

### ABSENCE OF CONSENSUS - MISTAKE

#### MISTAKE IN A CONTRACTUAL SENSE

Where a contracting party acts while under an incorrect impression regarding some other fact that relates to or affects the contract between the parties.

*Declared Intention vs. Subjective Intention*

All contracts are based on consensus between the parties to it. Often, the parties think that they are in agreement and have reached consensus, *but in fact are mistaken*. If the contract is concluded and it later turns out that *it was based on the mistaken belief that a certain state of affairs existed when in fact it did not*, the aggrieved party may want to opt out of the contract, or claim relief from the other party.

#### MISTAKE

- Parties **APPEARED** to have reached an agreement. However, one/both parties have different subjective intentions.

#### CASUAL MISTAKE

-Affects the mistaken party's decision to contract.

-The party would either:

- have not contracted at all OR
- would have contracted on different terms

#### Relevant

#### NON-CASUAL MISTAKES

-The party would have still contracted regardless of the mistake

### ABSENCE OF CONSENSUS - MISTAKE (cont)

Irrelevant

#### MISTAKE IN MOTIVE

-Only affects a party's *reasons* for contracting

-Despite the mistake, there is still *subjective consensus* between the parties on the *terms, parties and animus contrahendi*

#### ESSENTIAL (MATERIAL) MISTAKE

A mistake is *essential (material)* if it is *casual* AND it leads to *dissensus* (a lack of subjective consensus) between the parties on any of the following aspects

a) *Terms*

b) *Parties, or*

c) *Animus Contrahendi*

*\*Khan v Naidoo 1989 (3) SA 724 (N)*

#### TYPES OF MISTAKES

##### Unilateral Mistake

Where only *one party* makes a casual mistake.

**Effect:** Dissensus (*lack of consensus*): **VOID**

##### Mutual Mistake

*Both parties* make casual mistakes, but they make different mistakes.

**Effect:** Dissensus: **VOID**

##### Common Mistake

*Both parties* make the same mistake and the mistake is casual for both of them.

**Effect:** Consensus based on common false supposition (**STILL VOID**)

*\*Allen v Sixteen Stirling Investment (Pty) Ltd*

### ABSENCE OF CONSENSUS - MISTAKE (cont)

*\*Shepherd v Farell's Estate Agency*

#### MATERIAL AND NON-MATERIAL

##### Material

1) Goes to the heart of the contract

2) Completely negates consensus

3) No contract can be said to have existed

##### Non-Material

1) Does not exclude actual agreement

2) A valid contract comes into existence

3) The contract is voidable (rescindable) if consensus was reached improperly: by way of *duress, undue influence or commercial bribery*.

##### Material Mistake:

Parties must:

1) serious intention to contract;

2) be of one mind as to material aspects; and

3) be aware that all parties are of the same mind

If one or more of the above is lacking = **MATERIAL MISTAKE**

##### (a) Mistakes re parties to a contract

*National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A)*

##### (b) Mistakes re material terms

*Allen v Sixteen Stirling Investments (Pty) Ltd*

### ABSENCE OF CONSENSUS - MISTAKE (cont)

(c) Lack of understanding of legal consequences of a contractual provision - usually unaware

- where a party is mistaken as to the *contents* of the obligations that the parties wish to create. Any mistake arising therefrom is material.

*Du Toit v Atkinson's Motors Bpk 1985 (2) SA 889 (A)*

##### Non-material mistake:

- Does not affect the consensus.

##### Error in motive:

- Mistake regarding the reason/motive for the mistaken party agreeing.

##### Mistake - The Roman System of Classification

(1) error in *corpore*: mistakes can relate to the subject matter of the contract (**material**)

(2) error in *negotio*: mistake re the true nature of the contract.

*\*Khan v Naidoo 1989 (3) SA 724 (N)*. (**material**)

(3) error in *persona*: mistake re the identity of one of the parties to the contract. (**sometimes material**)

(4) error in *substantia*: mistake re an attribute or characteristic of the subject matter of the contract, i.e. it does not render the contract void. (**usually not regarded as a material mistake**)

(5) error in *motive*: mistakes as to the party's reasons for entering into the contract. (**not material**)

### ABSENCE OF CONSENSUS - MISTAKE (cont)

*Kok v Osborne 1993 (4) SA 788 (SE)*

The seller accepted an offer ostensibly made by two buyers jointly. However, the offer was actually from only one buyer. It was clear that the defendant in that instance would not have accepted the offer had he known the true position (**error in persona**)

**HOWEVER...** in *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd. 1996 (3) SA 966 (SCA)* - error in **persona** is material only if the identity of a party is of vital importance to the mistaken party.

#### JUSTUS ERROR

- 1) material error
- 2) reasonable error

*Allen v Sixteen Stirling Investments (Pty) Ltd.*

*Sonap Petroleum SA (Pty) Ltd (formally known as Sonarep (SA) (Pty) Ltd) v Pappadogianis.*

#### FACTS:

### ABSENCE OF CONSENSUS - MISTAKE (cont)

S and P entered into a finance lease. The agreement was supposed to provide for a lease of the premises for a period of 20 years, after which P would be the owner of the property. However, when S submitted the written offer to P, the period of the lease was accidentally given as 15 years instead of 20 years. P, fully aware of the discrepancy, readily accepted as the 15-year lease period as it meant that he would acquire ownership of the property sooner. When S realised the mistake and tried to change the lease period to 20 years, P refused.

#### COURT HELD:

S was the mistaken party, since its declaration (the written contract of lease of 15 years) differed from its true intention (that it wanted to lease the property for 20 years). There was therefore a misrepresentation of contractual intention by S. However, P knew that S wanted to lease the property for 20 years and not 15 years. P had not honestly relied on the impression created by S signing the contract. P was 'snatching at the bargain' - even though he knew what S' true intention was, he was trying to enforce the written contract. S was not bound by the written contract because there was no reliance by P.

#### Rectification:

### ABSENCE OF CONSENSUS - MISTAKE (cont)

- sometimes, when committing negotiated terms to a written format, a failure to correctly indicate the common intention of the parties occurs. (unintentional)

- remedy for correcting mistakes in written contracts.

- generally, parties can correct themselves (by agreement) or simply perform as per the correct intention.

(1) in the event of a dispute - a party may apply to court for rectification or correction of the written document - allows for the correct actual common intention of the parties to be reflected

(2) where a person applies to court to 'rectify' a contract that he has entered into, he is asserting that the written contract, as it stands, does not accurately reflect the true intention of the parties, and he is asking the court to order that the contract be rephrased so as to accurately reflect the true mutual agreement of the parties at the time they entered into their agreement.

(3) remedy available only where all the parties to the contract were in fact of one mind, but the written contract failed to accurately express their consensus.

### ABSENCE OF CONSENSUS - MISTAKE (cont)

(4) rectification is therefore not a remedy that is available where only one or some of the parties were under a misapprehension or mistaken impression

(5) rectification does not create a new contract, nor does it amend an existing contract; it merely serves to correct the written memorial of the agreement so as to accurately express the true intention of the parties. (*Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd [2009] (3) SA 447 (SCA)*)

#### Who may apply?

A party to an incorrectly recorded agreement.

#### When can you apply (under what circumstances)?

Document does not reflect the true intentions of the parties - *bona fide* mistake.

#### What does one need to prove/show?

Document does not reflect the common intention of the parties.

### IMPROPERLY OBTAINED CONSENSUS

- 1) Duress
- 2) Misrepresentation
- 3) Undue influence
- 4) Bribery of an agent

- The contract is deemed **voidable** at the instance of the innocent party

- Contract deemed to be valid until misrepresentation, coercion, or undue influence is proven.

### IMPROPERLY OBTAINED CONSENSUS (cont)

#### DURESS

Occurs when a party is induced to enter into the contract by **compulsion (pressure/coercion)**

- Improper pressure leading to intimidation

If one enters into a contract under duress, doing so because of fear as a result of an *illegitimate threat*

- A contract obtained by improper means is **voidable at the option of the threatened party**

- The threatened party may set aside and *claim restitution and damages*

#### Elements:

*Broodryk v Smuts*

1) Actual violence (physically occurring/in progress) or reasonable fear

2) Caused by threats of some considerable evil to the party or his family

3) It must be a threat of an imminent or inevitable threat

4) The threat or intimidation must be **contra bonos mores**

5) The *moral pressure* used must have caused 'damage' (*causation*)

#### Coercion

**vis compulsive** - coercion of the will (not physical force).

**Coercion operates on the mind of the victim** by forcing him/her to choose between entering the contract or suffering harm

### IMPROPERLY OBTAINED CONSENSUS (cont)

#### Actual Violence/Reasonable fear

Threat must be sufficiently grave to affect the mind of a reasonably steadfast person

The more unreasonable the fear, the greater will be the reluctance of the court to accept that it actually induced the contract

Subjective factors - *age, personal circumstances, etc.*

*Paragon Business Forms (Pty) Ltd v Du Preez*

The case dealt with the scenario where a former employee had alleged that he felt that he had no option but to sign an agreement containing a restraint of trade. The threat of dismissal was not expressed. The court there believed that there was no threat of dismissal and the alleged fear by the respondent was *illogical and unreasonable*

**Actual Violence:** X punches Y until agrees to sell his cellphone to him

**Reasonable Fear:** X threatens to punch Y until Y sells his cellphone to him

#### Threats of some Considerable Evil to the Party or his Family/Object of the threat

The threat must be directed at **life, bodily integrity, liberty, or property, or the immediate family**

### IMPROPERLY OBTAINED CONSENSUS (cont)

Some courts have indicated that *there must be proof of protest at the time or entry into the contract to prove the involuntary nature of the transaction*

If no protest, relief can still be granted if there is satisfactory evidence to establish that the contract was concluded as a result of duress

#### Imminence of Harm

The threat must be **imminent or inevitable**

Courts have shown - if threatened harm is neither "- imminent or inevitable" - **show that the threatened party has no reasonable or acceptable alternative available other than succumbing to the threat by entering the contract**

**imminent:** about to happen

**inevitable:** no way to prevent it

#### Unlawfulness of the Threat

**contra bonos mores**

**Test:** *the legal convictions of the community (BOE Bank Bpk v Van Zyl)*

The threat to bring civil action is not unlawful.

Threat to institute criminal proceedings - threat is unlawful if it is used to extort a benefit to which the creditor is not entitled or if the debtor is innocent of the alleged crime

#### Damage

Financial Loss.

### IMPROPERLY OBTAINED CONSENSUS (cont)

#### *Broodryk v Smuts*

The person alleging duress must show they have *become subject to obligations that they would not have otherwise have incurred*

**Fundamental Duress:** party would not have contracted

**Incidental Duress:** party would have contracted on the different terms

#### UNDUE INFLUENCE

A form of **improper pressure** brought to bear upon a person to induce him/her to enter into a contract

Pressure is more **subtle** here - erosion of the innocent party's ability to exercise a free and independent judgement

A close relationship between parties exists, e.g., **doctor/patient, attorney/client, parent/child, religious leader/discipline, etc.** \*the other party abuses the relationship\*

#### Elements:

*Patel v Grobbelaar\**

1) The aggrieved person was subjected to influence by another

2) The influence weakened the aggrieved person's capacity to resist and rendered the aggrieved person *pliable*

### IMPROPERLY OBTAINED CONSENSUS (cont)

3) The other person exploited this influence unscrupulously to persuade the aggrieved person to agree to a transaction which was both to the aggrieved *person's detriment (prejudicial) AND was a transaction that would not have been concluded had the aggrieved person acted of their own free will*

**Onus** of the party alleging undue influence is to prove it occurred.



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