

PLAIN AND SIMPLE

by Paula Gabriel, Cape Bar

“What happened thereafter is the subject of such flat contradiction and evasion that one has the impression of being without a compass in an uncharted sea of falsehood.”

I quote Holmes AJA¹ (as he then was) not because his words would find application in many aspects of our daily lives, but because it is pleasing when you stumble upon a construction that is so elegant that it seems inevitable.

This got me wondering about the fate of language in our law and the future of a legal system where equality before the law depends on the language you speak.

The dangers of not speaking the right language, or not speaking it well, were recently illustrated when an accused was called upon to offer a plea explanation, in Afrikaans, on a count of *menseroof* (kidnapping). The judge needed the accused to explain, in his own words, why he was guilty of robbing a person of their freedom.

Translated directly into English, *menseroof* means “people robbery” and should be distinguished from *roof*, which is ordinary robbery. The accused did not understand this distinction. He persisted with his explanation that he was guilty of kidnapping because he had robbed the victim of her cellphone. A plea of not guilty had to be entered.

It is debateable whether the move towards the use of “plain language”, which is a relatively recent phenomenon in the South African legal context, would have made much difference to the aforementioned accused. Nevertheless, in a country with 11 official languages, the idea of using plain language in legal documents is not without merit.

But what is plain language?

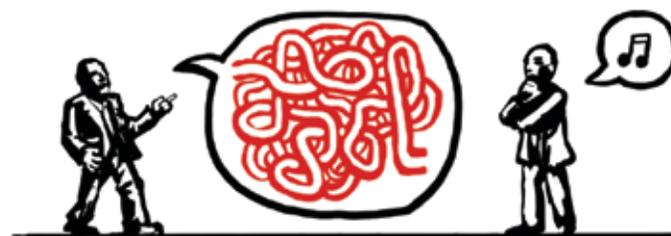
Both the National Credit Act² and the Consumer Protection Act,³ which mandate the use of plain language in certain documents, define plain language as being such language that an ordinary consumer, with average literacy skills, could be expected to understand the content, significance and import of the document without undue effort.

The Australian Commonwealth Industrial Relations Commission, on plain English, defined it as clear and precise language which is easy to understand and which communicates its message effectively. It is not a simplified form of English. It puts the reader first and avoids archaic words, jargon, unnecessary technical expressions and complex language. Using plain English, however, does not mean sacrificing precision.⁴

That last sentence should give one pause, as it did in a recent decision in the United States where the court began its judgment in *O'Connor v Oakhurst Dairy*⁵ with the words: “For want of a comma, we have this case.”

In that matter, truck drivers had sued their employer for millions of dollars because a missing comma, under the law in the state of Maine, failed to include their delivery duties in a list of jobs that were exempt from overtime.

Maine’s overtime law states that anything beyond 40 working hours must be compensated at 1.5 times the normal rate, with the following exceptions: “The canning, processing, preserving,



freezing, drying, marketing, storing, packing for shipment or distribution” of perishables and two other specific categories of food. The case turned on the absence of an Oxford comma before the words “or distribution”.

The court concluded that because the truck drivers do not “pack for distribution” they were owed the years of overtime pay for which they were not exempt.

So let the mandate to use plain language, which requires clarity of thought and precision, not become an excuse for poor language and inaccurate drafting. George Orwell was likely correct when he wrote that the English language “becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts.”⁶

Easier said than done. But the advice he offers is a good starting point:⁷

- Never use a figure of speech you are used to seeing in print;
- Never use a long word where a short one will do;
- If it is possible to cut a word out, always cut it out;
- Never use the passive where you can use the active voice;
- Never use jargon and foreign phrases where you can think of an everyday English equivalent;
- Break any of these rules sooner than say anything outright barbarous.

And a final rule from an essay by Sir Arthur Quiller-Couch in his 1916 collection *On the Art of Writing*:

Whenever you feel an impulse to perpetrate a piece of exceptionally fine writing, obey it – wholeheartedly – and delete it before sending your manuscript to press. Murder your darlings.

In other words, a passage is not relevant just because you enjoyed writing it. Those paragraphs you most sweated over, on the other hand, are more likely to be worth keeping.

As much as Holmes AJA’s description of an uncharted sea of falsehood should never apply to anything one does, one also hopes that the scathing indictment by Botha JA in *Santam Insurance Ltd v Taylor*⁸ will never describe our drafting:

One is left with the impression that when the draftsman came to write the exclusionary phrase he had lost his way in the maze of verbiage, with the result that a scrutiny of the language he used fails to reveal his intention. **A**

Notes

- 1 *R v Patel* 1959 (3) SA 121 (A).
- 2 Section 64.
- 3 Section 22.
- 4 Cheek, A. 2010. Defining plain language. *Clarity*: 64: 12.
- 5 No. 16-1901 (1st Cir. March 13, 2017).
- 6 *Politics and the English Language*.
- 7 *Ibid*.
- 8 1985 (1) SA p 524.