The significance of consensus in the Law of Contract

By

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ABSTRACT

This dissertation explores various legal theories, doctrines, and principles on consensus, and, to this end, highlights the significance of consensus, being one of the requirements for a valid contract, as the basis for contractual liability in South Africa. It, further, canvasses, the significance of consensus on the interpretation of contracts, with particular focus on the *prima facie* misalignment between the primarily subjective nature of consensus as the basis for contractual liability versus the objective approach to interpretation of contracts in the South African legal system. To the latter end, this dissertation further traverses the question of whether the possible misalignment, between the basis for contractual liability and contractual interpretation, justifies constitutional development of the law relating to interpretation of contracts. Lastly, the dissertation focuses on legal considerations that a drafter must consider, in order to ensure that a contractual instrument is not only legally sound, but also facilitates the enforcement of the parties' subjective common intention, even when interpreted objectively.

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Chapter 1

1.1 Introduction

The research objective of this dissertation is to:

- display how consensus, as one of the requirements for a valid contract, cannot be dispensed with in the formation of a valid and legally enforceable contract, and provide insight on theories of contract that have either influenced the South African approach to consensus or have an impact on other aspects of the Law of Contract;
- canvass the relationship between legal principles relating to consensus and the theories of contract, in general, with those applicable to contractual interpretation; and
- with reference to the above, explore the importance of drafting a contract such that the common intention of the parties is readily ascertainable with reasonable precision from the contractual instrument itself, and delineate ways in which this can be achieved.

1.2 Methodology

In doing this, a legal dogmatic approach is followed, and is based on literature review of relevant sources. Observations made, and personal opinions formed in relation to these issues are expressed, where considered necessary.

1.3 Structure

In order to provide the context for the rest of this dissertation, the next chapter focuses on consensus as the basis for contractual liability. In Chapter 2, consensus is portrayed as one of the *essentialia* for a valid, binding, and legally enforceable contract. It is argued that the South African approach to contractual liability is primarily subjective in nature.[1] This presupposes the actual meeting of the minds of the parties (*concursus animorum*),[2] which is also referred to as true consensus, *consensus ad*

[1] Hutchison, D *et al The Law of Contract in South Africa* 3rd ed (2017) 17 at §1.7.5
[2] *Jordaan v Trollip* 1960 1 PH A25 (T), Hutchison 14

idem, coincidence of the wills, or the real consensus of the parties.[3] As a result, consensus on all material aspects of the agreement is the basis of contractual liability.[4] Some legal scholars even argue that consensus is the foundation of an enforceable contract.[5] An objective approach to contractual liability is only followed in exceptional circumstances where a party has reasonably led another into believing that he has agreed to the terms proposed by the other, which is discussed in more detail under paragraph 2.3.1.

The focus of Chapter 5 is on how despite the subjective approach to contractual liability, contractual interpretation is, by contrast, objective in nature. The contractual text is construed as a reasonable person would, in the same context, understand it.[6] Although there is plenty authority to the effect that the primary goal of contractual interpretation is to ascertain the common intention of the parties (or concurrence of their intention),[7] the parties' common intention is ascertained, not with reference to either party's subjective intention, or the parties' subjective common intention, but with reference to the objective construction of the words used to express their agreement.[8] Since the inquiry into contractual interpretation is about ascertaining the objective meaning of contractual text, and not about ascertaining the parties' subjective common intention, it is imperative that a drafter approaches the process of reducing the parties' agreement to writing circumspectly.

Chapter 4 focuses on how a drafter should, therefore, display, in a contractual instrument, that the parties have reached consensus on all material aspects of the

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3 *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 994-6

4 LAWSA Vol 9 (3rd Edition) at §296, GB Bradfield in Christie's Law of Contract in South Africa (2016) 24

5 Christie 29 at 2.1.2; Hutchison 21 at §1.8; *Rose-Innes Diamond Mining Co Ltd v Central Diamond Mining Co Ltd* 1883; C J Pretorius *'The basis of contractual liability in English law and its influence on the South African law of contract'* 2004 The Comparative and International Law Journal of Southern Africa Vol. 37, No.1 96 at 122-3

6 Christie 241 at §5.4.3; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18]

7 AJ Kerr in The Principles of the Law of Contract (2002) 4 and 386; SJ Cornelius in Principles of the Interpretation of Contracts in South Africa (2016) 32 at §3.2; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 435; *Saambou-Nasionale Bouvereniging v Friedman* at 993E-F; Podolny R 'A Pragmatic Approach to Contractual Interpretation' (2014) 55 *Can Bus LJ* 428 at 448 451

8 *Worman v Hughes* 1948 (3) SA 495 (A); Kerr 388; Podolny R 'A Pragmatic Approach to Contractual Interpretation' (2014) 55 *Can Bus LJ* at 438 444

type of contract that the parties wish to conclude (the *essentialia*[9]), and any other material aspect that the parties have chosen to incorporate into their agreement (the *incidentalia*[10]). Failure to define the *essentialia* and *incidentalia*, including the parties' respective performances, clearly and sufficiently, may nullify their contract; obscure their common intention; and hinder the ascertainment of their purported construction of the contractual text. This could be fatal to the enforcement of the agreement that the parties envisioned, which underlies the contractual instrument.

9 Hutchison 247 at §10.3.1
10 Hutchison 248 at §10.3.1

Chapter 2

2 Consensus as the basis for contractual liability

This chapter explores the subjective, objective, and quasi-objective consensus which, over the years, have resulted in various legal theories, doctrines, and principles that govern the ascertainment of consensus and contractual liability in South African today. By extension, this chapter further distinguishes between contracts that are *void ab initio*[11] and those that are voidable,[12] where the law respectively deems a purported contract as never having come into existence, or in terms of which a valid contract is set aside.

2.1 Meaning of consensus and its significance on contractual liability

Consensus is defined as the meeting of the parties' minds on all material aspects of their contract. In other words, consensus is the mutual agreement of the parties that underlies a contract. This is often referred to as *consensus ad idem*. Du Plessis asserts that "the parties' intent in their minds must match (or at least appear to match) on all material aspects of their agreement".[13] The actual intellectual matching or meeting of the parties' minds is referred to as subjective consensus, whilst the appearance of matching or meeting of the parties' minds, which is discussed further below,[14] is referred to as objective or quasi-objective consensus. The legal theories on which these two broad types of consensus are based are discussed below.[15] According to Hutchison,[16] the parties' reach subjective consensus, when:

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11 Purported contracts that are a nullity, as they never gave rise to contractual liability either because of defective consensus or dissatisfaction of any other requirement for a valid contract, thus are not legally enforceable.
12 Contracts that are considered to have been valid, thus having given rise to contractual liability, until a court declares them invalid, because of defective consensus between the parties.
13 LAWSA Vol 9 (3rd Edition) at §296
14 Under paragraph 2.3.1
15 Under paragraph 2.4
16 Hutchison 14 at §1.7.2

- they seriously intend to contract;
- are of one mind (*ad idem*) as to the material aspects of the contract – namely, the terms of the proposed agreement, and the identity of the parties to it; and
- are conscious of the fact that their minds have met.

Consensus is one of the five legal requirements for a valid, binding, and enforceable contract. The other four are contractual capacity; legality; certainty and possibility of performance; and formalities.[17] If any of these requirements is not met, there can be no valid, binding, and enforceable contract between the parties, thus contractual liability does not arise between them. These five legal requirements are referred to as the *essentialia*, and are implied into a contract by the operation of law. Various scholars argue that consensus is the cornerstone of an enforceable contract.[18] Consensus could, therefore, also be defined as the agreement of contracting parties on all material aspects of the contract they are entering into, which agreement gives rise to contractual liability between the parties for the fulfilment of their respectively agreed obligations. Contracting parties must, therefore, have consensus at the time at which a contract is concluded. In addition to the parties' minds meeting on all *naturalia*, they must also be *ad idem* on all *essentialia* (i.e. contractual terms that categorise a contract as a particular specific contract) and *incidentialia* (i.e. contractual terms that the parties choose to include in a contract whose omission would, ordinarily, not affect the validity and enforceability of their contract), before a valid, binding, and enforceable contract is concluded between them. It is common course that without a valid, binding, and enforceable contract, there can be no contractual liability between the parties.[19]

The parties' consensus, both subjective and objective, is ascertained by having regard to external facts, as Wessels states:

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17 Hutchison 6 at §1.2; 153

18 Christie 29 at §2.1.2; Hutchison 21 at §1.8; *Rose-Innes Diamond Mining Co Ltd v Central Diamond Mining Co Ltd* 1883; C J Pretorius *'The basis of contractual liability in English law and its influence on the South African law of contract'* 2004 The Comparative and International Law Journal of Southern Africa Vol. 37, No.1 96 at 122-3

19 C J Pretorius states that: "*In modern English law contracts are still defined generally as legally enforceable agreements giving rise to obligations between the contracting parties. The notion of agreement thus remains central to the issue of contractual liability*." (102; 122-123)

> "Although the minds of the parties must come together, courts of law can only judge from external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance."[20]

2.2 Origins of South African approach to consensus

The modern day South African theories, doctrines, and principles, on consensus, have evolved from the Roman-Dutch Law and English Law.

2.2.1 Consensus under Roman-Dutch Law

The Roman-Dutch law, on consensus, gravitated towards actual, subjective consensus between the parties, which ties in with the *animus contrahendi* doctrine,[21] which is elaborated upon below. This presupposed the existence of subjective agreement in the mind of each contracting party, for legal liability to arise from an agreement.

The first drawback with this approach is that the subjective mind frame of the parties cannot be readily ascertainable. As Pretorius states:

> "…the notion that liability was contingent upon *consensus ad idem* was reasonably plausible, but it was problematic in practical terms to apply a wholly subjective inquiry as to the existence of subjective agreement between the parties. The inadequacies inherent to such an approach, led to the importation of the objective theory of assent in terms of which contractual consent was determined objectively. The question was not whether the intentions of the parties in fact concurred, rather whether the external signs of agreement were such as would lead reasonable person to assume that they had".[22]

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[20] Christie 30 at §2.1.2; *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715; *Jordaan v Trollip* 1960 1 PH A25 (T)

[21] Hutchison 18 at §1.7.5

[22] C J Pretorius *'The basis of contractual liability in English law and its influence on the South African law of contract'* 2004 The Comparative and International Law Journal of Southern Africa Vol. 37, No.1 96 at 99 - 100

Christie argues that subjective consensus is more a philosophical than a legal concept.[23] The second drawback is that a contract that was based on a unilateral or a common mistake could not be rectified, however unjust that might be.[24]

2.2.2 English Law approach to consensus

The English law has, for the longest time, gravitated towards objective consensus[25]. Objective consensus was crystallised by English courts' endorsement of the doctrine of quasi-mutual assent,[26] after a brief period of influence of the notion of *consensus ad idem* on the English legal system. Blackburn J summarised quasi-mutual assent as the reading of consensus where another party conducts himself in a manner that leads another to reasonably believe that he has agreed to all proposed contractual terms.[27]

An objective approach, that is not tested against contracting parties' true subjective intention, is flawed in that it could lead to an absurdity in terms of which a party, who had no intention of entering into a binding contract that gives rise to legal rights and obligations, could be deemed to have entered into a legally binding contract thus be forced to fulfil legal obligations that arose out of such a tacit contract.[28] This is the point of departure of the modern-day South African system, as discussed in more detail below.[29]

2.3 Modern-day South African approach

Until *Pieters & Co v Salomon*,[30] the South African approach on contractual liability was solely based on the Roman-Dutch subjective approach, in terms of which there could be no contract, unless there was true subjective mutual assent on every material term of the contract.[31] This excluded the possibility of objective consensus, which the judiciary adopted in *Pieters & Co v Salomon*. *Pieters & Co v Salomon* saw the

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23 Christie 30 at §2.1.2
24 Christie 11 at §1.4; Hutchison 16 at §1.7.4
25 Hutchison 18 at §1.7.5; Christie 11 at §1.4
26 See paragraph 2.3.1
27 *Smith v Hughes* (1871) LR 6 QB 597 at 607
28 See footnote 21 *supra*
29 See footnote 22 *supra*
30 1911 AD 121
31 Christie 11 at §1.4

importation of the English concept of objective consensus into the South African law. This approach was to be reinforced by Wessels JA later.[32]

In *Pieters & Co v Salomon*, A had made an unqualified offer to settle B's debt to C, which C accepted. A had been under a mistaken belief that B's debt was for £345, when it was, in fact, for £490. As a result of A's mistaken belief, a dispute arose between A and C. Even though there was, therefore, no subjective consensus between the parties, and therefore no contract between A and C, according to the Roman-Dutch approach, the then Appellate Division upheld C's claim. The reasoning for the Appellate Division's ruling was that A had not expressed any reservations upon which his offer, to settle B's debt, was conditional, thus led C to reasonably believe that his offer was to pay C the actual outstanding amount (regardless of what it was).

Pieters & Co v Salomon, however, did not entirely overhaul the South African approach to contractual liability; it merely added an objective dimension to it. The modern-day South African legal approach to consensus recognises the significance of the parties' intention to enter into a contract that gives rise to legally enforceable rights and duties (*animus contrahendi*).[33] Where subjective intention is unascertainable, the enquiry then proceeds to consideration of an appearance of consensus, from surrounding facts. The modern-day South African approach to consensus is therefore a hybrid system, in terms of which the good of both the Roman-Dutch and the English approaches have been incorporated into our law, with the nett effect of the shortcomings of the Roman-Dutch and the English approaches being balanced out. Thus, contractual liability is primarily still determined by having regard to the parties' real intention (subjective consensus).[34] Objective consensus is only resorted to where real, subjective consensus cannot be readily ascertained or where there is dissensus.

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[32] See footnote 10 *supra*
[33] Hutchison 17; Christie 10
[34] *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 994-6

2.3.1 Quasi-mutual assent

This doctrine originates in English law, and precludes a party, who knowingly conducts himself in a manner that reasonably leads another into believing that he or she agrees with all the material terms of a contract, from vitiating a contract on the basis of the parties not having been *ad idem*.[35] However, the party that seeks to rely on the doctrine of quasi-mutual assent, to prove the existence of consensus, must not have been negligent or careless in believing that the other party had agreed to all the material terms of the contract.[36]

In *Van Ryn Wine & Spirit v Chandos Bar*,[37] Mrs Hartley who owned a restaurant, had bought wines from a salesman employed by Van Ryn Wine, who promised her a discounted price, if she paid the purchase price to the salesman in cash. After being paid the discounted purchase price, the salesman advised Mrs Hartley to ignore Van Ryn's subsequent invoices for the full amount. Mrs Hartley duly ignored Van Ryn's invoices for the full amount, not knowing that the 'discounted' amounts she had paid the salesman had never been paid over to Van Ryn. In a claim against Mrs Hartley, Van Ryn argued that Mrs Hartley was liable for the full amounts, as she never disputed the full amounts, upon receipt of invoices, as a reasonable man would have. The court, subjecting Van Ryn to an objective test, held that a reasonable company in Van Ryn's shoes would have picked up the fraud perpetrated by its salesman. Van Ryn, therefore, could not avail itself of the doctrine of quasi-mutual assent, as it had acted negligently.

In *Steyn v LSA Motors Ltd*,[38] the then Appellate Division held that where the offeror's expression of their intention differed from their true intention, the acceptance of the misaligned offer could not give rise to contractual liability. Only where it was proven that a reasonable man, in the shoes of the offeree, would have believed that the expressed offer represented the true intention of the offeror could contractual liability arise. In this case, LSA Motors had sponsored a golf tournament, in which Steyn

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35 *South African Railways & Harbours v National Bank of South Africa Ltd; Pieters & Co v Salomon supra*
36 *Patel v Le Clus* 1946 TPD 30 at 34; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 354 (SCA) at 21-23
37 1928 TPD 339 at 423
38 1994 (1) SA 49 A

participated, promising that whoever scored a hole-in-one would win the displayed car. Steyn managed to score a hole-in-one and claimed the car, a request that LSA Motors refused. LSA Motor's refusal was based on an argument that the true intention was to reward a professional golfer, who scored a hole-in-one, with the car. Thus, Steyn did not qualify for the prize, as he was an amateur golfer. The court upheld LSA Motor's refusal.

A test for quasi-mutual assent was developed in *Pillay v Shaik,*[39] a case in which the Supreme Court of Appeal held that a party who wishes to rely on quasi-mutual assent must answer the questions:

- was there a misrepresentation that the parties had reached consensus *ad idem*;
- who made the representation;
- did the misrepresentation mislead the other party into believing the parties had reached consensus on all the material terms of the proposed contract; and
- would a reasonable person have been similarly misled into believing that the parties had reached consensus?

In this case, the buyers had separately bought the sellers' interest in a close corporation that owned rights to sectional title units in a sectional title scheme that the sellers were going to develop. In pursuance of this agreement, the sellers had given the buyers a standard offer to purchase (for the sectional title units), which the buyers signed and sent to the sellers' attorney. With the consent of the sellers' attorney, the buyers paid their deposits into the attorney's trust account. The attorney later requested the buyers to provide bank guarantees, for the remainder of the purchase prices, which the buyers provided. It later transpired that the sellers had not signed the offers to purchase, a fact that the buyers had not been made aware of. The sellers denied that the buyers and them had concluded a binding contract. This led to a legal dispute, which the Supreme Court of Appeal ultimately had to adjudicate upon. The buyers sought an order declaring that the purported agreements of sale were of full force and effect. In their defence, the sellers argued that the offers to purchase had not been signed on their behalf, and that a contractual term, contained in the standard

[39] 2009(4) SA 74 (SCA)

offers to purchase, that required the sellers to provide the attorney with certain documents, after signature of the offers to purchase, had not been complied with.

The Supreme Court of Appeal applied the quasi-mutual assent doctrine, by applying the test outlined above, and held that although acceptance did not take place in accordance with the mode prescribed in the standard offer to purchase, the sellers' conduct induced a reasonable belief that they had (*albeit* through their attorney) accepted the offers to purchase. The court, thus, held that the agreements were valid and binding, and ordered the sellers to transfer the sectional title units in question. Although some legal scholars have criticised this ruling, for various reasons, the usefulness of the test it has developed, to prove quasi-mutual assent, is undeniable.

2.3.2 *Animus contrahendi*

Animus contrahendi is one of the indicators of consensus between the parties. It is a serious intention to create a binding contract (*vinculum iuris*) that gives rise to rights and duties that are legally enforceable.[40] Put differently, the offeror must intend to be bound by the offeree's mere acceptance of the offer.[41] This doctrine, in South African law, forms part of the will theory,[42] which is discussed below, thus is more aligned to the Roman-Dutch approach to consensus. The parties' intention, to create legally enforceable obligation, must be accompanied by mutual consciousness that agreement has been reached between them. Except for instances discussed above,[43] in the absence of unanimity on the creation of a contract that gives rise to legally enforceable rights and duties, the parties cannot be said to be *ad idem.* Even if they are *ad idem*, if they are either not unanimous on the creation of legally enforceable rights and duties, or are unaware of having reached such unanimity, theirs will merely be an agreement that is not legally enforceable, and not a contract.

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40 *Conradie v Rossouw* 1919 AD 279; Kerr 41; Hutchison 4 at §1.1.1
41 Christie 37; 38 at §2.2.2
42 C J Pretorius states that: "In modern English law contracts are still defined generally as legally enforceable agreements giving rise to obligations between the contracting parties. The notion of agreement thus remains central to the issue of contractual liability." (126)
43 In paragraph 3.3.1

Animus contrahendi requires that an offeror must have made an offer with the intention of being bound by the offeree's mere acceptance of his or her offer.[44] In *Conradie v Rossouw*, Wessels AAJA, concurring with Solomon ACJ that a serious and deliberate agreement is enforceable by action, stated: "I agree with the conclusion arrived at that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established.".[45] The parties' mutual consciousness that they have reached agreement presupposes that an offeree must communicate his or her acceptance of the offer to the offeror.[46]

An analysis of an offer and acceptance is, thus, an aid in an inquiry into whether the parties have reached consensus,[47] thereby triggering legal liability. Put differently, an analysis of an offer and an acceptance could, where such evidence is admissible, elucidate the nature and extent of what the parties reached consensus on, thus aid a court in giving expression to the parties' common intention. This is crucial, given the fact that contracts are voluntarily initiated and concluded by the parties, and are predicated upon consensus.[48]

In an enquiry into the parties' state of mind, i.e. whether the parties were *animus contrahendi* or not, courts will, therefore, examine the words used, the relationship between the parties, and the circumstances under which a perceived offer was made. If the words used in the offer show a clear intention to conclude a legally enforceable contract, the enquiry into *animus contrahendi* will, as a general rule, end there. An exception to this would be where the 'offeree' knows that the words used do not coincide with the true intention of the 'offeror'.[49]

In *Robinson v Randfontein Estates Gold Mining Co*,[50] Robinson was a director at Randfontein Estates Gold Mining Co. He bought mining property for himself, which he

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44 *Saambou-Nasionale Bouvereniging v Friedman* at 991G; *Hottentots Holland Motors (Pty) Ltd v R* 1956 1 PH K22 (C); Christie 37-38 at §2.2.2
45 At 324
46 *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241; *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) at 532E; Christie 36 at §2.1.4; *Kgopana v Matlala* at [12]
47 Christie 36 at §2.1.4
48 *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* [2020] ZACC 13 at [21], [27], [84]
49 Christie 38-39 at §2.2.2
50 1921 AD 168

then sold to Randfontein Estates at a profit. Randfontein claimed a refund of the profit he was due to make from the sale. In his defence, Robinson argued that he had relied on a pre-emptive right that the owners of the mining property had given him, in his personal capacity, in the process of Randfontein Estates being formed. The alleged right had supposedly been given after Robinson had assisted the owners with the installation of beacons on the mining property. In expressing their gratitude for Robinson's assistance, the owners had said: "If we ever sell the farm, you shall have the *voorkeurrecht* as far as the purchase is concerned.". After examining the circumstances surrounding the alleged right of pre-emption, the then Appellate Division held that the words of the mining property owner had merely been an expression of gratitude that was not intended to be a definite contractual undertaking, thus the owners were not *animus contrahendi*. In *Kgopana v Matlala*,[51] the Limpopo Provincial Division held that contractual liability only arises if the parties are expressly of one mind, or if the offeror gives the other party a reasonable impression that he intends to bind himself to a contract. The court considered the fact that Kgopana had consistently denied winning a lottery prize, thus interpreted his text message, about giving each of his children R1 million if he were to win lottery, as further denial. The court observed that Kgopana's response was hypothetical and futuristic in nature; and considered the fact that Matlala had neither responded to the text message, accepting what she regarded as a contractual offer, nor claimed payment immediately upon learning that Kgopana had won the lottery. Similarly, in *Vincorp (Pty) Ltd v Trust Hungary ZRT (THR)*,[52] the Supreme Court of Appeal held that based on various correspondence between Vinco CC, Trust Hungary, and Vincorp, it was clear that Vincorp had never stepped into Vinco CC's shoes as Trust Hungary's distributor in South Africa and the purchaser of the wine barrels, thus did not have the *animus contrahendi* to become the buyer of the wine barrels. The Supreme Court of Appeal noted that Vincorp, in fact, never even had a contractual relationship with Trust Hungary.

[51] 2019 (1081/2018) [2019] ZASCA 174
[52] (061/2017) [2018] ZASCA

2.4 Theories of contract

The theories explained below are employed, when assessing whether the parties had reached consensus, thereby giving rise to contractual liability.

2.4.1 Will Theory

In terms of this theory, which is sometimes referred to as the subjective theory, the parties' coincidence of wills forms the basis of a contract.[53] According to this theory, the basis of a contract is to be found in individual will. The will theory requires actual, subjective agreement between the parties for contractual liability to arise.[54] This is where the parties have chosen to enter into a binding contract and have expressed their individual intention to be bound to all the material terms of their contract. This is primarily the basis for contractual liability, in South Africa, as discussed above.[55] It is always the starting point when ascertaining contractual liability. One of the downsides of exclusively applying this theory is that it could result in a contract on which both parties were mistaken about a material aspect of their agreement being deemed void, and outlaw the *caveat subscripto* rule, which is discussed below.[56]

2.4.2 Declaration Theory

This theory is on the extreme end of the will theory, as it postulates that what matters is not the inner wills of the parties, but the external manifestation of their wills, thus contractual liability is to be found in the concurring declarations of the parties, regardless of their subjective intentions.[57] This is, sometimes, referred to as the objective theory. The downside of the declaration theory is that, applied dogmatically, a contract could be forced upon an unwilling or mistaken party.[58]

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53 Christie 30 at §2.1.2; Hutchison 15 at §1.7.4
54 Hutchison 83 at §3.1
55 Under paragraph 2.3
56 Hutchison 16 at §1.7.4
57 Hutchison 16 at §1.7.4
58 Christie 30 at §2.1.2, Hutchison 16 at §1.7.4

2.4.3 Reliance Theory

This is the secondary basis for contractual liability, in South Africa, upon which quasi-mutual assent, discussed above, is based. This theory provides for contractual liability even when the parties are not in actual agreement, if one of them could be said to have reasonably led another into believing that he or she was in agreement with the other, i.e. where the other party is reasonably led into believing that there has been an offer and an acceptance.[59] This theory is a compromise between the will and declaration theories. It protects a party's reasonable expectation of a contract.[60]

2.5 Void and voidable contracts

A void contract is one which never came into existence, thus did not give rise to contractual liability,[61] because for example, the parties failed to satisfy all requirements, or to demonstrate satisfaction of all such requirements in the written memorial of their agreement. Therefore, in the event of the parties not reaching consensus, or consensus being unascertainable from the memorial of their agreement, their contract will be *void ab initio*.

A voidable contract, on the other hand, is valid and enforceable, until set aside on one of the grounds discussed in more detail below,[62] such as mistake or defective consensus.

2.5.1 Mistake

Mistake refers to a situation where a party is (or both are) under an incorrect impression regarding an aspect of their contract.[63] A mistake could relate to the object of contractual performance (*error in corpore*); the nature of the contract being concluded (*error in negotio*); the identity of the party with whom the contract is being concluded (*error in persona*); or attributes or characteristics of the object of contractual

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59 Hutchison 16 at §1.7.4
60 Hutchison 17 at 1.7.4
61 Palmer, FB; et al 'Company Precedents for Use in Relation to Companies Subject to the Companies Acts' (1908-1917) *Stevens & Sons Ltd* 16
62 Under paragraphs 2.5.1 and 2.5.2
63 Hutchison 84 at §3.1

performance (*error in substantia*). Whether a mistake renders the contract void or voidable is determined through a factual inquiry.

The party that seeks to escape contractual liability based on mistake must show that he or she was labouring under some misapprehension at the time of concluding the contract, and that he or she did not orchestrate the mistake, lest he or she collides with the doctrine of quasi-mutual assent.[64] Some mistakes vitiate consensus between the parties, thereby rendering the contract void *ab initio*, whilst others render a contract voidable.

Various types of 'mistake', and their effect on consensus are discussed below.

2.5.1.1 Unilateral mistake

With a unilateral mistake, only one of the parties is under a mistaken impression regarding an aspect of their contract.[65] If one party is mistaken about an aspect of the contract, and the other, being aware of the mistake, remains silent about the mistake, there is dissensus between the parties. If the mistake is material, the resultant contract is void *ab initio*. If the mistake is not material the contract is valid, but voidable, if the mistake was induced by the other party.[66]

In *Kempston Hire (Pty) Ltd v Snyman*,[67] Snyman had signed a document confirming receipt of a vehicle hired by his employer, from Kempston Hire, not realising that a clause therein held him personally liable for rental charges. Kempston Hire sued Snyman, for rental charges, based on that clause. He argued that he thought that he was merely signing a receipt. The court held that Snyman had been misled as to the contents of the document, given the fact that apportionment of personal liability of an employer to an employee was out of the ordinary. The court took cognisance of the fact that Snyman would not have expected to be held personally liable for his employer's liability, solely based on him having happened to be the one to acknowledge receipt of the hired vehicle. The court found that there had been

64 *Pieters & Co v Salomon*; Christie 366 and 375
65 LAWSA Vol 9 (3rd Edition) at §310
66 Hutchison 85 at §3.2.1; 87 at Figure 3.1
67 1988 (4) SA 465 (T)

misrepresentation by silence, thus dismissed Kempston Hire's attempt to rely on the *caveat subscripto* rule.[68] In *Shepherd v Farrell's Estate Agency*,[69] a similar approach was followed.

In *Khan v Naidoo*,[70] the court held that the mistake must have influenced a party's decision to enter, or not enter, into the contract, in addition to being relevant and material. In this case, Mrs Khan was held to be bound to the suretyship agreement that she had signed under the impression that it was a document for the transfer of some property into her name, as her knowledge of the true nature of the contract she was signing would not have influenced her decision whether to sign it.

2.5.1.2 Common mistake

With common mistake, both parties are under a mistaken belief, regarding an aspect of the contract, thus are *ad idem*. In recognition of the *pacta servanda sunt* principle, the courts will give effect to the true nature of the parties' agreement, by ignoring their erroneous intention.[71] Rescission will, therefore, generally not be permitted in a case of a common mistake.

It was decided, in *Dickinson Motors v Obeholzer*,[72] that a common mistake can be rectified without the parties following any formal procedure.

2.5.1.3 Mutual mistake

A mutual mistake arises when the parties are at cross-purposes,[73] at the time of their purported agreement. Generally, this results in the parties not being *ad idem*, thus voids the contract *ab initio*. Where one party's mistaken belief is reasonable and the other party's unreasonable, the courts will enforce the reasonable belief.[74] If both parties' belief of what is being agreed is reasonable, but at cross-purposes, then you

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68 Discussed under paragraph 4.4
69 1921 TPD 62
70 1989 (3) SA 724 (N)
71 *First National Bank v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA)
72 1952 (1) SA 443 A
73 Christie 375 at §9.3
74 *Pieters & Co v Salomon*

are dealing with a case of common mistake, which renders them in dissensus at the time of their supposed agreement, thus the effect of voiding their contract *ab initio*.[75]

In *Maritz v Pratley*,[76] Maritz had sold lot 1208 to Pratley at an auction. Pratley had bought the property thinking that a mantelpiece and mirror, that were on the property, were included in the sale. It later transpired that the mantelpiece and the mirror belonged to lot 1209 instead. Pratley sought to have the contract rescinded and succeeded on the basis that the parties had not been *ad idem* about the *merx*, thus a valid contract had not arisen between them. The court held that there can be no agreement, unless the parties agree on the same thing.

Similarly, in *Allen v Sixteen Stirling Investments (Pty) Ltd*,[77] the court ruled that a valid contract could not have arisen between the buyer, who thought that he was buying the property wrongly pointed to him by the estate agent, when the seller thought that the buyer was buying the seller's property instead.

In *Laco Parts (Pty) Limited t/a ACA Clutch v Turners Shipping (Pty) Limited*,[78] Burochowitz J held, on appeal, that no contract had been concluded between the parties. The Appellant had understood the Respondent to be offering to sell them the number of clutch parts indicated on the invoices that the Respondent had sent to them (2955 clutch parts), whilst the Respondent understood themselves be offering to sell only the parts reflected in the bills of entry (723 clutch parts). The learned judge overturned the court *a quo's* Order, which, even though it had found the parties to have been at cross-purposes thus their contract to have been void *ab initio*, ordered restitution of the Respondent to the position it has been in prior to the supposed contract.[79]

There can be no other remedy, in contract, for a contract that was void *ab initio*.[80] Mutual mistake can, therefore, only be 'cured' by concluding a new contract, as the

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75 Christie 376 at §9.3
76 (1894) 11 SC 345
77 1974 (4) SA 164 (D)
78 2008 (1) SA 279 W
79 At [13], [16] - [18]
80 *Kudu Granite Operations (Pty) Ltd v Cartena Ltd* 2003 (5) SA 193 (SCA) [15]; *Laco Parts (Pty) Limited t/a ACA Clutch v Turners Shipping (Pty) Ltd*

contract concluded based on mutual mistake is considered a nullity or by a claim for unjust enrichment.

2.5.2 Wrongfully obtained consensus

Certain wrongful conduct, committed by a party, that leads to the conclusion of an agreement, has the effect of vitiating what may, on the face of it, have been seen as consensus between the parties. This is because such conduct affects the will of the innocent party, and makes true coincidence of the parties' minds on the proposed contract impossible. Contracts that are concluded as a result of wrongfully obtained consensus are voidable, at the instance of the innocent party, with the result that they can be rescinded, which rescission will be followed by restitution.[81]

2.5.2.1 Misrepresentation

A misrepresentation is a material false statement, that has induced a contract, made by one party, to another, with the intention of inducing a contract or causing the other party to conclude a contract on terms that are less favourable.[82] Misrepresentation is, put differently, a misstatement of fact by one party to another, before or at the time a contract is concluded, regarding a material matter or circumstance that relates to the contract.[83] It can be express or implied by conduct – even silence can be deemed a misrepresentation, where a party has a duty to speak.[84] Misrepresentation can also be fraudulent, negligent,[85] or innocent. A fraudulent misrepresentation is one that is made knowingly; not believing it to be true; and recklessly or carelessly.[86] A party who was induced to enter into a contract by a material misrepresentation, made by the other party or the other party's representative, is entitled to rescission of the contract and restitution, or may choose to raise misrepresentation as a defence if confronted

81 Hutchison 118 at §4.1
82 *Karroo and Eastern Board of Executors and Trust Co. v Farr and Others* 1921 A.D. 413 at 415; *Trust Bank of Africa Ltd v Frysch* [1977] 4 All SA 114 (A) at 129
83 *Wright v Pandell* 1949 (2) SA 279 C 2
84 *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 726A-G
85 *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559(A)
86 Hutchison 121 at §4.2

with a contractual claim ensuing from that contract,[87] unless he or she has waived such remedies in express contractual terms.

2.5.2.2 Duress

A contract concluded as a result of fear that is induced by a considerable threat is voidable,[88] at the instance of the induced party. This is because the induced party is, under such circumstances, acting involuntarily so as to negate his or her consent. Duress is an illegitimate threat that detracts from a party's free will. The party who alleges duress must, however, prove:[89]

- actual violence or reasonable fear;
- the fear must be caused by the threat of some considerable evil to the party or his family;
- it must be the threat of an imminent or inevitable evil;
- the threat or intimidation must be *contra bonos mores*; and
- the moral pressure used must have caused damage.

The induced party may rescind the contract and claim restitution; resist the enforcement of the contract; and claim damages.[90]

2.5.2.3 Undue influence

Undue influence is the deceitful erosion of a party's ability to exercise free and independent judgement in a matter, usually by someone in close relationship with the party. In *Preller v Jordaan*,[91] despite Van den Heever JA's criticism of undue influence, the majority, led by Fagan JA, were responsive to the plight of contracting parties, who cannot prove the elements of misrepresentation or duress, although they have been coerced into a contract through undue influence. The then Appellate Division

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87 *Karroo and Eastern Board of Executors and Trust Co v Farr* 1921 AD 413 at 415*; Phame (Pty) Ltd v Paizes [*1973] 3 All SA 501 (A) at 512 - 513
88 *Medscheme Holdings (Pty) Ltd v Bhamjee* [2005] 4 All SA 16 (SCA) at [6]
89 *Broodryk v Smuts, NO* 1942 TPD 47 at 51-52;
90 Hutchison 141 at §4.3
91 1956 (1) SA 483 (A)

reaffirmed this approach in a subsequent case.[92] A contract that is concluded pursuant to undue influence is voidable. The party alleges undue influence must, however, prove that:[93]

- the other party obtained influence over him or her;
- the other party's influence weakened his or her power of resistance and rendered his or her will compliant; and
- the other party used his or her influence in an unscrupulous manner to persuade him or her to agree to a transaction that was prejudicial to him or her, and which he or she would not have concluded with his or her normal freedom of will.[94]

With undue influence, the contract may only be set aside, if the other contracting party was aware that undue influence had been exerted at the time an agreement was supposedly reached between the parties.

2.6 Conclusion

The very nature of the term: "contract", postulates consensus as the basis of a contractual bond between the parties. Although it is primarily based on subjective consensus, the modern-day South African approach to consensus is a compromise between the will and declaration theories of consensus, the latter being resorted to only in the event of dissensus. Subjective consensus is about the psychological state of the parties' minds, thus an enquiry into whether the parties reached consensus *ad idem* generally involves a determination of whether a valid offer, which was duly accepted, was made; and whether by making and accepting the offer the parties were *animus contrahendi*, thus intended to create a *vinculum iuris*.

Consensus is the basis for contractual liability. That is why, where it is proven that there was mistake or conduct that improperly induced what, on the surface, appears to be consensus, a contract is declared void or voidable at the instance of the mistaken or improperly induced party. As already discussed, this is the position, even where the

92 *Patel v Grobbelaar* 1974 (1) SA 532 (A)
93 *Patel v Grobbelaar*
94 Hutchison 145 -146 at §4.4

parties understood themselves to have reached agreement on all material aspects of their agreement.

To facilitate fulfilment of agreed obligations, and for the reasons discussed above, it is imperative that the parties, or a drafter, take cognisance of the rules and doctrines applicable to the ascertainment of consensus, during contractual interpretation.

Chapter 3

3 The significance of consensus in interpretation of contracts

Given the fact that a contract can only be concluded, once the parties have reached consensus on all elements of their specific contract, and that contractual liability is premised upon the parties' serious intention to create binding rights and duties that are legally enforceable, it is imperative that the interpretation of any contract be centred around giving expression to the mutual rights and duties that the parties agreed to or reached consensus on. This is even more so, as, according to the *pacta sunt servanda* doctrine, contracts that are freely and seriously entered into must be enforced. Contractual interpretation should, therefore, be aimed at unearthing the parties' common intention, as articulated by contractual obligations they have undertaken.

Despite case law developments, in recent years, in terms of which evidence on the contractual context (or the factual matrix) has become admissible as a matter of course, the legacy of the literalist interpretive approach, which elevates the meaning of the contractual text over the agreement underlying the contractual text, can, in certain circumstances, lead to the enforcement of obligations that differ from the ones that the parties subjectively contemplated.

It is with this in mind that it is argued that the common law of contract may have to be further developed with a view to fostering alignment between the predominantly subjective approach to contractual liability vis-à-vis the objective approach to contractual interpretation.

3.1 The philosophy behind interpretation of contracts

Legal scholars are unanimous on the primary goal of contractual interpretation, being to ascertain the common intention of the parties (or concurrence of the parties' intention).[95] This is consistent with consensus being the basis for contractual liability.

[95] Kerr 386; Cornelius 32 at §3.2; Podolny 451

Yet in practice, a contract is interpreted for the sole purpose of ascertaining the meaning of the language used in a contractual instrument, and not the common intention of the parties.[96] The interpretation of contracts is, therefore, an objective process that is aimed at ascertaining the meaning of words the parties have selected to express the agreement that underpins their contract.[97] Christie argues that seeking the intention of the parties should not be equated with seeking to understand what the parties proposed to do, as that, according to him, may lead courts to stray into seeking the parties intention outside of the contractual text.[98] In his opinion, the parties' intention should be sought from the words the parties have used in the contract.[99] In *BOE Bank Ltd t/a BOE Corporate v The Grange Timber Farming Co (Pty) Ltd & others*,[100] Theron J, as she then was, held that "the golden rule of interpretation of contracts is that the language in the document is to be given its grammatical and ordinary meaning unless this would result in some absurdity, repugnancy or inconsistency with the rest of the instrument". In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[101] Wallis JA held that "interpretation is the process of attributing meaning to the words used in a document,…".[102]

This is contradictory to the statement of Innes JA, as he was then, who, during an era in which literalism prevailed, boldly stated: "The golden rule applicable to the interpretation of all contracts is to ascertain and follow the intention of the parties, and if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning.".[103]

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96 *Worman v Hughes*
97 Footnote 6 *supra*
98 Christie 241-2 at §5.4.3
99 *Hansen, Schrader & Co v De Gasperi* 1903 TH 100 at 103; *Union Government v Smith* 1935 AD 232 at 241; *Worman v Hughes*
100 [2006] JOL 17279 (N)
101 Footnote 6 supra
102 At [18]
103 *Joubert v Enslin* 1910 AD 6; Kerr 397

Myburgh[104] states:

> "… a contract is based on consensus or a meeting of the minds of the parties (as dictated by the will theory). It is only in instances of dissensus that a court will resort to the reliance theory to determine whether a contract should be upheld on the basis of a reasonable reliance.".[105]

The ascertainment of consensus is a two-stage inquiry which primarily seeks to establish actual or true consensus; then proceeds to the determination of whether reliance can be placed on the conduct of the party who disputes contractual liability, or the nature or extent of his or her liability having reasonably led the other to believe that the former had assented to the proposed contract and the obligations that flow therefrom.[106]

Speaking of the legal nature of interpretation, and citing Van Tonder,[107] Cornelius states that a question which legal scholars often overlook is whether legal interpretation is a question of law, a question of fact, or a combination of the two.[108] He goes on to state that if it were a question of law, legal interpretation would be done by weighing legal authorities and arguments. If it were a question of law, courts would apply legal rules and principles to interpret an instrument without considering evidence, thus their interpretive approach would be more objective and traditional in nature. The connotations of the foregoing are that, if legal interpretation were a question of fact, it would be done by weighing evidence, which would involve an inquiry into subjective factors that are relative to the instrument being interpreted. Therefore, if legal interpretation were a question of fact or a combination of law and facts, which Cornelius argues it is,[109] courts would be more open to admitting evidence proving the common intention of the parties, which is the professed primary objective of

[104] Myburgh F 'Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law' (2017) 134 *SALJ* 514
[105] At 522
[106] Christie 31 at §2.1.2; *Ngobese, Sifiso Quinton v The State* 2019 (1) SACR 575 (GJ) [31-3]
[107] In Steyn LC *Uitleg van Wette* (1990)
[108] Cornelius 31 at §3.2
[109] Cornelius 33 at §3.2

interpreting a contract in terms of the South African jurisprudence.[110] Myburgh[111] asserts that whether the purpose of interpretation was to give meaning to the words used in an instrument or to establish the parties' common intention determined the kind of extrinsic evidence that would be admissible, and the stage at which it would be admissible.[112]

The objective approach to contractual interpretation is inconsistent with the modern-day South African approach to contractual liability, according to which contractual liability is primarily triggered by consensus *ad idem*. This interpretive approach, therefore, has a potential of projecting, onto a contract, a reasonable person's interpretation of the contractual text, contrary to the parties' common intention. This would have the effect of an interpreter making a contract on behalf of the parties, which a number of jurists, as discussed above, caution against. Citing Lord Tomlin, in *Hillas & Co Ltd v Areos Ltd*,[113] when he cautioned against the law incurring reproach as being a destroyer of bargains,[114] Kerr[115] and Hussein[116] allude to the commercial nature of contracts, and that whilst a more dogmatic interpretive approach may foster legal certainty, it may undermine the parties' bargaining process and lead to commercial uncertainty.

3.2 *Pacta sunt servanda* doctrine

Decrypting contractual rights and duties that the parties contemplated, when they concluded an agreement, is not only in the interests of the advancement of the *pacta sunt servanda* doctrine, which is one of the cornerstones of the law of contract.[117] It also gives effect to the constitutional values of freedom and dignity.[118] The *pacta sunt servanda* doctrine encapsulates the contractual autonomy of parties, thus is about the

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[110] Footnote 8 *supra*
[111] Myburgh F 'Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law' (2017) 134 *SALJ* 514
[112] At 515
[113] [1932] All ER Rep 494 (HL)
[114] At 499H-I
[115] Kerr 385-6
[116] Hussain B 'Interpretation of Contracts in Commercial Law: Competing Principles' (2008) 11 *Trinity at CL Rev* 58 at 64-5
[117] *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* at [12]
[118] *Barkhuizen v Napier* 2007 (5) SA 323 CC at [57]; *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* at [30], [35], [83], [85]

parties' "freedom of choice whether, with whom and on what terms to contract".[119] It upholds the sanctity of contract, and provides that contracts that are freely and seriously entered into must be honoured and enforced.[120] Whilst others have sought to shoot this principle down, on the basis of constitutionalism, the Supreme Court of Appeal and the Constitutional Court have held that courts must approach the task of striking down a contract, or refusal to enforce it, with perceptive restraint;[121] and have remarked that this doctrine fosters commercial and legal certainty.[122] Theron J has, however, cautioned[123] that the *pacta sunt servanda* doctrine is "not the only nor the most important principle informing the judicial control of contracts", and that there is no basis for privileging the doctrine over other constitutional rights and values.[124] Even though the *pacta sunt servanda* doctrine, rightfully, should not be elevated above other principles, without a compelling justification, the parties' freedom of contract should not be trampled upon.

The equitability of applying an objective standard, without admitting evidence relating to their common intention, on the subject, nature, and extent of the parties' consensus and their subjective contemplation of rights and duties they were binding themselves to,[125] should be re-assessed.

3.3 Parol evidence and plain meaning rules

The parol evidence rule or integration rule generally limits the admissibility of extrinsic evidence, to prove the terms of a contract, where a contract has been reduced to writing,[126] unless the parties have agreed otherwise in their written contract.[127] In

[119] Dale Hutchinson and Pretorius (eds) in The Law of Contract in South Africa (2017) 25 at §1.8.3
[120] Hutchison 21 at §1.8; *Wells v SA Allumenite Co* 1927 AD 69 73; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at [7]; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 CC at [70] *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* at [30] [57]
[121] *Brisley v Drotsky supra*
[122] *Brisley v Drotsky* at [2] [22]; *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* at [92]
[123] *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others*
[124] At [87]
[125] *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* at [Footnote 203]
[126] Cornelius 71 at §6.1; Christie 226 at §5.4.1
[127] Cornelius 30 at §3.2

Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd,[128] Watermeyer JA stated that where a contract has been reduced to writing, the written contract is generally regarded as the exclusive memorial of the transaction, and its contents may not be contradicted, altered, added to, or varied.[129] This, however, only applies where the writing is a complete integration of the agreement between the parties.[130] Even with partial integration, extrinsic evidence to vary or detract from the written terms is inadmissible. Podolny, quoting a commentator, states that "The parol evidence rule does not priviledge language over something else; it privilegdes some language (the final writing) over other language (earlier written and oral statements).".[131] With the exception of specific circumstances, it thus prohibits the admission of extrinsic evidence in aid of contractual interpretation.[132]

Hutchison is of the view that the parol evidence rule comprises the integration rule, on the one hand, and the interpretation rule, on the other hand.[133] According to him, the integration rule speaks to the inadmissibility of extrinsic evidence where an agreement has been consolidated into a single written memorial.[134] The interpretation rule is about when and the extent of extrinsic evidence that may be adduced to interpret contractual text.[135] Therefore, linked to the parol evidence rule, although not only restricted to written contracts,[136] is the clear or plain meaning rule, also known as the golden rule of interpretation, in terms of which a court must give effect to the literal meaning of the contractual text, in the absence of ambiguity or reasonable alternative interpretation of the text.[137] In terms of this rule, where the meaning of the contractual text is clear and unambiguous, no evidence may be given to alter such plain

[128] 1941 AD 43 at
[129] At 47; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 326; Cornelius 80 at §6.4
[130] *Johnston v Leal* 1980 (3) SA 927 A at 944B-C; Kerr 353
[131] At 448
[132] Podolny at 436
[133] Hutchison 271 at §11.5.1
[134] Hutchison 271 at §11.5.1.1
[135] Hutchison 272-3 at §11.5.1.25
[136] Christie 239 at §5.4.2
[137] *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454-5; Cornelius SJ *'Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) [Redefining the rules for the admissibility of evidence in the interpretation of contracts]' 2014 *DeJure* 363 at 366; Myburgh at 523; Hutchison 273 at §11.5.1.3

meaning,[138] regardless of the accuracy with which the text captures the parties' common intention.[139]

The plain meaning rule has metamorphosised over the past couple of decades. In recent years, South African courts and English courts[140] have been more open to admitting evidence on surrounding circumstances or the factual matrix, in order to place a court in the position the parties were when they concluded a contract,[141] and aid with construction of a contract.[142] Commendable as these developments may be, it is worrisome that they still do not cure the potential mischief of ascribing, to the parties, an agreement that neither party or one of the parties did not consent to, based on the objective contextualisation of the contractual text, as the focus is still on the objective linguistic construction rather than the common intention of the parties.[143] Despite these developments, the law, on the admissibility of extrinsic evidence, is yet to be settled.[144] In fact, the Supreme Court of Appeal has been making contradictory pronouncements on the matter,[145] which can be confusing.[146]

Myburgh observes the English origins of the parol evidence rule, where the basis of contractual liability is objective, and opines that the adoption of the parol evidence rule, without taking cognisance of the primarily subjective basis of contractual liability, in the

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[138] *Rand Rietfontein Estates Ltd v Cohn* at 326
[139] Myburgh at 524-5; Christie 241-2 at §5.4.3
[140] Hodge PS 'Judicial Development of the Law of Contract in the United Kingdom' (2017) 85 *Geo Wash L Rev* 1587 at 1589-90
[141] *Haviland Estates v McMaster* 1969 (2) SA 312 (A); *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA)
[142] *Van der Westhuizen v Arnold* 2002 (6) SA 453 SCA at 538; Kerr 352 & 396
[143] *Jaga v Dönges, NO: Bhana v Dönges, NO* 1950 (4) SA 653 (A) at 662G-663A; *Coopers & Lybrand and Others v Bryant* at 767E-768E (with the emphasis on the third rule); *Van der Westhuizen v Arnold* at [4] [21]; *KPMG Chartered Accountants (SA) v Securefin Ltd* at [39] [40]; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at [16]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* at [18] [20]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at [12]; Cornelius SJ *'Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) [Redefining the rules for the admissibility of evidence in the interpretation of contracts]' 2014 *DeJure* 363 at 369 371-2
[144] Kerr 396
[145] Myburgh at 541
[146] V*an der Westhuizen v Arnold* at [1]; *KPMG Chartered Accountants (SA) v Securefin Ltd* at [39]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* at [18]; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 at [24]; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* at [16]; *Norvatis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at [27] [30] [31]

modern-day South African context, may be the root cause of the misalignment between the primarily subjective nature of contractual liability vis-à-vis the objective nature of contractual interpretation.[147] She makes an observation that the influence of the traditional approach or literalist theory of contractual interpretation, which seems to discount the parties' intention in favour of the objective meaning of words, is at odds with the primary basis of contractual liability, i.e. consensus *ad idem*.[148] She states that:

> "Given that the Appellate Division eventually settled on consensus as the primary basis of contractual liability, one would expect that this approach would also be reflected in matters of interpretation and the relaxation of rules limiting the resort to extrinsic evidence.".[149]

An interpretive approach that pivots around the ascertainment of the objective meaning of the contractual text, and discounts evidence relating to the parties' common intention,[150] is counterproductive to the professed objective of contractual interpretation, and the discharge of a contract that the parties consented to.

3.4 The role of holistic and contextual interpretation on the ascertainment of the parties' intention

In *Jaga v Dönges, NO: Bhana v Dönges, NO*, Schreiner JA, in his dissenting judgment, warned against over-concentrating on words, without recourse to the context, when interpreting legislation. Kerr[151] cites Corbin as stating that the object of a court's existence is to do justice to the parties, thus the parties should not be held to an interpretation of contractual words that neither party intended.

Cornelius argues that, in the past, even where lawyers were dissatisfied with the strict literalist approach to interpretation, and claimed to consider other factors to determine the intention of the drafter, they still equated the intention of the drafter with contractual

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147 Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134 *SALJ* 296 at 307
148 At 522-5
149 At 524
150 Footnote 8 *supra; Union Government v Smith* 1935 AD 232 at 240-241; *Jordaan v Trollip* at 255D-H
151 At 389

text.[152] They did not seem to recognise the fallaciousness of the text in practical ways, i.e. that the meaning of an instrument often goes beyond the instrument itself, as the text often points to something that the author has not expressed that an interpreter should bear in mind.[153] He, thus, proposes a holistic approach to legal interpretation, in terms of which a variety of aids are employed to ascertain the intention of the parties.[154] in terms of which:

- An interpreter should leverage on the benefits of different theories of interpretation;
- the text should not be read in isolation of surrounding circumstances; and
- historical events surrounding the authorship of the instrument should be considered.

This approach seems to have been followed in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) (Ltd) and Others*,[155] where the importance of the context; historical background; and purpose of the contract were considered *important in contractual interpretation.*[156]

In *KPMG Chartered Accountants (SA) v Securefin Ltd*,[157] whilst setting a new precedence on legal interpretation, by acknowledging the importance of conservative evidence establishing the context and factual matrix of a legal instrument being interpreted, Harms DP, citing Lord Tomlin,[158] held, *inter alia*, that, save for expert evidence, on the meaning of technical terms, legal "interpretation remains a matter of law and not fact and, accordingly, interpretation is a matter for the court and not for witnesses…".[159] Courts followed an approach in terms of which they generally hesitated to admit extrinsic evidence, relating to the context, until recently. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[160] Wallis JA held that:

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[152] Cornelius 17 at §2.3
[153] Cornelius 20 at §2.3
[154] Louw, E *The Plain Language Movement and the Legal Reform in the South African Law of Contract* (2010) South Africa: University of Johannesburg 39
[155] 1980 (1) SA 796 (A) at 805A-B
[156] *Van der Westhuizen v Arnold* at 538
[157] 2009 (4) SA 399 (SCA)
[158] *British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL)
[159] At [39]
[160] Footnote 6 supra

> "interpretation is the process of attributing meaning to the words used in a document,… having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and in the circumstances attendant upon its coming into existence… A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.".

Pursuant to these jurisprudential developments, no longer is the golden rule (plain meaning rule), as discussed above, applied dogmatically and in isolation of the context in which words are used in a contract.[161] Nowadays, the meaning of a contractual provision, whose interpretation is disputed, is ascertained from the language used; nature; context; and purpose of a contract as a whole.[162] Hutchison[163] argues that context includes the rest of the contract; background and surrounding circumstances; as well as the Constitution of the Republic of South Africa, 1996[164] and the Bill of Rights. This development is aligned to shift away from the fragmented approach to interpretation of legal instruments, towards uniform rules of 'legal interpretation'. In this regard, it is noteworthy that interpretation of statutes has long acknowledged the value of considering the context and purpose of a statute as useful interpretive aids.

The language used, in a contract; its context or what other judges refer to as the "factual matrix"; and purpose are, nowadays, considered from the outset, regardless of whether the contractual text appears to be ambiguous or not.[165] This is the unitary approach to interpretation.

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[161] Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134 *SALJ* 296 at 297 303
[162] Kerr 389; Christie 244-7 at §5.4.3
[163] Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134 *SALJ* 296 at 303
[164] Act 108 of 1996, which is referred to as "the Constitution" throughout this paper
[165] *KPMG Chartered Accountants (SA) v Securefin Ltd* at [39]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* at [18]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* at [12]

In *Consolidated Diamond Mines of South West Africa Ltd v Administrator SWA*,[166] the court held that the matter was not about what the law said about a contractual phrase, but about what the parties intended that particular phrase to mean. Although courts now admit contextual evidence as a matter of practice, as discussed above, evidence relating to the parties' subjective intention is still inadmissible and the contractual text is still contextualised objectively. When reading a contract, an interpreter assumes that the parties intended the words used to bear the meaning they would ordinarily bear in a similar context.[167] This is despite the fact that De Wet JA expressed the importance of an interpreter apprising himself or herself of the surrounding circumstances at the time the instrument was executed, so as to place himself or herself, as nearly as possible, in the position of the parties, when interpreting an instrument.[168]

It would seem, therefore, that courts place themselves as nearly as possible, in the position of the parties, when interpreting a contract, not with a view to determining the meaning the parties intended the contractual text to denote, when they reached consensus, but to ascertain the meaning that a reasonable person would, in the parties' shoes, arrive at.[169] Despite recent jurisprudential developments, there, therefore, seems to be general agreement amongst judges and legal scholars that the process of legal interpretation is still an objective one, in terms of which meaning to the text being interpreted is attributed as it would be understood by a reasonable person.[170] This goes against the injunction of Innes JA,[171] cited above,[172] and smacks of courts potentially being destroyers of bargains and doing injustice to the parties.

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[166] 1958 (4) SA 572 (A)
[167] Kerr 395; Myburgh at 531; *Burger v Central South African Railways* 1903 TS 571; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A)
[168] *Rand Rietfontein Estates Ltd v Cohn* at 329; *Richter v Bloemfontein Town Council* 1922 AD 57 at 59; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A)
[169] Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134 SALJ 296 at 305 307
[170] Footnotes 6 and 8 *supra*; Hutchison A 'Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication' (2017) 134 *SALJ* 296 at 304
[171] Discussed under paragraph 3.1
[172] Under paragraph 3.1

3.5 Development of common law principles of contractual interpretation

According to section 2 of the Constitution, "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid…". The judiciary is duty bound to develop the common law of contract, in terms of section 173 of the Constitution, which applies horizontally as between private parties, superior courts have the inherent power to, amongst others, "develop the common law, taking into account the interests of justice".

Ngcobo J, as he was then, stated, in *Barkhuizen v Napier*, that all law, including the common law of contract, must be consistent with the provisions of the Constitution and the values that underpin it.[173] Section 39(2), on the other hand, which applies vertically as between the State and a private party, requires every court, tribunal, or forum to promote the Bill of Rights, when developing the common law. It is common cause that there are three arms of the State[174], in South Africa, namely: the Executive, the Legislature, and the judiciary. Whilst section 173 gives superior courts the power to develop the common law, taking into account the interests of justice, in matters relating to private parties, section 39(2) of the Constitution compels the judiciary (as an arm of the State) to promote the Bill of Rights, when developing the common law of contract. This is demonstrated by, amongst others, the *dicta* of Moseneke DCJ, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[175] and Ackermann and Goldstone JJ, in *Camichele v Minister of Safety and Security*[176], where they stated that "the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights",[177] and "where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately".[178] Perceptive restraint is often cited as a counter-argument against the development of the common law is often that. Theron J has, in *Beadica 231 CC &*

[173] At [15]
[174] Or "arms of government"
[175] Where he, at paragraph 71, stated that: "Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values,…".
[176] 2001 (4) SA 938 (CC) at [36] and [39]
[177] At [36]
[178] At [39]

Others v Trustees for the time being of the Oregon Trust & Others,[179] cautioned that "courts should not rely on this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values". Her ladyship, further, states that the degree of restraint to be exercised must be balanced against the backdrop of constitutional rights and values.

Although the issues before the Constitutional Court, in the cases cited above, revolved around the constitutionality of certain contractual provisions, these principles are equally applicable to the development of common law relating to the interpretation of contracts.

As discussed above, the Constitutional Court has upheld the *pacta sunt servanda* doctrine as giving effect to the constitutional values of freedom and dignity, and has held that courts must approach the task of striking down a contract, or refusal to enforce it, with perceptive restraint.[180]

Although inroads have been made in developing the common law of contract, relating to the interpretation of contracts, there is still scope for further development to ensure that contractual interpretation is, in practice, approached with a view to ascertaining and giving expression to the common intention of the parties, and not merely ascertaining the objective meaning of words, as is currently the case. This approach would contribute towards settling the rules of contractual interpretation and aligning contractual interpretation to the basis for contractual liability.

3.6 Conclusion

The common intention of the parties and their subjective collective will are the golden thread that runs through various aspects of the common law of contract, with a few exceptions.

Although contracts are predominantly based on consensus *ad idem*, and our courts' professed aim of contractual interpretation is to ascertain the parties' common

[179] At [90]
[180] Under paragraph 4.2

intention, in practice, an objective meaning to a contract is attributed to the parties, regardless of their subjective common intention. It can be argued that this is tantamount to striking down a contract, as agreed by the parties, or refusal to enforce it, which the Constitutional Court has commented should be approached with perceptive restraint. Furthermore, this is at odds with the *animus contrahendi* principle and the *pacta sunt servanda* doctrine. Consequently, it is at war with the public policy, as it, without an overriding constitutional justification, undermines the parties' constitutional rights to freedom and dignity in as far as their freedom of contract is concerned.

The selective adoption of certain principles of the English Law, without careful consideration of their practical connotations within our legal environment, has likely resulted in the inconsistency between the predominantly subjective approach to contractual liability versus the objective approach to contractual interpretation. Ideally, the approach to creation of contractual liability and contractual interpretation should be aligned. Even under the English Law, where there is synchrony between the objective approach to contractual liability and the objective approach to contractual interpretation, several jurists, some of whom are cited above, have questioned the plausibility of a strict literalist approach to contractual interpretation.

Unless the contractual interpretive approach is aligned to the basis for contractual liability, the illustration of Lord Steyn,[181] will continue to echo through the corridors of our courts. Lord Steyn said:

> "What is literalism? This is straightforward. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive. That is literalism.".[182]

[181] Steyn J 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 24 *Sydney L. Rev*. 5
[182] At 7

Chapter 4

4 Reflecting the parties' consensus in a written contract

Bearing in mind the fact that the courts interpret the intention of the parties objectively, it is imperative that a drafter takes care to ensure that a contractual instrument clearly, unambiguously, and precisely reflects the rights and duties that the parties have reached consensus on.

The fact that consensus is a cornerstone of a valid and legally enforceable contract underscores the importance of ensuring clarity and precision, when a drafter, in a contractual instrument, reflects the meeting of the parties' minds on all material aspects of their contract. A drafter's failure to be meticulously clear and unambiguous, in his or her choice of contractual text, can lead to the distortion of the agreement that underlies the contractual instrument. This could, in the event of a dispute, necessitating the objective interpretation of the contract, potentially lead to the contract being interpreted in a manner that does not give effect to the subjective common intention of the parties, or to the contract being declared void *ab initio* in a worst-case scenario.

Considerations that a drafter must take, in order to ensure that a contractual instrument is legally sound, and clearly and accurately conveys the common intention of the parties are discussed below.

4.1 Role of agreement on creation of contractual rights and duties

In order for the parties to reach consensus *ad idem*, the parties must have entered into the agreement seriously, deliberately, and with the intention of creating legally enforceable obligations between them.[183] The intention of the parties to seriously and deliberately create legally enforceable obligations is evidenced by the acceptance of an offer that was made with the intention of being legally binding upon acceptance, in

[183] Kerr 41; Hutchison 4 at § 1.1.1; *Conradie v Rossouw* at 324; *Balfour v Balfour* 1919 2 KB 571; *Rose and Frank Co v JR Crompton and Brothers Ltd and others* 1925 AC 445 (HL); *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers and others* 1969 1 WLR 339 (QB)

line with the *animus contrahendi* doctrine.[184] The parties must, in addition to this, be mutually aware of having reached consensus *ad idem,* on all material aspects of their contract, for the conclusion of a valid contract, that gives rise to legally enforceable obligations. In other words, contractual liability only arises once the parties have reached consensus *ad idem* on an offer and acceptance; intend to be legally bound by the rights and duties created by the mere acceptance of the offer; and are in one accord regarding performance(s) to be rendered in terms of their contract.

It follows that a contractual instrument must, therefore, clearly, unambiguously, and precisely reflect the parties' consensus on all the requirements for the specific type of a contract that the parties wish to conclude (the *essentialia*[185]), and any other material aspect that the parties have chosen to incorporate into their agreement (the *incidentalia*[186]). The insufficient and unclear description of the *essentialia* and *incidentalia* may hinder the determination of performance as agreed between parties, which could potentially lead to a contract that does not satisfy three requirements for a valid contract, namely: consensus; certainty; and possibility of performance.[187] This can, further, potentially lead to the parties being held to have failed to reach consensus *ad idem* on all material aspects or particular terms of their contract.[188] This can result in certain contractual terms, or the whole contract, being declared void for vagueness.[189] The foregoing inference would be premised upon the parties' failure to be clear on their contractual obligations or their contractual obligations being indeterminate.[190]

A drafter must, therefore, be meticulous in crafting contractual terms in a manner that demonstrates, not only that the parties have reached consensus on all material

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[184] *Watermeyer v Murray* 1911 AD 61 at 70; *Reid Bros (SA) Ltd v Fischer Bearings* Co Ltd 241; *Estate Breet v Peri-Urban Areas Health Board*; *Hottentots Holland Motors (Pty) Ltd v R*; *Minister of Home Affairs and Another v American Ninja IV Partnership and another* 1993 (1) SA 257 (A) at 263A-D; 268J-269C

[185] Hutchison 247 at §10.3.1

[186] Hutchison 248 at §10.3.1

[187] Christie 112-3 at §2.5.6

[188] *Beretta v Beretta* 1924 TPD 60; *Levenstein v Levenstein* 1955 (3) SA 615 (SR) at 619

[189] Kerr 421; Hutchison 416 at §16.6.3; *Mitchell Cotts Freight Zimbabwe (Pvt) Ltd v S & T Import Export (Pvt) Ltd* 1982 (2) SA 669 (Z) at 672D-E

[190] *Cassimjee v Cassimjee* 1947 (3) SA 701 (N) at 706; *Steyn v Lomlin (Edms) Bpk* 1980 (1) SA 167 (O); *Mitchell Cotts Freight Zimbabwe (Pvt) Ltd v S & T Import Export (Pvt) Ltd* 1982 (2) SA 669 (Z) at 672D-E; *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* [2014] 2 All SA 35 (SCA) at [10] [27]

aspects of their agreement but also adequately and clearly sets out, the parties' respective obligations towards each other, in order to facilitate the enforcement of the contract contemplated and agreed to by the parties.

4.2 Contractual obligations and performance

A hallmark of various definitions of a "contract" is that it creates legal obligation(s)[191] or gives rise to legal liability.[192] An "obligation" is a legal bond *(vinculum iuris)*,[193] or undertaking,[194] between two or more persons, in terms of which one party undertakes to perform certain duties for the benefit of the other party(ies),[195] which gives rise to personal rights *inter partes*.[196] It arises by agreement between two or more parties who exercise their wills.[197] This implies that, for a contractual obligation to arise, the parties involved must be *ad idem* about the performance(s) to be rendered, and must have entered into their agreement seriously and with an intention to create a legally binding contract.[198]

Contractual obligations render the party who is liable for particular performance a 'debtor', and the one in whose benefit performance is rendered a 'creditor', and are determined through contractual terms that the parties have reached consensus on. In other words, an "obligation" has two sides to it, namely, a duty that the debtor must fulfil towards the creditor; and a legally enforceable right which entitles the creditor to benefit from the fulfilment of that duty.[199] Put differently, for every duty to perform, for which a debtor is liable, there is a corresponding right to benefit from the performance, to which a creditor is entitled.[200]

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[191] LAWSA Vol 9 (3rd Edition) at §374; Nagel, C *Commercial Law* 3rded (2007) 36; Hutchison 6 at §1.1.4; Christie 10 at §1.4; *Conradie v Rossouw* at 324
[192] Pretorius 102; 122-123
[193] Hutchison 8 at §1.4.1
[194] Hutchison 7 at §1.3
[195] Christie 3 at §1.2
[196] Christie 4 at §1.2
[197] Christie 5 at §1.2
[198] Christie 6-7 at 1.3
[199] Christie 4 at §1.2
[200] Cornelius SJ 'Study Guide on Drafting of Contracts' (2021) (iii)

Under Roman Law, contractual obligations can be in the form of:[201]

- handing something over (*dare*), as is the case in a sale agreement where the seller is required to deliver the agreed *res* upon payment of the purchase price;
- doing something (*facere*), as is the case in a service agreement; or
- refraining from doing something (*non facere*), as is the case with a restraint of trade.

Contractual obligations are critical for determination of the mutual performance(s), which each party is liable for. As mentioned above, if the parties' contractual obligations, and by extension mutual performances, are neither specified nor determinable, from the contractual text, the parties can be said not to have reached consensus on an essential aspect of their contract. As a result, their supposed contract could be deemed void *ab initio* for vagueness. Furthermore, the possibility of performance and certainty, at the time the contract was concluded, which are yet other requirements for a valid contract, would be unascertainable. In addition to this, the discharge of the contract may, in the absence of specificity on contractual obligations (and performance), be unascertainable. The discharge of the contract is preceded by proper performance of contractual obligations, or termination of the contract, thus releases the debtor from his or her contractual obligations. Proper performance by both parties, therefore, has the effect of releasing the contract in its entirety.[202]

In order to determine contractual obligations, that the parties have reached consensus on, and the proper performance, the contract must specify:[203]

- by whom performance must be made;[204]
- to whom performance must be made;
- the nature of performance;[205]

[201] Hutchison 7 at §1.3; Christie 4 at §1.2
[202] Christie 468 at §11.1; *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539
[203] Christie 471-486 at §11.3-11.6
[204] Kerr 520 at §20
[205] Kerr 523 at §20

- the method and time of performance[206], if the creditor does not wish to leave this aspect to the discretion of the debtor;
- the place of performance;[207] and
- whether performance should be *in forma specifica* or *per aequipollens*.[208]

Performance should be determinable, from contractual text, in relation to the nature of the obligation(s) that the debtor is liable for (including the nature, place, time, and method of performance; and the frequency of performance (although, where the date of performance has not been specified, or is not determinable by application of implied terms, the creditor may put the debtor in *mora*). If the parties have selected to leave the determination of the nitty-gritties of performance to a third party or later determination, performance must be objectively ascertainable using the criteria outlined in the contract, and without necessity for further agreement between the parties.

It is, therefore, imperative that a contract articulately sets out the respective obligations of each party, or the criteria for determination of performance,[209] if the contract is to be enforced at all or in the manner contemplated by the parties.

4.3 Impact of certain express terms on consensus

Contractual terms are stipulations that the parties have reached consensus on, that are enforceable at law, which the parties have set out in words in their contract ("express terms"),[210] or which are incorporated into their contract by operation of the law or trade usage ("implied terms").[211] Because the *pacta sunt servanda* doctrine advocates the enforcement of contracts that are freely and seriously entered into, it is common cause that express terms are the starting point when determining 1) if a contract was concluded, as well as 2) the nature and extent of undertakings made by the parties towards each other (for the purpose of their enforcement).[212] In a similar

[206] Christie 498 at §11.9; Kerr 533 at §20
[207] Christie 498 at §11.10; Kerr 528 at §20
[208] Christie 475 at 11.5
[209] Christie 121 at §2.5.6(d)
[210] Christie 182 at §5.1.2
[211] Hutchison 254 at §10.3.3
[212] *Smith v Hughes*; *SAR & H v National Bank of SA Ltd* 1924 AD 704 at 715; *Jordaan v Trollip*

way that the parties' obligations are, in the first instance, ascertained through express terms, so are restrictions and formalities that the parties may have imposed upon themselves. Some express terms, such as are discussed below, restrict the parties' freedom to contract, by providing that the written memorial of the parties' agreement is the exclusive evidence of the agreement between the parties, or prescribing formalities for the subsequent amendment of their agreement.

In the event of such express terms having been incorporated into the contract, and regardless of the parties reaching consensus on the subsequent amendment of agreed express terms or the extratextual interpretation of the contractual text, the parties will, as a general rule, be bound by the initial express terms they reached consensus on. An exception will only arise where the non-variation clause and/or entire agreement clause was drafted so as not to entrench itself, and if it is amended or cancelled prior to the substantive contractual term which the parties wish to subsequently amend.

4.3.1 Entire agreement clause

An entire agreement, whole agreement, or exclusive memorial clause is an express term, which provides that the written contract embodies the whole agreement between the parties.[213]

Where the parties, in the absence of a legal requirement that their contract must be recorded in writing, prescribe a formality that the validity of their contract is predicated upon their agreement being reduced to writing, and agree that the written contract will constitute an exclusive memorial of their agreement, their contract will not give rise to binding contractual obligations, unless it is reduced to writing,[214] and, subject to jurisprudence relating to the parol evidence rule, extrinsic evidence, aimed at proving the terms of the contract, will be inadmissible.[215]

[213] Hutchison 422 at §16.8.2
[214] *Goldblatt v Fremantle* 1920 AD 123 at 126 and 128-129; Kerr 139-144 at §5
[215] Christie 226 at §5.4.1; *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* at 47; *Ex parte Kramer: in re Estate Selesnik* 1973 (4) SA 163 (W) at 167H-168A

Unless an aggrieved party can prove mistake or improperly obtained consensus, the parties are, therefore, generally bound to the meaning of words selected to record their written contract, where they have included an entire agreement, whole agreement, or exclusive memorial clause in their contract. As a result, it is important that, when drafting a contract, the drafter does not misrepresent the common intention of the parties in the contractual text, and that the pros and cons of including an entire agreement, whole agreement, or exclusive memorial clause are assessed carefully.

4.3.2 Non-variation clause

A non-variation clause is a contractual term that restricts the parties' freedom of contract, by either preventing them from amending the terms of their contract or prescribing formalities for such variation to be valid, e.g. by requiring that the amendment be in writing and/or be signed by both parties.[216] The clause protects the parties against casual and unilateral cancellation or variation of the contract by restricting their freedom to vary a signed contract, and prescribing formalities that the parties must adhere to, in order to vary or cancel the contract. The usual formalities that the parties impose upon themselves, in a non-variation clause, are that any variation of the contract must be reduced to writing and signed by both parties. The non-variation clause, thus, serves to facilitate commercial certainty.

Although some legal scholars hold the view that non-variation clauses are against public policy,[217] in *SA Sentrale Ko-Operatiewe Graanmaatskappy Bpk v Shrifren*, the then Appellate Division, considered that the parties had themselves restricted their own freedom to amend the contract, by including a non-variation clause in their contract, and that the parties did not completely preclude themselves from amending their contract in future. They could still amend their contract, on condition that they fulfil the conditions set out in the clause. The Appellate Division, thus, enforced the clause. In a subsequent case,[218] the Supreme Court of Appeal observed that the clause was in the interests of both parties, as it facilitates certainty. The Supreme

[216] Hutchison 169-171 at §6.3.2 and 263 at §10.3.7.3; *SA Sentrale Ko-Operatiewe Graanmaatskappy Bpk v Shrifren* 1964 (4) SA 760 (A)
[217] *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (A)
[218] *Brisley v Drotsky*

Court of Appeal, as a result, upheld the enforcement of the non-variation clause as being in line with the *pacta sunt servanda* doctrine.

It is important, therefore, that, where parties wish to reduce their agreement to writing, and include a non-variation clause in it, they take care to ensure that contractual obligations set out in their contract align with the objects with which they are entering into the contract, in order to prevent the inclusion of a non-variation clause having the unintended consequence of constraining the ascertainment of the parties' common intention and its enforcement. The inclusion of a non-variation, where care has not been taken to coin contractual text precisely and accurately could, therefore, lead to costly and drawn-out litigation at the expense of the discharge of the contract envisaged by the parties when they reached agreement.

4.4 Effect of signature of contractual instrument on consensus

A signature on a contract is *prima facie* evidence that the signatory undertakes the contractual obligations outlined in the contract.[219] This is in terms of the *caveat subscripto* rule, which is an extension of the quasi-mutual assent doctrine. This rule is premised upon the reasonable impression that the signatory creates, by appending his or her signature to the contract, that he or she seriously and deliberately intended to create legally enforceable contractual obligations.[220] In terms of the *caveat subscripto* rule, a person, who signs a contractual document, is held bound by it even if he or she claims not to have read or understood it.[221]

In *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*,[222] Cloete JA held that the signature of standard terms and conditions could be relied upon as proving that Mrs Hartley had read and understood the terms on which Sun Couriers agreed to courier travellers' cheques to Jersey Island. He, further, held that expecting Sun Couriers to bring the possible consequences of the exemption clause, contained in the standard terms and conditions, to the signatory's attention would have introduced a degree of

[219] Kerr 45; Christie 205 at §5.3.1
[220] *Burger v Central South African Railways* at 578; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A; *Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) SA 441 (SCA)
[221] Hutchison 249 at §10.3.2.1; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)
[222] 2007 (2) SA 599 (SCA)

paternalism that is inconsistent with the *caveat subscripto* rule into the South African law.[223]

Fraudulent misrepresentation[224] and mistake are the only exceptions to the *caveat subscripto* rule. Upholding the former of the foregoing exceptions, Diemont JA held, in *Da Silva v Janowski*,[225] that a signature is not only a reflection of physical characters, but also an affirmation of the contents of the document to which the signature is appended.[226]

The *caveat subscripto* rule is, therefore, significant in as far as the parties ensuring that they judiciously decide on express terms that articulate rules that govern their contractual relationship, and, within the bounds of what law permits, vary default legal rules that apply to their contract in line with their common intention.[227] The parties must, furthermore, assure themselves, prior to signing a written contract, that the contractual text selected to convey their underlying agreement does so in such a way that a person who was not privy to their negotiations, who interprets the contractual text objectively, would reasonably have no other possible interpretation to arrive at than the one the parties subjectively intended.

4.5 Conclusion

The importance of meticulous and accurate reflection of the agreement underlying a contract, with regard to the parties' respective contractual obligations and performance(s), is not only pivotal in avoiding protracted and costly court proceedings aimed at rectifying contractual text or resolving contractual disputes, but also in ensuring the enforcement of contractual terms that the parties understood themselves to have reached consensus on.

The fact that consensus, which is primarily subjective by nature, is a cornerstone for a valid and legally enforceable contract, which is interpreted objectively in the event of

[223] At [9]; *Afrox Healthcare Bpk v Strydom*
[224] Kerr 46
[225] 1982 (3) SA 205 (A)
[226] At 218G - 219A; *Sonfred (Pty) Ltd v Papert* 1962 (2) SA 140 (W) at 145
[227] Burnham, SJ *'Drafting in the Contracts Class'* 2000 44 St Louis U LJ Vol. 44 1535 at 1537

a dispute, underscores the importance of selecting words that, in an objective manner, clearly, unambiguously, and accurately reflect the parties' common intention. Furthermore, it is equally pivotal that each contracting party, and/or his or her legal representative, verifies that they understand the meaning of the contractual text and that it conveys the parties' contemplation of the agreed contractual obligations and performances before appending their respective signatures onto the written contract, in order to facilitate the determination and enforcement of their common intention, in the event of a dispute relating to the contract.

It is incumbent upon a drafter, therefore, to apply the legal doctrines and principles relating to the Law of Contract, in general, and to interpretation of contracts, when drafting a contractual instrument. In the interests of his or her client, a drafter must, when coining a written contract, endeavour to place him or herself in the shoes of an interpreter who would not have been privy to negotiations, that led to the contract, or to consultation with either of the parties.[228]

[228] Burnham at 1536

Chapter 5

5 Conclusion

Legal scholars agree that consensus is one of the requirements for a valid and legally enforceable contract; thus is the basis for contractual liability. The modern-day South African approach to consensus is a hybrid of the Roman-Dutch and English legal systems, although it is predominantly based on the Roman-Dutch subjective approach. Therefore, unless there is dissensus, consensus *ad idem* is required for contractual liability to arise between the parties. In line with the *animus contrahendi* principle, it is, furthermore, required that the parties must seriously and deliberately intend to create legally enforceable contractual obligations by mere acceptance of an offer; and must be consciously aware of having reached agreement on all material aspects of their contract. This is the basis on which mistake and defective consensus can, in the worst-case scenario, vitiate consensus, thereby voiding a contract.

The objective English approach to consensus, by way of the quasi-mutual assent doctrine, is only resorted to, where a party has, by his or her conduct, reasonably led another into believing that he or she has assented to all material aspects of the proposed contract.

Although contracts are said to be interpreted to ascertain the common intention of the parties, in reality they are interpreted with a view to ascertaining the meaning of words used in them, as they would be understood by a reasonable person having regard to the context. This is indicative of a disjuncture between the approach to contractual liability, which is derived from the Roman-Dutch Law and is predominantly subjective, and the approach to interpretation of contracts, which is derived from the English Law and is objective. This points to a need for further constitutional development of the common law that governs the interpretation of contracts, in order to mitigate the risk of imputing, upon the parties, a contract that neither may have subjectively intended.

The facts that consensus is the basis for contractual liability, and contracts are interpreted objectively, underscore the importance of elaborate and comprehensive specification of contractual performance and contractual obligations that the parties

undertake, when drafting a contract. A contractual instrument must, therefore, be unambiguously explicit on the concurrence of the parties' minds; their intention to create binding obligations; and their unanimity on the consequences of their contract. It must, in other words, provide for certainty regarding the parties' respective obligations and performances, such as the debtor's duty to fulfil an explicit obligation; the creditor's right to benefit from the debtor's performance; the form of the obligation(s) undertaken in the contract; the date, time, and place for performance; to whom performance must be rendered; the exact measure of performance; and how it must be rendered.[229] Failure to do this can lead to misinterpretation of the parties' common intention; the inability to determine whether the parties reached consensus on all material aspects of their contract, giving rise to an enforceable contract; and contractual performance and discharge being indeterminate.

[229] Except where the parties have selected to leave such certainty to the determination of an identifiable third party; or have agreed to negotiate it at a later stage and have agreed to a deadlock-braking mechanism in the latter case.

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