

ACHIEVING GENDER NEUTRALITY IN CONTRACTS*

Michele van Eck
*Senior Lecturer, Department of Private Law
University of Johannesburg*

“The unfortunate truth is that the words and phrases which we use by habit may become the masters of our thoughts as much as they are its servants. We fall under their spell. We entangle our thinking in our own verbal net, becoming the slaves to our own vocabulary which needs regularly to be examined and reassessed.”¹

SUMMARY

Written contracts are expressed through language, which has legal consequences. Language is reflective of preconceptions and misconceptions of a particular matter or circumstance and language usage, being of a personal nature, may also impact a person’s dignity. This can be illustrated in the use of gendered language, which has historically been perfectly acceptable but have fallen in disfavour due to the potential preconceptions, presumptions, and biases that are inherent in stereotypical male-dominated language terms. The approach to replace the male term with a female equivalent still retains gendered language and fails in using gender-neutral language in a world where gender is not as simple as being classified as either male or female. Against this background, this article considers the existing gender-based framework, legal framework, and language framework to assess gender-based language found in written contracts and proposes a contract language framework in order to achieve gender neutrality in contracts.

1 INTRODUCTION

Contracting parties often express themselves through language,² and such language usage is a reflection of a party’s contractual obligations, which cannot be viewed or interpreted in isolation.³ The meaning and consequences attached to the language in contracts are linked to the accepted standards, norms, and values of society,⁴ the legal framework of

* Inspiration for this article was drawn from the author’s presentation at the 6th annual Quiltbag Seminar under the theme “Safe Spaces” (2019) held at the University of South Africa.

¹ Barker *The Drafting of Wills* (1993) 4.

² Cornelius *Principles of the Interpretation of Contract in South Africa* 3ed (2016) 3.

³ Burger *A Guide to Legislative Drafting in South Africa* (2009) 1, describes “language [as] the chief medium of communication and thought”.

⁴ For example, the Bill of Rights reflects the values of South African society.

the country, as well as the set of rules that have been established to guide the interpretation of contracts.⁵

In this sense, language plays an important role not only in achieving certainty within a contractual engagement but may also be a reflection of the thoughts of the drafter and the contracting parties themselves. After all, language forms the basis of the expression of ideas and thoughts within a wide variety of legal instruments, which consequently impacts individual lives in some way, shape, or form.⁶ For example, the written contract may impact the lives of the parties to the contract, and even third-party beneficiaries in instances where the contract contains a *stipulatio alteri*.⁷ This can be described as operating at a horizontal level.⁸ The influence of the written words in statutes has a much wider application influencing and impacting the lives of the people of a country,⁹ and this can be described as operating at a vertical level.¹⁰ In fact, Cornelius describes all forms of legal instruments as “indispensable sources, not only for creating but also for ascertaining modern law and legal relations”.¹¹ Yet, language is also of a personal nature, as the written word is a reflection of an individual’s thoughts, feelings, and attitudes.¹² It can even be said that the use of language in addressing a person is integral to a person’s sense of dignity and respect.¹³ Burger perhaps best describes it as follows:¹⁴

“Language is a tool that gives expression to our very way of life. There is not an aspect of our lives which is unaffected by language. We order our society through expressions of language – be they oral, written, gesticulated, or otherwise. Every aspect of our thought processes is facilitated by language. Language is the magical instrument of communication.”

Language can also be indicative of an individual’s preconceptions and misconceptions of a particular matter or circumstance. Take for instance gendered language usages in which the masculine language terms are used to express seemingly generic or objective terms. Such gendered language usages have historically been embedded in written discourse,¹⁵ and have

⁵ See, for e.g., Cornelius *Principles of the Interpretation of Contract*, which discusses the rules of interpretation applicable to South African contracts.

⁶ See general discussion on legal discourse in Cornelius “The Complexity of Legal Drafting” 2004 *TSAR* 693–699.

⁷ Cornelius *Principles of the Interpretation of Contract* 34, describes this as falling within the scope of private law.

⁸ Cornelius *Principles of the Interpretation of Contract* 34.

⁹ Cornelius *Principles of the Interpretation of Contract* 34, describes this as falling within the scope of public law.

¹⁰ Cornelius *Principles of the Interpretation of Contract* 34.

¹¹ Cornelius 2004 *TSAR* 693.

¹² See also Barker *The Drafting of Wills* 4.

¹³ Take, for example, *S v Madigage* 1999 (2) SACR 420 (W) where it was unacceptable to address a person in a court setting in Afrikaans as “jy” and that one should use the Afrikaans pronoun “u”. See also *S v Malatji* 1998 (2) SACR 622 (W) 624 where the Afrikaans pronoun “jy” and “jou” in a formal setting towards an accused was described as being both discourteous but also “inconsistent with the dignity and propriety which is required of a judicial officer”.

¹⁴ Burger *A Guide to Legislative Drafting in South Africa* 67.

¹⁵ See discussion in heading 2.2 (below).

been found in legal instruments. In the past, gendered language usages were perfectly acceptable but have fallen in disfavour due to the potential preconceptions, presumptions, and biases that are inherent in such stereotypical male-dominated language terms.¹⁶ To address this, the written discourse has mostly exchanged male-dominated language with its female equal. Yet, replacing the male language with the female equivalent is a limiting and narrow approach, as such language terms are still not fully gender-neutral in a world where gender is not as simple as being classified as either male or female.

Traditionally, the concepts of “gender” and “sex” have been considered synonymous terms, and such a classification has been described as binary.¹⁷ The binary classification essentially groups a person’s gender as either being male or female, which is ultimately linked to a person’s biological disposition at birth.¹⁸ The general understanding of these terms has evolved in that it is now understood that the concepts of gender and sex are not always the same. Gender can be described as the internal disposition with what a person identifies,¹⁹ or could even be described as a “cultural construction”.²⁰ Sex, on the other hand, can be described as the biological characteristics that group a person as either male or female at birth,²¹ and has also been described as a “natural distinction”.²² Our sophistication in understanding these terms has been driven by, amongst other things, the feminist discourse,²³ the equality jurisprudence under the legal reform of the South African Constitution,²⁴ as well as various specific pieces of legislation geared towards advancing the equal recognition of all people and groups of society.²⁵ Yet, language usage and recognition of marginalised groups in verbal and written discourse extend much further than this; the use of language can strike at the core of a person’s identity, dignity, and, even sometimes, a person’s self-worth. Herpolsheimer

¹⁶ *Ibid.*

¹⁷ See discussion in heading 2 (below).

¹⁸ See Sloth-Nielsen “Gender Normalisation Surgery and the Best Interest of the Child in South Africa” 2018 *Stell LR* 48 49. This is referred to as “primary sexual characteristics” in s 1 Alteration of Sex Description and Sex Status Act 49 of 2009.

¹⁹ This is referred to as “secondary sexual characteristics” in s 1 of Act 49 of 2009.

²⁰ Van Marle “Gender Mainstreaming – An Ethical Feminist Consideration” 2005 *Obiter* 642 644–645. See also the definition of “gender characteristics” in s 1 of Act 49 of 2009, describing this as “the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means”.

²¹ Clarke “They, Them, and Theirs” 2019 132(3) *Harvard Law Review* 894 897.

²² Van Marle 2005 *Obiter* 642 644.

²³ See, for e.g., Van Marle 2005 *Obiter* 644–645 and Bonthuys “The Personal and the Fiducial: Sex, Gender and Impartiality” 2008 24 *SAJHR* 239–262.

²⁴ See Albertyn “Substantive Equality and Transformation in South Africa” 2007 23 *SAJHR* 253 270–271. See also s 9 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (Constitution), which affords all people the right not to unfairly discriminate based on a person’s gender, sex or sexuality.

²⁵ See heading 2 (below).

summarises the impact of language on the issue of gender and sex as follows:²⁶

“Gender, sex, sexual orientation, and sexuality are distinct characteristics distinguishable from one another in varying degrees—but central to each is the relation to one’s own personal identity. Beyond the intimate relationship these terms have for the individual, society has historically used them as tools to identify and describe, but also to persecute and stereotype. By using the characteristics gender, sex, sexual orientation, and sexuality as tools to identify and describe, persons are inadvertently but inherently persecuted and stereotyped.”

Several themes emerge from Herpolsheimer’s comments that have a direct bearing on gender-based language in verbal and written discourse. The first is the centrality of a person’s association with their identity, which naturally leads to the individual’s sense of self (or dignity) and even the right to equality.²⁷ The second theme is how language can be used as a tool to liberate but can also simultaneously function as a tool to discriminate against marginalised groups within society.²⁸ Drafters of legal instruments, and particularly contract drafters (for the purposes of this article), must then take into account the potential role language plays within the legal discourse and private contractual engagements concerning individual gender preferences. It is against this background that this article intends to analyse how gender-based language is typically used in contracts,²⁹ and thereby establish a framework to achieve gender-neutrality in contracts generally.

2 GENDER-BASED FRAMEWORK IN SOUTH AFRICA

2.1 Background

It is conceivable that bias and discriminatory conduct will have an adverse impact on individual lives,³⁰ yet one must not lose sight of the impact originating from discriminatory conduct in the form of language usage in

²⁶ Herpolsheimer “Third Option: Identity Documents, Gender Non-Conformity and the Law” 2017 39(1) *Women’s Rights Law Reporter* 46 46.

²⁷ Botha “Equality, Plurality and Structural Power” 2009 25 *SAJHR* 1 8, describes the potential discrimination as follows: “A complex understanding of equality recognises, then, that different forms of discrimination may require different types of analysis. Discrimination on the grounds of sexual orientation can usually be expressed powerfully in the language of dignity, as discrimination against gays and lesbians is rooted in moral disapproval and results directly in an affront to their dignity and identity”. See, for e.g., Cowen “Can Dignity Guide South Africa’s Equality Jurisprudence” 2001 17(1) *SAJHR* 34 34. See also Liebenberg and Goldblatt “The Interrelationship Between Equality and Socio-Economic Rights Under South Africa’s Transformative Constitution” 2007 23 *SAJHR* 335 343, as well as *September v Subramoney NO* [2019] 4 ALL SA 927 (WCC) 951.

²⁸ Clarke 2019 *Harvard Law Review* 912, describes some of the reactions to non-binary individuals as being de-humanising.

²⁹ Cornelius *Principles of the Interpretation of Contract* 35, notes that language is used to convey the message of a contract.

³⁰ See, for e.g., Van Marle 2005 *Obiter* 647 that notes the importance of such personal experiences, specifically from a female perspective.

addressing a person.³¹ Take, for instance, the case of *September v Subramoney*,³² where the applicant was born a male but identified as a female. The applicant expressed this by dressing as a woman, having long hair, wearing make-up, and also referring to herself as a woman (which was done through using the female pronoun).³³ The applicant, being convicted and incarcerated for several crimes, felt that she was not able to express her gender identity,³⁴ which included not being addressed as a female and other people failing to use the female pronoun when referring to her.³⁵ She brought a claim of unfair discrimination based on the alleged contravention of section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act.³⁶ For the purposes of this discussion, it is useful to highlight the court's commentary that the prohibition of expressing one's gender could have an impact on the applicant's dignity, and was best summarised as follows:³⁷

"It is common cause that all people in our country, including the applicant, are entitled to their constitutionally enshrined human rights. Yet the applicant is not being afforded that recognition, protection and respect. She is prevented from expressing her identity. Conduct which is part of her experience of being human is being condemned. She is being denied the personal freedom to develop and express her true nature, therefore her dignity is being impacted on severely by the conduct of the respondents."

Language usage played an important role in *September v Subramoney*, with particular reference being made to how the applicant was addressed, and the particular pronouns used when addressing her. Two further examples can be found in the United States cases of *Whitaker v Kenosha Unified School District*,³⁸ and *Prescott v Rady Children's Hospital-San Diego*.³⁹ In both cases, a person's request to be addressed as a male was ignored.⁴⁰ In the one matter, the individual was born a biological girl but related to, and identified as, a transgendered boy, whilst in the other case, the individual was transitioning from female to male.⁴¹ However, in both instances, the request to be referred to as a male and to use masculine descriptors were simply ignored.⁴² What is of interest is that the court in *Prescott v Rady Children's Hospital-San Diego* had stressed the importance of the correct use of gender-based language for an individual's identification, noting that "[f]or a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing."⁴³

³¹ See, for e.g., *supra* 13.

³² *September v Subramoney NO supra*.

³³ *September v Subramoney NO supra* 931–932.

³⁴ *September v Subramoney NO supra* 930.

³⁵ *September v Subramoney NO supra* 931.

³⁶ 4 of 2000.

³⁷ *September v Subramoney NO supra* 958.

³⁸ 858 F 3d 1034 – Court of Appeals, 7th Circuit 2017, 1041.

³⁹ 265 F Supp 3d 1090 – Dist. Court, SD California 2017, 1097.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Prescott v Rady Children's Hospital-San Diego supra* 1097.

These examples are indicative of how the concepts of language and gender are interconnected,⁴⁴ and illustrate the importance of language when referring to a person's gender as well as the potentially destructive effect language can have when used incorrectly to refer to an individual. If language is then of such importance to an individual's sense of self, the question is posed as to what extent gender preferences are being used in legal discourse? To analyse this, both the legal and language frameworks are considered in relation to gender's role in written legal discourse.

2.2 Legal framework

The promulgation of the Constitution marked a distinct break from the past and sparked a revolutionary approach to recognising equal protection of all people within the boundaries of South Africa.⁴⁵ Of particular importance, in this context, is section 9 of the Constitution, which provides that all people have the right to be treated equally and should not be unfairly discriminated against on grounds of, amongst other things, gender, sexuality, and sexual orientation.⁴⁶ Although these rights are independent, they are to some extent also interdependent of each other,⁴⁷ and consequently gender equality, the rights of equality and dignity generally,⁴⁸ and even discrimination based on disabilities share certain commonalities.⁴⁹

In addition to the Constitution, several pieces of legislation exist dealing with gender, sex, and sexual orientation in some way, shape, or form, including those statutes that have been promulgated to give effect to the rights in the Constitution.⁵⁰ It is not the intention of this discussion to provide an exhaustive list of these pieces of legislation; however, key statutes have been selected to highlight the approach of the legislature concerning the concepts of gender, sex, and sexual orientation within South Africa. These include, for example:

- (i) Births and Deaths Registration Act.⁵¹ In terms of the Act, births must be registered in the population register and must include the child's sex.⁵² At this time only binary sexes are recognised in South Africa as a choice under the Act, being male or female.⁵³
- (ii) Identification Act.⁵⁴ The Act requires that an identity number be assigned to every person that is included in the population register⁵⁵

⁴⁴ Also alluded to in DiRusso "He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills" 2007 22(1) *Wisconsin Women's Law Journal* 14.

⁴⁵ See Liebenberg and Goldblatt 2007 *SAJHR* 338.

⁴⁶ See s 9(4).

⁴⁷ Liebenberg and Goldblatt 2007 *SAJHR* 338.

⁴⁸ Liebenberg and Goldblatt 2007 *SAJHR* 335 341–342.

⁴⁹ See, for e.g., Ngwena "Developing Juridical Method for Overcoming Status Subordination in Disablism: The Place of Transformative Epistemologies" 2014 30 *SAJHR* 275 281.

⁵⁰ See s 9(4) of the Constitution.

⁵¹ Act 51 of 1992.

⁵² *September v Subramoney NO supra* 940.

⁵³ *Ibid.*

⁵⁴ Act 68 of 1997.

⁵⁵ S 7(1) of Act 68 of 1997.

and must include every person's sex.⁵⁶ The number that is assigned to a person under the Act then represents certain information, including a person's date of birth and their gender.⁵⁷ As gender relates to an individual's preference and not necessarily their biological disposition, it would have been better for the Act to use the term "sex" rather than "gender".⁵⁸

- (iii) Promotion of Equality and Prevention of Unfair Discrimination Act.⁵⁹ This Act can be viewed as giving effect to the Constitutional right to equality,⁶⁰ and that no person may be discriminated against based on the prohibited grounds listed in the Act. Such prohibited grounds include sex, sexual orientation, and any ground that may impact a person's dignity,⁶¹ as well as the concept of gender.⁶² However, the Act permits certain forms of discrimination if it can be demonstrated that such discrimination is fair.
- (iv) Alteration of Sex Description and Sex Status.⁶³ The Act allows for the amendment of a person's sex in the country's population (or birth) register, if a person has surgically amended their sex, there has been a natural reassignment of gender or a person that is intersexed.⁶⁴ The Act provides four definitions that become applicable to the concept of sex and gender, being gender characteristics,⁶⁵ primary sexual characteristics,⁶⁶ secondary sexual characteristics,⁶⁷ and sexual characteristics.⁶⁸

These statutes highlight that the legislature has, in some respects, recognised the distinction between the concepts of "sex" and "gender", which is most recognisable when considering these statutes as a cohesive whole.

How society acts (and even reacts) towards people plays a significant role in how the spirit of the Constitution and subsequent language usages are practically imported into the interaction between individuals. Consequently, how language is used within discourse should be reflective of inclusivity,

⁵⁶ *Ibid.*

⁵⁷ S 8(b) of Act 68 of 1997.

⁵⁸ See discussion in heading 1 (above).

⁵⁹ Act 4 of 2000.

⁶⁰ *September v Subramoney NO supra* 944.

⁶¹ S 1 of Act 4 of 2000.

⁶² S 8 of Act 4 of 2000.

⁶³ Act 49 of 2003.

⁶⁴ S 2 of Act 49 of 2003.

⁶⁵ S 1 of Act 49 of 2003, which reads "means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means".

⁶⁶ S 1 of Act 49 of 2003, which reads "means the form of the genitalia at birth".

⁶⁷ S 1 of Act 49 of 2003, which reads "means those which develop throughout life, and which are dependent upon the hormonal base of the individual person".

⁶⁸ S 1 of Act 49 of 2003, which reads "means primary or secondary sexual characteristics or gender characteristics."

tolerance, and acceptance, especially when the interaction between law and language can be said to be part of the social fabric of society.⁶⁹

2 3 Language framework

Historically, the English language used male words in discourse when the gender was uncertain or unclear.⁷⁰ It was believed that the masculine term in the English language was generic and included, by default, the female equivalent.⁷¹ These language usages changed over time as there was a growing awareness that male-dominated language terms may not adequately reflect their female counterparts.⁷² The modern development in understanding these issues, as highlighted by Foertsch and Gernsbacher, has illustrated that the so-called generic “he” can be a form of bias towards the female gender.⁷³ This use of male-dominated language terms has been described as a “false generic” term,⁷⁴ and that “[t]his convention is rooted in discriminatory ideologies of the nineteenth century”.⁷⁵ The use of male-dominated language could then be described as gender-biased language.⁷⁶ In some respects, language usage has matured and has shifted from a predominantly male-dominated language usage into being more inclusive of the female gender equivalent.⁷⁷ Yet, this is not always the case, and two extreme modern approaches have emerged.

⁶⁹ Sarkisov and Kude “Pronoun Power the Standard for Gender Neutrality” 2017 *The Bar Association of San Francisco San Francisco Attorney* 40. See also Cornelius *Principles of the Interpretation of Contract in South Africa* 4, which notes that the way in which contracts are interpreted will be influenced by society and social changes at the time.

⁷⁰ See, for e.g., the US case of *Stearns v Veterans of Foreign Wars* 353 F Supp 473 – Dist. Court, Dist. of Columbia 1972, 476 which notes that “[t]he use of the pronoun ‘he’ and the words ‘enlisted man’ cannot reasonably be construed to be anything more than grammatical imprecision in drafting the clause. Masculine pronouns are often used to refer to antecedents of indefinite or mixed gender without modifying the meaning of the antecedents”.

⁷¹ Fischer “Framing Gender: Federal Appellate Judges’ Choices About Gender-Neutral Language” 2009 43(3) *University of San Francisco Law Review* 473 474.

⁷² Adapted from The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf (accessed 2021-01-11) par 6.27, noted that this the language used could be reflective of the view that it is “acceptable for woman to be subsumed within men linguistically”.

⁷³ Foertsch and Gernsbacher “In Search of Gender Neutrality: Is Singular ‘They’ a Cognitively Efficient Substitute for Generic ‘He’?” 1997 8(2) *Psychological Science* 106 106; *Rahube v Rahube* [2018] ZACC 42, par 2.

⁷⁴ Fischer *University of San Francisco Law Review* 475.

⁷⁵ Schweikart “The Gender-Neutral Pronoun Redefined” 1998 20(2) *Women’s Rights Law Reporter* 1 2; Fischer *University of San Francisco Law Review* 475, describes this as being a form of demeaning women.

⁷⁶ Fischer *University of San Francisco Law Review* 475, which also describes it as exclusionary and sexist language.

⁷⁷ Hord “Bucking the Linguistic Binary: Gender Neutral Language in English, Swedish, French, and German” 2016 3(4) *Western Papers in Linguistics/Cahiers linguistiques de Western* 1 (obtained from https://ir.lib.uwo.ca/wpl_cw/vol3/iss1/4).

At the one end of the spectrum, a stubborn persistence remains in using inherently male-dominated stereotypical language terms.⁷⁸ Many languages have gendered references embedded in their language structures,⁷⁹ but as legal instruments (particularly contracts) predominantly find themselves expressed in English in South Africa, the English language is focused upon herein. Fischer highlights that the English language uses gender-specific language in three broad instances, being:

- (i) Pseudo-generic male-linked words.⁸⁰ Take, for example, nouns that refer to both male and female but use a predominantly male-orientated word, such as man or mankind.⁸¹ Another example is generic male third-person pronouns, such as “he”, “him” or “his”.⁸²
- (ii) Gender-marked terminology.⁸³ This is found in the use of nouns to reflect gender in a specific role that a person occupies, such as chairman.⁸⁴ Or, even the distinction between Miss and Misses that distinguishes and identifies a female’s marital status.⁸⁵
- (iii) Formalistic and habitual language usage may also be a form of gendered language.⁸⁶ This can often take the form of patronising or belittling an individual based on their gender (often female).⁸⁷ Take for example referring to a woman as “girl”, “goose”, “honey” or “bird”.⁸⁸

At the other end of the spectrum, language usage could also falsely be perceived as being objective or neutral. This false sense of objectivity can take different forms,⁸⁹ but if the work of Van Marle is adapted and extended in its application to that of language usage in legal instruments then one could categorise a false sense of gender objectivity occurring in the following instances:⁹⁰

- (i) Complete exclusion.⁹¹ This describes an approach that completely excludes females (or other genders) from written discourse and only uses the male equivalent.⁹² In contracts, a complete exclusion could conceivably be present where definitions have not been used within

⁷⁸ This is not only an occurrence in language. Bonthuys 2008 24 *SAJHR* 250–253, explains that even the position of female judges still experience inequality within the South African judicial system.

⁷⁹ Take for instance the romans languages, such as German and French.

⁸⁰ Fischer *University of San Francisco Law Review* 476–477. See also Burger *A Guide to Legislative Drafting in South Africa* 71, which describes such language as being sexist and should be avoided in legislative drafting.

⁸¹ Fischer *University of San Francisco Law Review* 476–477.

⁸² *Ibid.*

⁸³ Fischer *University of San Francisco Law Review* 478.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Fischer *University of San Francisco Law Review* 479.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Van Marle 2005 *Obiter* 647.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

the contractual document and the document only refers to masculine language terms.

- (ii) Pseudo inclusions.⁹³ This type of approach would *prima facie* include females (or other genders) but actually has the substantive effect of marginalising such gender groups.⁹⁴ This could include, for example, the use of pseudo-generic male-linked words or even gender-marked terminology within the text of the contract, which was discussed earlier in this article.⁹⁵
- (iii) Alienations.⁹⁶ Although this approach does include the female (or other genders) in written discourse, a person's individual experiences are not considered authentic or taken into account when preparing and drafting the document.⁹⁷ Although this may, at first, seem irrelevant to the discipline of contract drafting, should the drafter ignore gender groups within the drafting process, it could be considered a form of alienation.

In both extreme instances, there remains the use of gender-based language in some way, shape, or form. The recognition of gender within any form of discourse, cannot be, and should not be limited to the binary categorisation of masculine and feminine.⁹⁸ After all, not all members of society identify or neatly fit within such binary gender roles.⁹⁹ Take, for example, a person could identify as being non-binary,¹⁰⁰ gender non-conforming,¹⁰¹ genderqueer,¹⁰² trans,¹⁰³ transgender,¹⁰⁴ or even pangender, and certainly other categorisations which have not all necessarily been listed herein. In addition to this, there may also be instances where a person, from a biological perspective, is born with both sets of reproductive organs.¹⁰⁵ With so many different possible ways in which a person may identify with their gender, it seems necessary that language must also be used to ensure

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Fischer *University of San Francisco Law Review* 476–479.

⁹⁶ Van Marle 2005 *Obiter* 647.

⁹⁷ *Ibid.*

⁹⁸ Kabba “Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity And Unambiguity?” 2011 37(3) *Commonwealth Law Bulletin* 427 429, suggests that gender-neutral language does not distinguish between male and female, however, to truly achieve gender-neutral language the non-binary nature of gender must also be taken into account.

⁹⁹ Darr and Kibbey “Pronouns and Thoughts on Neutrality: Gender Concerns in Modern Grammar” 2016 7(1) *Pursuit – The Journal of Undergraduate Research at the University of Tennessee* 71 73.

¹⁰⁰ Hanssen “Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law” 2017 96 *Oregon Law Review* 283 287.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ United Nations Department of Economic and Social Affairs Statistics Division “Gender Identity – Developing a Statistical Standard” (18 March 2015) <https://unstats.un.org/unsd/classifications/expertgroup/egm2015/ac289-Bk2.PDF> (accessed 2019-02-16) 42, “someone whose gender identity differs from their sex recorded at birth”.

¹⁰⁵ Sloth-Nielsen 2018 *Stell LR* 48–272.

the inclusion of all forms of gender identification within verbal and written discourse.

In legal discourse, there has already been some progress in this area. The avoidance of stereotypical and discriminatory practices has been recognised in some local and foreign judgments where the courts have attempted to use gender-neutral language when referring to a person in judgments,¹⁰⁶ and in some instances, the courts have specifically used the personal pronoun that correlates with the gender identified by the transgendered person.¹⁰⁷ If progress has already been made in order to address a person correctly based on their gender preference in the courts, the questions that follow are: to what extent do written contracts use gender-based language and whether more gender-neutral options are available in the contract drafting process.

3 GENDER-BASED LANGUAGE IN THE DRAFTING OF CONTRACTS

3.1 Background

Interpreting is the first step to the drafting of contracts, and the process of interpreting legal instruments such as contracts, wills, and statutes have many similarities.¹⁰⁸ So too, the process and practice of drafting contracts often borrow from other drafting disciplines, which can result in some similarities between the drafting practices of contracts and legislation.¹⁰⁹ In fact, contracts and legislation have much in common, as contracts have

¹⁰⁶ See, for e.g., *September v Subramoney NO supra* and *Attorney General of Canada and Attorney General of Ontario v Terri Jean Bedford, Amy Lebovitch and Valerie Scott* [2012] 256 CRR (2d) 143, ft referred to in par 17, the court recognises the reference to the female pronoun and explains its use in the judgment by stating “[t]hroughout these reasons, we use feminine pronouns when referring to prostitutes because the evidence establishes that the majority of prostitutes are women. However, we recognize that, as some of the interveners point out, there are also a significant number of men, and transgendered and transsexual persons working as prostitutes”. See also *Taschner v Freeman Decorating Services*, Dist. Court, MD Florida 2014 ft 2, which the court noted that “[a]s [the] Plaintiff has not specified a pronoun preference, the Court refers to Plaintiff as ‘she’ or ‘her’ as that appears to be the gender Plaintiff is presenting”. Further examples can be found in *Soneeya v Spencer* 851 F Supp 2d 228 – Dist. Court, D. Massachusetts 2012 ft 1; *Her Majesty the Queen v Shan Latif, Rubina Latif and Mohammad Latif* [2016] 351 CRR (2d) 202 par 4, and *Her Majesty the Queen v David Daley, Kevin Benons and Kevin Griffith* [2014] 302 CRR (2d) 240 par 6.

¹⁰⁷ See, for e.g., *Parents for Privacy v Dallas School District NO. 2*, Dist. Court, D. Oregon 2018 ft 3, “when referring to a transgender person, the Court uses the pronoun consistent with that person’s gender identity”; *Schwenk v. Hartford*, 204 F 3d 1187 – Court of Appeals, 9th Circuit 2000 1206 ft 1), noted that “[i]n using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun”; *Matter of Outman v Annucci* 49 Misc 3d 1129 – NY: Supreme Court, Albany 2015 1135 ft 1 “[t]he court will honor petitioner’s preference to be referred to by the female pronoun”; *League of Women Voters of Florida, Inc v Detzner* 314 F Supp 3d 1205 – Dist. Court, ND Florida 20 1225 ft 4 noted that the “Plaintiff Roy identifies as gender-queer and prefers the use of the gender-neutral pronoun ‘they’”.

¹⁰⁸ Cornelius *Principles of the Interpretation of Contract* 33.

¹⁰⁹ Cornelius 2004 TSAR 693.

been described as a form of self-regulation, which creates *ad hoc* legislation between the contracting parties.¹¹⁰ Therefore, contracts can be viewed as a form of personal and individualised legislation between contracting parties.¹¹¹ Considering the similarities between the legal instruments of statutes and that of contracts, it seems natural that, at least some aspects of contract drafting will find similarity with the legislative drafting approach. It is on this basis that certain answers in the gender-neutral approaches within contractual documents may be found in considering the equivalent legislative approach.

Legislation, like many other forms of written discourse, has in the past suffered from gendered language usage. Yet, with the introduction of the Constitution, there have been positive steps towards inclusive legal language used both within the Constitution itself and various other statutes.¹¹² Take, for instance, the interim Constitution has been the forerunner in changing old drafting approaches, as highlighted in the *President of the Republic of South Africa v Hugo*.¹¹³

The court highlighted that historically legislative drafting styles used that of masculine gender.¹¹⁴ Moreover, section 6(a) of the Interpretation Act of 1957 gave effect to such gender-based drafting approaches.¹¹⁵ In fact, the need for more inclusive language usage was recognised by the South African Law Reform Commission, in their discussion paper on the revision of the Interpretation Act of 1957.¹¹⁶ What is of interest is that the South African Law Reform Commission recognised that male-dominated language could be regarded as sexist and that gender-neutral language should recognise both the male and female genders.¹¹⁷

On the other hand, the written contract may use both the binary genders as well as a non-binary gender, however, such non-binary gender usage often refers to a juristic person or legal entities that hold no gender.¹¹⁸ Non-binary genders in this context are generally referred to as “it” in the singular, or “they” in the plural in the contractual setting. Yet, this does not, in itself, satisfactorily address the possible wider gender identification of non-binaries

¹¹⁰ Cornelius *Principles of the Interpretation of Contract* 35; Cornelius 2004 TSAR 693.

¹¹¹ Cornelius 2004 TSAR 693, notes that contracts (as well as other legal instruments) “are indispensable sources, not only for creating, but also for ascertaining modern law and legal relations”.

¹¹² See, for e.g., s 9 of the Bill of Rights.

¹¹³ *President of the Republic of South Africa v Hugo* 1997 (1) SACR 567 (CC) 597F–G.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See The South African Law Reform Commission “Review of the Interpretation Act 33 of 1957” Discussion Paper 12 Project 25 https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf (accessed 2021-01-11). See also Hofman “Comments on the South African Law Reform Commission’s Draft Interpretation of Legislation Bill” 2007 124 SALJ 479.

¹¹⁷ The South African Law Reform Commission “interpretation.pdf par 30.

¹¹⁸ LAWSA Vol 10(2) 2ed (2005) 392. Take for e.g., *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A), where the court noted “[t]he use of the pronoun ‘his’ again suggests a natural person” when assessing the concept of private person under s 7 of the Criminal Procedure Act 51 of 1977.

within the written contract. Other than for formalities required for certain specific contracts, there exist no legislative interventions that would regulate how contracts are drafted. The closest link to non-gendered language appears in the use of plain language in consumer contracts, but even in such instances little to no guidelines have been provided to draft contracts in gender-neutral language.¹¹⁹ Yet, gendered language is still used within contracts and can generally be found either in the interpretation clause, citing the parties, or the use of definitions. These aspects are discussed in the sections that follow and, where necessary, draw the comparative position of legislative and other legal instruments to highlight gendered-language practices that persist within the drafting of contracts.

3 2 Interpretation clauses

The correct use of gendered language terms when drafting a legal instrument was illustrated in the case of *Absa Bank Ltd v Botha*,¹²⁰ where the incorrect use of a gendered pronoun had serious consequences in a summary judgment application. The affidavit used in the application referred to a female deponent, whilst the commissioner of oaths stamp referred to a male deponent (in having used a masculine pronoun). The court found that this discrepancy was inconsistent with the requirements of the Uniform Rules of court.¹²¹ This case highlights a relatively common occurrence in legal instruments, and although it is not possible in affidavits, other legal instruments, such as contracts, wills, and even statutes, may attempt to avoid pronoun errors through an interpretation clause.

The process of interpretation between legal instruments such as contracts and statutes have some similarity in this regard¹²² and often incorporate an interpretation clause. Many contractual interpretation clauses may mirror the wording found in section 6 of the Interpretation Act of 1957, which reads:¹²³

“Gender and Number

In every law, unless the contrary intention appears—

- (a) words importing the masculine gender include females; and
- (b) words in the singular number include the plural, and words in the plural number include the singular.”

The Interpretation Act provides that should a statute refer to a male word then such a word would include a female equivalent.¹²⁴ Yet, the specific words used in section 6(a) may, in itself, be indicative of male-dominated language as highlighted in *President of the Republic of South Africa v*

¹¹⁹ See, for e.g., s 22 of the Consumer Protection Act 68 of 2008.

¹²⁰ *Absa Bank Ltd v Botha NO* [2016] JOL 37101 (GNP).

¹²¹ Rule 32(2). See also a similar case of *Oosthuizen v Steyn* 2020 JDR 0867 (GP).

¹²² Cornelius *Principles of the Interpretation of Contract* 33; Cornelius 2004 TSAR 693.

¹²³ 33 of 1957.

¹²⁴ See, for e.g., *Her Majesty the Queen v Jason Michael Cornell* [2009] 192 CRR (2d) 41 par 35.

Hugo.¹²⁵ The words “masculine gender” in section 6(a) can generally be defined as “having qualities appropriate to or normally associated with men”.¹²⁶ This could also mean that it is the male form of the word “of, relating to, or constituting the gender that ordinarily includes most words or grammatical forms referring to males”.¹²⁷ However, the words that follow in section 6(a) refer to “females”, and one would have expected to find the equivalent of “feminine gender” rather than “females” in the Interpretation Act. Notwithstanding the incorrect language used to denote the female gender, it does appear that the legislature intended to equalise the differences in language usage of both males and females,¹²⁸ but in doing so failed to recognise non-binary genders. Therefore, in its current form, section 6(a) only recognises the traditional binary classification of male and female. The South African Law Reform Commission noted that “the enactment of legislation in masculine language has been perceived as contributing to the perpetuation of a male-oriented society in which women are seen as having a lower status and value”.¹²⁹

In September 2006 the South African Law Reform Commission embarked on a statutory review of the Interpretation Act.¹³⁰ The purpose was to consider whether there was a need to update the Act to align with the Constitution and to avoid unintentionally discriminating based on gender. Although there has been some criticism raised in the proposed approach of the South African Law Reform Commission (being formalistic and adopting an approach of codifying the process of interpretation),¹³¹ there are certainly elements of the Interpretation of Legislation Bill of 2006 that is conducive to more inclusive language and interpretation of legislation. Take, for instance, the South African Law Reform Commission recommended that section 6(a) of the Interpretation Act would be updated and incorporated into section 28 of the Interpretation of Legislation Bill which would read as follows: “In any legislation a word denoting the masculine, feminine or neuter gender includes the other genders”.¹³² This amendment would then recognise that gender is not limited to binary gender classification but references neuter gender classifications as well. Until promulgated, the binary classification in section 6(a) of the Interpretation Act remains.

¹²⁵ *Supra* 597F–G.

¹²⁶ Merriam-Webster Dictionary “Definition of Masculine” (undated) <https://www.merriam-webster.com/dictionary/masculine> (accessed 2019-02-15).

¹²⁷ *Ibid.*

¹²⁸ The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.27, noted that the language used could be reflective of the view that it is “acceptable for woman to be subsumed within men linguistically. See also Burger *A Guide to Legislative Drafting in South Africa* 71.

¹²⁹ The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.27.

¹³⁰ The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf.

¹³¹ See, for e.g., Le Roux “The Law Reform Commission’s Proposed Interpretation of Legislation Bill: Critical Comments” 2007 22 *SA Public Law* 520–531.

¹³² The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.40.

Notwithstanding the proposed amendments made through the Interpretation of Legislation Bill, an argument can still be made that, irrespective of the amendments, such changes may not have the consequence of altering the drafting methodology employed in legislation.¹³³ One could still argue that should the drafting of statutes remain the same without considering the use of gendered language in the legislation itself, the interpretation provisions found in section 6(a) of the Interpretation Act and section 28 of the Interpretation of Legislation Bill could serve as a convenient “way out” for drafters to justify the continued use of exclusionary language and thereby creating a false form of gender-neutrality.¹³⁴ Therefore, the statute itself should ideally use gender-neutral language, as seen in examples like *S v Jordan*,¹³⁵ where the court found that the language of the Sexual Offences Act was set in a gender-neutral manner, therefore there was no unfair discrimination based on gender.¹³⁶ Other examples of gender-neutral legislation can be found in the words “spouse” in the Intestate Succession Act,¹³⁷ and the word “survivor” in the Maintenance of Surviving Spouses Act.¹³⁸ Having said this, the use of language in legislation in a gender-neutral manner does not in itself mean that there is no discrimination. The circumstances of every particular matter must be assessed to ascertain whether discrimination does indeed exist.¹³⁹

The legislative interpretation and drafting principles can be extrapolated to apply to contracts. After all, contracts are considered to be a form of *ad hoc* legislation between the contracting parties,¹⁴⁰ and thereby bear some resemblance in their drafting and interpretative approaches. In fact, many contracts already include similar language characteristics as found in section 6(a) of the Interpretation Act. However, the proposed wording in section 28 of the Interpretation of Legislation Bill may serve as a better guide to contract drafters to address both binary and non-binary genders in the expressed terms of written contracts. Hutchison and Pretorius, albeit a wordier alternative, provides for a similar gist to section 28 of the Interpretation of Legislation Bill and uses the following interpretation clause:¹⁴¹

“In this Agreement, unless expressly stated otherwise or where the context indicates otherwise, words in the singular shall also mean the plural and vice versa, words in the masculine also mean the feminine and the neuter and vice versa.”

¹³³ Constanza “Gender Neutral Drafting: Gender Equality or an Unnecessary Burden” 2018 5(1) *IALS Student Law Review* 34 34.

¹³⁴ Constanza 2018 *IALS Student Law Review* 34. See also the example in Burger *A Guide to Legislative Drafting in South Africa* 71, in which the author highlights the argument that the use of “he” would consequently also mean the female gender. Therefore, some may argue that there is no need to change in the usage of the masculine pronoun in legislative drafting.

¹³⁵ 2002 (6) SA 642 (CC).

¹³⁶ See also Jagwanth “Expanding Equality” 2005 *Acta Juridica* 131 135, which notes that the nature of the sex trade is of such a nature that it is likely that indirect discrimination could be prevalent.

¹³⁷ 81 of 1987.

¹³⁸ 27 of 1990.

¹³⁹ *Daniels v Campbell* 2004 (7) BCLR 735 (CC) par 21–22; Jagwanth 2005 *Acta Juridica* 135.

¹⁴⁰ Cornelius *Principles of the Interpretation of Contract* 35.

¹⁴¹ Hutchison and Pretorius *The Law of Contract in South Africa* (2017) 415.

versa, and words referring to a natural person shall include a reference to a body corporate and vice versa.”

Both the Interpretation of Legislation Bill and Hutchison and Pretorius still persist in referring to males and females. To achieve true gender neutrality, reference to binary-gender roles could be removed completely, and likely the most gender-neutral alternatives to the interpretation clause in contracts could read “unless the context shows otherwise, an expression which represents any gender includes the other genders”.¹⁴²

3 3 Citing parties and the use of definitions

The citation of the contracting parties is another element of a contract where gender-specific language may be used. One drafting technique to identify the contracting parties is not only to cite the contracting party but also to define the contracting parties, which may be generally useful for referring to a term or even the contracting party within a contract. In some instances, drafters, especially in older precedence, may mirror citation practices in court documents and processes when referring to a contracting party. This should be avoided, as it serves little purpose in a contract where the main purpose of referring to a party is the identification of a contracting party. The citation of parties in the content of pleadings are different and are regulated by rule 5(4) of the Magistrate Courts Act Rule and rule 17(4) of the High Court Uniform Rules, which are nearly identical in substance. In essence, both rules require the full name, gender, occupation, place of residence or business, and capacity to be included in the pleading.¹⁴³

As such, court pleadings require the use of an individual’s gender to be included in such documents.¹⁴⁴ This approach is sometimes adopted in contracts to describe the contracting parties. However, there is no need to include a person’s gender in a contract at all, as only the identity of the contracting parties needs to be included in a contract. As the inclusion of a person’s gender in contracts is not a requirement, nor does it add any further value in identifying the contracting party, it serves no purpose to include gender as part of the party descriptor in a contract. Therefore, it is submitted that the use of gender in referring to a party in a contract may, in most instances, be excluded to achieve a more gender-neutral language approach in the drafting of contracts.

4 CONTRACTUAL LANGUAGE FRAMEWORK

Drafting styles in written discourse are inherently subjective.¹⁴⁵ Yet, there are sometimes better ways of approaching drafting.¹⁴⁶ The plain language movement is renowned for best drafting practices in achieving effective

¹⁴² Clause obtained LexisNexis Online Forms and Precedence *Sale of Business – Precedent 1* (accessed 2021-02-05).

¹⁴³ Harms *Amler’s Precedents of Pleadings* 9ed (2018).

¹⁴⁴ See, for e.g., Van Blerk *Legal Drafting Civil Proceedings* (2014) 12.

¹⁴⁵ See, for e.g., Hofman 2007 *SALJ* 485.

¹⁴⁶ Adapted from SJ Cornelius’ saying used in his drafting of contract lectures.

communication. The use of readability indexes will often indicate how easy or hard a text is to read as well as the appropriateness of the language in relation to the intended audience.¹⁴⁷ To achieve gender-neutral language in the drafting of contracts, specific mechanisms concerning language usage within the contract construction should be considered.

As a starting point, the contract drafter should establish the contracting party's gender preference and reflect such a preference in the contract. Without first establishing the individual party's personal preferences, the correct use of the personal pronoun and other gendered terms is near impossible.¹⁴⁸ Some contracts employ other more inclusive approaches in using the male and female alternatives such as "his or her" or "his/her" in contracts.¹⁴⁹ Unfortunately, such an approach only recognises binary genders and all but ignores the non-binary gender classification. Therefore, it is recommended that such language be avoided and rather consider the actual gender preferences of the contracting parties.

The use of correct gender-based language could be adapted in bespoke contracts, however, in instances of standard contracts it may be best to employ gender-neutral language and techniques to ensure inclusivity of all members of society and consumer groups. To achieve such gender-neutrality in contracts the following mechanisms could be adopted:

- (i) The contract drafter should not blindly use precedence (whether that be for a contract or a specific clause) without first consciously considering the language usage.¹⁵⁰ Any gender-based language should be amended to gender-neutral language, alternatively, the individual's gender preference should be established before embarking on the changes to the contract.
- (ii) The interpretation clause within a contract should employ such language to be inclusive of all genders and must not be limited to binary genders only. In this regard, the language suggested by the South African Law Reform Commission relating to section 28 of the Interpretation of Legislation Bill model for contractual interpretation clauses could be adopted in the contract, or even more generic, neutral alternatives.¹⁵¹
- (iii) The contract drafters should avoid following the approach used in civil litigation in citing a person's gender when describing contracting parties. There is no legal requirement for contracts to identify whether a contracting party is male or female and omitting a person's gender will not impact the validity of the contract.¹⁵²

¹⁴⁷ Hofman 2017 *SALJ* 485.

¹⁴⁸ In Barker *The Drafting of Wills* 19–20, the process of understanding the client in the process of drafting a will is highlighted. Similarly, the process of understanding the contracting of the parties involved is important to address any gender preferences.

¹⁴⁹ The court in *Petersen v Master of the High Court, Cape Town* [2006] JOL 17358 (C), noted that the use of "his or her" in a will could indicate the use of pre-printed or pre-prepared documents.

¹⁵⁰ Van Blerk *Legal Drafting Civil Proceedings* 1.

¹⁵¹ See heading 3.1 (above).

¹⁵² See heading 3.2 (above).

- (iv) In instances where a standard contract is used, gender-neutrality can be achieved by using second-person personal pronouns as advocated by the plain language movement which uses words such as “you”, “your” or “their” and “our” to speak directly to the reader of the contract.¹⁵³

Notwithstanding point (iv) above, there may be instances where the second personal pronoun is simply inappropriate to use in a contract. In such an instance certain alternative techniques could be employed to achieve gender-neutral language within a contract, these being:

- (i) Instead of using gender-based language, the contract drafter could use “they” (and other grammatical forms such as “them”, “themselves”, and “their”) to refer to indefinite pronouns and singular nouns.¹⁵⁴
- (ii) The contract drafter could also replace the masculine pronoun with an article.¹⁵⁵
- (iii) Instead of using one of the genders exclusively, the contract drafter could use both pronouns “he” and “she” at the same time within the document, such as “s/he”.¹⁵⁶ Although this seems to be an elegant solution, it would not accommodate all members of the transgender community who simply do not identify with binary genders. On this basis, this approach is limiting and still is, at its core, the use of exclusionary language.
- (iv) Neutral words or phrases such as “person”, “any person”, “every person” or “no person” could be used to ensure that focus is not placed on a specific gender.¹⁵⁷ In some instances, it is suggested that the word “it” be used as a gender-neutral pronoun.¹⁵⁸
- (v) In some instances, the sentence could be rewritten to completely eliminate the pronoun.¹⁵⁹
- (vi) Although discouraged in the plain language movement, the use of the passive voice could in certain instances eliminate the need for a gendered pronoun.¹⁶⁰

¹⁵³ The use of such pronouns can often result in ambiguity as to whether the pronoun refers to the singular or plural, as was mentioned in passing in the case of *Rex v Rautenbach* 1949 (1) SA 135 (A) 147.

¹⁵⁴ Canadian Department of Justice on Legastics “Gender Neutral Language” (undated) <https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html> (accessed 2019-02-16). See also Benatar “Sexist Language: Alternatives to the Alternatives” 2005 19(1) *Public Affairs Quarterly* 1 5.

¹⁵⁵ *Ibid.*

¹⁵⁶ Foertsch and Gernsbacher 1997 *Psychological Science* 106; Canadian Department of Justice on Legastics <https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html>. See also (author unknown) “More Ways to Write in Sex-Neutral Language” (October) 1986 12(4) *Commonwealth Law Bulletin* 1102 1103.

¹⁵⁷ Canadian Department of Justice on Legastics <https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html>.

¹⁵⁸ Schweikart 1998 *Women’s Rights Law Reporter* 8. See also “More Ways to Write in Sex-Neutral Language” *Commonwealth Law Bulletin* 1103.

¹⁵⁹ Canadian Department of Justice on Legastics <https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html>; Fischer *University of San Francisco Law Review* 491.

- (vii) A drafter could use a synonym to avoid the need for a gendered pronoun.¹⁶¹ This is often achieved with the use of definitions and defined terms within the written contract.

As language is fluid and evolving there cannot be a single set of language rules that are applicable in the drafting of contracts. Although there is no right or wrong way of drafting a contract, there are better ways of approaching it.¹⁶² One could, therefore, state that a better way of drafting a contract is to recognise the dignity of all members of society and approach the drafting of a contract with gender-neutral language. Thereby, the legal space created by individual contractual engagements could be considered safe and dignified for all members of society regardless of their sexual orientation or their individual gender identification.

5 CONCLUSION

Society has, only fairly recently, seen another transformative shift in recognising non-binary genders. The legal framework, inclusive of the advent of the Constitution, has guaranteed equal treatment and rights to all members of society irrespective of their gender identification, sex, or sexual orientation.¹⁶³ Notwithstanding this, the language adopted in verbal and written discourse has, in many respects, yet to catch up with these developments to ensure a gender-neutral and inclusionary language usage that recognises all members of society.

A person's gender identification can be linked to their very identity and consequently their dignity.¹⁶⁴ Dignity can then be described as conduct that supports "the recognition of and respect for the unique identity and expression of each individual".¹⁶⁵ The opportunity exists to ensure that all members of society are afforded a safe legal space to co-exist, which can only be achieved by the inclusionary language employed for both binary and non-binary genders. This can be accomplished by abandoning the historical practices of gender-based language and employing different contractual approaches and drafting techniques to achieve gender-neutrality within private contractual engagements.¹⁶⁶ After all, language usage is one of the tools of the legal profession,¹⁶⁷ and the contract drafter has a responsibility to ensure that the language used in a contract is clear and accurate, but also inclusionary.

The reason for using exclusionary language in contracts could be summed up in the words of Barker who states that "the fundamental reason

¹⁶⁰ Fischer 2009 *University of San Francisco Law Review* 491–492. See also (author unknown) *Commonwealth Law Bulletin* 1103.

¹⁶¹ Fischer 2009 *University of San Francisco Law Review* 491–492.

¹⁶² A saying that Prof SJ Cornelius has used in his drafting of contracting lectures.

¹⁶³ See s 9 of the Constitution.

¹⁶⁴ See Botha 2009 25 *SAJHR* 1 2, which describes that a person's dignity is central to that of the right to equality.

¹⁶⁵ *September v Subramoney NO supra* 952.

¹⁶⁶ See heading 4 (above).

¹⁶⁷ Burger *A Guide to Legislative Drafting in South Africa* 1.

is that most of us develop bad habits in the use of language and these result in bad habits of thought.”¹⁶⁸ Perhaps when it relates to gender neutrality in the drafting of contracts, it is not necessarily bad habits of thought (as suggested by Barker) but rather an awareness of matters relating to gender to ensure contracts are drafted in more appropriate and inclusionary language within South Africa’s constitutional democratic context. In doing so, the account of both the feminist method and individual experiences within society should be imported within written discourse,¹⁶⁹ but equally so, it is important to take into account the personal experiences and perceptions of those individuals that identify as non-binary. After all, individuals, groups, and the collective society’s perceptions, values, and prejudices are often reflected in the use of language, irrespective of whether such language is found in verbal or written discourse. It is on this basis that the maturity and tolerance of a society can be said to be linked to how language is employed within a country’s legal framework and even private contractual engagements.

Both the law and language are intertwined and are expressions of the societal fabric of a country.¹⁷⁰ One must look to the not-so-distant past to find legally oppressed female rights and, consequently, language’s parallel path in male-orientated and male-dominated language usage during a time in history. Largely through the efforts of the feminist movement and advocates of women’s rights, both locally and internationally, social structures shifted and began recognising the equality of both males and females in the legal framework, private engagements, and language usages.¹⁷¹ So too, it is necessary to now also recognise other genders within the written context, and thereby (adapted from the words of the South African Law Reform Commission) ensure that that gender-neutral language “should become the general rule”,¹⁷² and thereby employ drafting practices to achieve gender-neutral language in contracts.

¹⁶⁸ Barker *The Drafting of Wills* 4.

¹⁶⁹ Van Marle 2005 *Obiter* 647–648.

¹⁷⁰ See, for e.g., Cornelius *Principles of the Interpretation of Contract* 4, highlighting the manner in which social change may influence the interpretation of words.

¹⁷¹ Fischer 2009 *University of San Francisco Law Review* 473. See also the discussion in Clarke 2019 *Harvard Law Review* 915–918,

¹⁷² The South African Law Reform Commission //www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.31, referencing Thornton.