

Is it worth paying an Attorney to draft a Contract?

Although it might not be a perfect analogy, I believe paying an attorney to draft a contract is akin to paying for medical aid. There might be months, or even years, that go by 'incident free'. Normally, during these months, one starts to wonder if it's worth incurring the costs of the premiums. However, the value of the premiums is soon realized when an accident occurs.

The same can be true in the realm of contracts. If the parties to the contract cooperate and perform, they might think it unnecessary to have incurred the costs of drafting the contract. However, when disagreements arise, and emotions erupt, the true value of a contract comes to light.

This, of course, is only true of properly drafted contracts. A poorly drafted contract with ambiguous clauses will lead to more questions than answers. Even worse is a contract that does not contain all the essential elements.

Roughly, a contract can be described as an agreement concluded between parties with the intention to create rights and obligations. Should a contract be unclear about a party's obligations, the contract would serve little purpose. Sale agreements, as an example, must state with sufficient accuracy that the parties intend to transfer ownership of a specific object for a specific price. This is referred to as the essentialia of a sale agreement.

Where a contract does not contain all the required essential terms, such a contract will be null and void. This flows from the reasoning that there cannot be a 'meeting of minds' where one of the agreement's essential terms was never agreed upon.

However, the Supreme Court of Appeal has held that the terms which must be contained in a contract are not always confined to only the essential terms. In certain circumstances, a contract can also be declared null and void because other material terms, in addition to the essential terms, were not contained in the contract.

In the matter of *Cooper N.O. and Another v Curro Heights Properties (Pty) Ltd*,

the parties only recorded that a certain property was sold to the purchaser without stipulating that that property must first be subdivided. The contract further did not mention who would be liable for the costs of the subdivision or what would happen if the subdivision was not approved.

In 2023, the Supreme Court of Appeal held that the agreement, which was concluded in 2016 already, was null and void for not containing all the material terms. The court provided that to determine which terms constitute a material term that must be concluded in a contract, reference must be had to the effect that the term will have on the rights and obligations of the parties.

I believe the judgment highlights the importance of having a properly drafted contract. You are welcome to contact our offices should you require assistance with a contract.

Janus Olivier, Van Velden-Duffey Inc