102</sup> Thus it is a statutory requirement that the target consumer be identified and section 4.2 of this study aims to provide guidance in this regard.

The Center for Plain language provides a definite list of tasks that need to be completed in order to determine who the target audience is. These tasks include listing and prioritising the top tasks of the audience group, listing what people will need and will need to know in order to complete the task in question and listing the characteristics of the target group that could influence the content, structure and design of the document.<sup>103</sup> The aim of this step is to determine if a drafter knows who he or she is drafting for, what these people want to do, what they know and finally what they need to learn.

#### 6.1.2. Structuring the content

The second step in the process prescribed by the Center for Plain language entails structuring the content to guide the reader through it. The structure works when readers can quickly and confidently find the information that they are looking for.<sup>104</sup>

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<sup>101</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

<sup>102</sup> Section 22(2) of the Consumer Protection Act, 68 of 2008.

<sup>103</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

<sup>104</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

Cheek<sup>105</sup> states that when it comes to the structure of the document that the points in the document must be ordered in some way that makes sense to the reader, for example chronologically or in order of importance. She adds that the drafter should get to the main point as soon as possible, with subsidiary points afterwards and that each paragraph should deal with one topic exclusively. With regard to paragraph and sentence length, Cheek prescribes sentences of no more than 40 words, with average sentence length between 15 and 20 words, and paragraphs of between 150 and 250 words. The use of consecutive long sentences is discouraged.

In addition, Kimble<sup>106</sup> calls for the minimisation of cross-references and definitions and the use of transitions to introduce new ideas.

### 6.1.3. Content

The next step in the plain language drafting process is to write the content in plain language. Drafters need to bear their target audience in mind when determining the level of language to be used. A drafter will know that his or her attempt to draft in plain language was successful if the reader of the document understands the content and comprehends the intended message. The following guidelines for drafting in plain language<sup>107</sup> are provided:

a) Keep it short and to the point

The aim is to write short, but logical sentences which include the information that helps the reader to complete the required task. A drafter should never assume that the reader knows something, hence information that the reader wants to know should always be included. Only the essential information should be included and excessive details should be left out as these only confuse the reader. Important information should be presented first in each section and paragraph and transitions should be used to connect ideas, sentences, paragraphs and/or sections.

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<sup>105</sup> Cheek A “*Defining plain language*” (2010) 64 *Clarity: Journal of the International Association Promoting Plain Legal Language* 5.

<sup>106</sup> Kimble J (2002) The elements of plain language, <http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm> (accessed on 5 August 2015).

<sup>107</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015); Cheek A “*Defining plain language*” (2010) 64 *Clarity: Journal of the International Association Promoting Plain Legal Language* 5; Kimble J (2002) The elements of plain language, <http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm> (accessed on 5 August 2015).

- b) Set a helpful tone by using a conversational, rather than legal or bureaucratic tone.

Kimble<sup>108</sup> makes a very important point by saying that in consumer documents, the consumer should be addressed as “you”.

- c) Pick the right words by making use of words that the target audience are familiar with and by using strong verbs in the active voice.

The more complex words should be explained and examples used where necessary. The same word should consistently be used to mean or describe the same thing. Kimble urges drafters to avoid doublets and triplets, such as “any and all; give, devise and bequeath”.

#### 6.1.4. Document design

The fourth step in the plain language drafting process involves the design of the document. The aim of this step is to ensure that the reader is able to move through the information easily and efficiently. General guidelines<sup>109</sup> on this subject provide that headers and sub-headers, as well as whitespace, should be used to organise the information. Fonts and font sizes that are easy to read should be employed and where necessary, images should be used to make the content easier to understand. Large blocks of dense text should be avoided and lists, tables and other graphic elements should be used to convey lengthy or complex material.

It is very important to remember that a drafter should never sacrifice precise and concise drafting for the sake of a modern or striking design. Form should follow function when it comes to plain language documents.

#### 6.1.5. Testing content and design

The Center for Plain language<sup>110</sup> prescribes testing the content and design of a document as its final step in plain language drafting. The aim of the testing is to determine if the document complies with all the requirements of plain language

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<sup>108</sup> Kimble J (2002) The elements of plain language, <http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm> (accessed on 5 August 2015).

<sup>109</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015) and Cheek A (2010) “*Defining plain language*” 64 *Clarity: Journal of the International Association promoting plain language* 5.

<sup>110</sup> Write better <http://centerforplainlanguage.org/5-steps-to-plain-language/> (accessed on 13 March 2015).

drafting. At the end of the day the aim of such testing is to determine if the intended audience or target group understands the document and is able to act on its contents.

## **6.2 Proposed South African plain language drafting guidelines**

Although the South African legal community is trying to incorporate the use of plain language in our legislation and selected consumer documents, the exact definition and scope of the required plain language is unclear.

The CPA<sup>111</sup> provides that the Commission may publish guidelines for methods of assessing whether a notice, document or visual presentation satisfies the plain language requirements set by the CPA. Both the NCA and the Companies Act<sup>112</sup> contain similar provisions. None of the Commissions have, to date, published such guidelines.

It is my submission that different sets of guidelines will have to be developed for documents relating to different levels of commercial transactions. The applicable guidelines will depend on the definition of an ordinary consumer for the transaction in question.

International plain language guidelines can easily be adopted for documents of a more specialised commercial nature as the ordinary consumer of these types of transactions are more sophisticated, with a higher level of education. For this type of consumer, clear and proper plain language should be sufficient to make the consumer contract in question easier to understand and consequently easier to honour. In contrast, a unique set of guidelines should be developed for the so called vulnerable consumers and consumers that are illiterate.

Most of the international plain language guidelines are summarised in paragraph 6.1 above. After a systematic investigation of the various international plain language guidelines available, I would suggest that Kimble's guidelines<sup>113</sup> be incorporated in our law. This summary of plain language guidelines is concise and to the point. He organises his guidelines in five categories, the first of which provides general drafting

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<sup>111</sup> Section 22(3) of the Consumer Protection Act, 68 of 2008.

<sup>112</sup> Companies Act, 71 of 2008.

<sup>113</sup> Kimble J (2014) *Writing for Dollars, writing to please: A case for plain language in business, government and law* Durham: Carolina Academic Press.

guidelines, thereafter two categories relating to the organisation and design of the document and finally two categories relating to sentences and words.

Using Kimble's guidelines as a starting point, I suggest that the following plain language guidelines should be adopted in South Africa for use in documents for the more sophisticated ordinary consumer:

#### A. In General

1. All documents should be written in a way that the reader thereof understands.
2. Use a relaxed tone when drafting consumer documents.
3. Omit unnecessary detail.
4. Use examples to explain the text, where appropriate.
5. Test consumer documents to ensure that the content is understandable and relevant.

#### B. Design

1. Ensure that the document is inviting and easy to read.
2. Create a table of contents for long documents.
3. Use a font type and size that is easy to read.
4. Use ample white space in margins and between lines.
5. Organise headings and levels in an easy to read manner and ensure that the consumer can distinguish between the different levels of text.
6. Avoid using all-capital letters and underlining and avoid overusing initial capitals for common nouns (This Agreement v this agreement).
7. Consider using diagrams, tables, and charts in place of continuous text, or at least as an aid to understanding it.
8. Make liberal use of bulleted lists. Use hanging indents: don't let 'n later line come back farther than the first word in the line.

#### C. Organisation

1. Where possible, start your document or section of a document, if is a long document, with a summary of the next section.
2. Use short sections, or subdivide longer ones.
3. Show the structure with headings and subheadings, and make them informative.



4. Try putting at least the main headings in the form of a question that the reader may ask.
5. Put related material together.
6. Order the parts in any logical sequence that will make sense for the document.
7. Break up long paragraphs. Paragraphs should be between 60 and 100 words.
8. Use transitions to link your ideas and introduce new ones.
9. Minimise cross-references. Limit global cross-references, such as “except for otherwise provided herein”.
10. Minimise definitions. If you have more than a few, put them in a separate section at the start of the document.

#### D. Sentences

1. Prefer short and medium-length sentences. Use an average of 20 words per sentence.
2. If there are complicated items contained in a sentence, put them at a vertical list at the end of the sentence.
3. In most sentences, put the subject near the beginning; keep it short and concrete; make it something the reader knows about (old information); and make it the agent of the action in the verb.
4. Put the central action in strong verbs, not in abstract nouns (“If the seller delivers the goods late, the buyer may cancel the contract.” Not: “Late delivery of the goods is a grounds for cancellation of the contract.”). Uncover hidden verbs.
5. Keep the subject near the verb, and the verb near the object (or complement). Avoid intrusive phrases or clauses.
6. Put the strongest point in your sentence, your most important information, at the end – where the emphasis falls.
7. Prefer the active voice. But use the passive voice if the agent is unknown or unimportant.
8. Connect modifying words to what they modify. Be especially careful with a series: make clear whether the modifier applies to one or more than one item.

## E. Words

1. Prefer familiar words – usually the shorter ones – that are simple and direct.
2. Avoid unnecessary jargon, especially legalese, doublets, triplets and needless Latin.
3. Explain technical terms that your reader may not understand.
4. Omit unnecessary words.
5. Replace wordy phrases.
6. Avoid multiple negatives.
7. Banish “shall”, use “must” instead.
8. Consider making the consumer “you” and the organisation “we”.
9. Think twice about creating acronyms that will be new to your readers.
10. Be consistent; use the same term for the same thing.

With regard to commercial transactions for the masses, the provisions of the CPA relating to the use of illustrations, examples, headings and other visual aids<sup>114</sup> will have to be utilised, in addition to the international plain language guidelines.

When it comes to drafting for the uneducated ordinary consumer or the vulnerable consumer, drafters can learn a few things from legislature. Our legislature already started with this process of creating visually arresting posters, explaining difficult concepts to the uneducated consumer some time ago. There are various such posters<sup>115</sup> available and visible in our courts, addressing issues such as domestic violence and the rights of an employee in terms of the Labour relations Act.<sup>116</sup>

Plain language drafting at the level of the uneducated or vulnerable consumer will most certainly be a process of trial and error for the drafters of these documents.

Companies, especially those with a diverse consumer base such as the big cellular network providers, will have to make sure that they know their market and who they are drafting for. The balance here is between having uneducated consumers understand the terms of a consumer agreement on the one hand and not insulting more sophisticated consumers with a document that could be interpreted as frivolous by them on the other hand.

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<sup>114</sup> Section 22(2)(d) of the Consumer Protection Act, 68 of 2008.

<sup>115</sup> For example: “How to get a protection order in terms of the Domestic Violence Act, 1998 (Act 116 of 1998).

<sup>116</sup> Labour Relations Act 66 of 1995.

## 7. Conclusion

In the fast-paced, ever-changing world that we live in, one thing remains sure – change is inevitable. This has never been more true for drafters of, specifically, consumer documents. Internationally, there has been a great shift toward consumerism and the protection of the consumer. The plain language requirements of various acts and statutes guides drafters toward the perfect balance between the needs of consumers and the requirements of an open market economy.

The use of plain language in South Africa by the legislature has come a long way, although plain language drafting in the South African commercial world has, to date, not yet seen such a positive uptake. Here, Section 22 of the CPA sets the tone for the new generation consumer drafting in South Africa. Its plain language requirement is of fundamental importance in moving our law forward and will be of great significance in the field of drafting consumer contracts in future.

The challenges faced by local drafters are unique in some ways. Although the question of who an ordinary consumer is has been asked internationally –South Africa drafters a faced with a diverse, multicultural and multilingual society, with varying literacy levels. Only when we are able to properly define an ordinary consumer, will we be able to create clear plain language drafting guidelines. In the meantime, the guidelines of international giants such as Kimble may be used to ease us through this transition period.

“Out of intense complexities intense simplicities emerge”.<sup>117</sup>

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<sup>117</sup> Quote by Winston Churchill, Historical quotes on plain language and writing simply, <http://www.plainlanguage.gov/resources/quotes/historical.cfm> (accessed on 16 October 2015).

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