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Consensus as a Requirement of a Valid Contract from a Namibian Perspective: Issues and Solutions

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ABSTRACT

The basis of the existence of a contract is an agreement between the parties. No contract can therefore be concluded when there is no contract. Hence, the consensus is the very first step in establishing whether or not a contract has been concluded between the parties. Consensus is one of the requirements of a valid contract. However, the validity of a contract does not only rests on consensus. There are several other requirements that must be complied with before one can say that a valid contract has been concluded. It is essential for both parties to be ad idem regarding all the material terms and conditions of the agreement, failing of which the parties will be unable to enforce any rights and remedies which could normally flow from a valid contract. This article, therefore, analyses the concept of consensus as a requirement of a valid contract. In doing so, the article looks at what is consensus, how consensus is obtained, factors affecting consensus and the possible consequences for failing to obtain consensus.

Keywords: *Consensus, Offer, Acceptance, Contract*

I. INTRODUCTION

In today's world, commercial agreements are used in almost all areas related to the economy. Governments sign agreements, Memorandum of understanding and other legally binding documents. Companies and other juristic persons also enter into agreements on a daily basis. On an individual level, natural persons also conclude different types of agreements on a daily basis. Different types of contracts are valid in terms of the law, for example, the contract of sale, contract of lease, contract of insurance, credit agreements and employment contracts to mention but a few.

For a contract to be valid, it must comply with various requirements. Hence all contracts meet the following requirements, consensus, contractual capacity, legality, the possibility of performance and certainty. Depending on the type of contract entered into, formality may also

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be a requirement to be complied with. Thus, a formality is not necessarily a requirement in all contracts. But certain types of contracts need to comply with a formality.[2]

Generally, speaking consensus as the first requirement of a valid contract calls on the parties to create a serious intention to create binding rights and obligations.[3] There are various aspects that may affect consensus, resulting in the contract either being void or voidable. For example, a mistake renders the contract void, while misrepresentation, duress and undue influence renders the contract voidable.

This article, therefore, assesses the extent to which consensus is important as a requirement of a valid contract. Furthermore, the article seeks to examine the possible consequences that the parties may suffer as a result of failing to ensure that a proper consensus was obtained at the conclusion of the agreement.

II. WHAT IS CONSENSUS?

Consensus means agreement. The parties to the contract must reach an agreement in relation to the terms and conditions of the contract in order for them to conclude a valid contract. Thus, the consensus is a requirement of a valid contract and only when consensus has been reached can the parties form a valid contract, provided that the other requirements have been complied with.

When one speaks about consensus, we are referring to a serious intention to create rights and obligations. This is referred to as *animus contrahendi.*

It is essential to distinguish between subjective and objective consensus. Subjective consensus exists when the parties to the alleged agreement seriously intend to contract; are ad item regarding the material aspects of the contract, and are conscious of the fact that their minds have met.[4]

When parties reach a consensus, an agreement has come into existence between them, creating legally enforceable rights and obligations.[5] In other words, by reaching a consensus, the parties agree to the rights and the obligations they intend to create through such consensus. For

[2] For example, in a contract of marriage, a marriage must be solemnized by a marriage officer. In the Namibian context, several persons are recognised as marriage officers, authorized to solemnized a marriage. No marriage can be solemnized by someone who is not authorise to do so. Furthermore, in accordance with section 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 The contract of sale pertaining to immovable property must be reduced to writing and signed by the parties to such a contract. If a contract of sale of immovable property is not reduced to writing and signed will therefore be enforceable.
[3] Hutchison, D et al (2017) 'The Law of Contract in South Africa' 3rd edition 14.
[4] Ibid at 14.
[5] Fouche M, (2015) 'Legal Principles of Contracts and Commercial Law' LexisNexis 40.

example, in a contract of sale, the parties have to reach an agreement on the purchase price, the *merx* (item of sale) and the aspects relating to the performance such as the place and time of performance. In a contract of lease, the lessor and the lessee, for instance, need to reach an agreement on the rental property for use and enjoyment by the lessee, the rental amount to be paid to the lessor and the date and method of payment of the rental amount.

Hence, in order for parties to fully reach a consensus, it is important that they are in agreement in relation to the essential elements of a particular contract they purport to conclude. There will be dissensus if there is divergence with regards to the essential elements of a particular contract.

In determining whether or not consensus was obtained, the courts look at two factors, namely, consensus and reasonable reliance on consensus. In other words, the enquiry is made into whether the minds of the parties have actually met; and a subjective approach is followed in making this determination.[6] If it is found that consensus exists, it is the end of the enquiry.[7]

III. HOW IS CONSENSUS OBTAINED?

The process of reaching an agreement is done through the declaration of intentions communicated by the parties to the purported agreement.[8] This means that one party has to make an offer to another party, and once this offer is accepted, the consensus is reached.[9] Offer may be described as:

''...as a declaration by the offeror of his intention to conclude a contract, while all the terms on which he is prepared to contract are set out in this declaration''.

This means that an offer is a proposal made by the offeror to the offeree. In this proposal, the offeror sets out all the terms and conditions upon which he wishes to bind himself and also to behind the offeree. The offer must be crafted in such a way as to place the offeree in the position to accept the offer. The offer must contain all material aspects of the contract, or the offeree does not fully understand the terms upon which the offeror intends to create a contract; it will not be possible for the parties to reach a proper consensus. Therefore, the offer must meet set requirements in order to be valid and accepted by the offeree. Firstly, the offer must be clear and unambiguous.[10] This means that it must contain sufficient information so as to enable the offeree to assess the offer and decide whether or not to accept the offer. Secondly, the offer

[6] *Muvangua v Hiangoro* [2020] NAHCMD 292 (16 July 2020); paragraph 7.
[7] Ibid.
[8] Hutchison, D *et al* (2017) 'The Law of Contract in South Africa' 3rd edition 48
[9] The party who makes an offer is referred to as an offeror and the party to whom the offer is made is referred to as the offeree.
[10] Fouche M, (2015) 'Legal Principles of Contracts and Commercial Law' LexisNexis 41.

must be complete. An offer is complete if it contains all the material terms and elements of a contract. The offeror may also behind the offeree on the terms and conditions as set out in the contract.[11] In the case of *Tjirare N.O v Mgohagolema*[12] the court cited with approval the principle outlined in the matter of *Wasmuth v Jacobs*[13]where Levy, J said:

'*It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted, it will bind the offeror*.'

An act that does not meet all the requirements of an offer cannot be taken to be an offer as it is incapable of being accepted. Only an act that meets all the requirements of an offer can be said to be an offer which if accepted, forms a valid contract.

Acceptance, on the other hand, is a clear, unambiguous [and conscious] response by the offeree to the offer made by the offeror.[14] In other words, acceptance is a declaration of intention made by the offeree assenting to all the terms proposed by the offeror in his offer.[15]

Acceptance needs to meet certain requirements before it can be regarded as a valid acceptance, giving arise to reaching consensus. Firstly, acceptance must be unqualified.[16] In order to constitute a valid acceptance, the acceptance of an offer made by the offeree must be clear and unambiguous and must correspond with the terms of the offer.[17] In the case of quoted with approval in *Seagull's Cry v Council of the Municipality of Swakopmund*[18] the case of *JRM Furniture Holdings v Cowlin*[19] in which the following was stated:

'*The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract*.'

An acceptance must be an unequivocal assent to every aspect or element of the offer.[20] In other words, the offeree must not set new or additional terms in the acceptance. The moment the acceptance creates new terms and or conditions, it is no longer acceptance but rather a counter-offer. When a counter-offer is made, it terminates an initial offer. The person who makes the initial offer because the offeree, while the one who makes a counter-offer becomes the offeror.

[11] It is however important to note that the are certain terms that do not necessarily need to be included in a contract as they automatically form part of the contract through the operation of law. This are referred to *ex lege* terms. Thus, certain terms are read into the contract by operation of law. See Hutchison, D et al (2017) 'The Law of Contract in South Africa' 3rd edition 254.
[12] (I 1852/2013) [2017] NAHCMD 17 (30 January 2017)
[13] *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633.
[14] Hutchison, D *et al* ''The Law of Contract in South Africa'' (2017) 3rd edition, Oxford University Press. 57
[15] Ibid.
[16] Ibid.
[17] *Tjirare N.O v Mgohagolema* (I 1852/2013) [2017] NAHCMD 17 (30 January 2017). Paragraph 26
[18] 2009 (2) NR 769 at 780 D.
[19] 1983 (4) SA 541 (W) at 544B.
[20] Hutchison, D *et al* ''The Law of Contract in South Africa' Op cit 12 at 57

A counter-offer becomes the 'new' offer and must be accepted by the other party to reach consensus. In the same vein, acceptance must be unambiguous to qualify as valid acceptance. Something is said to be ambiguous if it is capable of having more than one meaning. Hence, acceptance will be ambiguous such acceptance can be interpreted to provide two possible meanings. An example of this could be where a party makes the following statement in the contract of sale, 'I am interested and will most likely purchase your computer, but must first determine whether I have sufficient funds to purchase it.' Such a statement is ambiguous while being conditional at the same time. The words 'most likely' indicates ambiguity, while the words 'must first determine whether' makes the acceptance conditional. A conditional and equivocal acceptance renders the acceptance invalid.

Secondly, acceptance must be a response by the person to whom the offer was made. In other words, where Ben makes an offer to Jane, the latter party is the one who has to accept the offer in order for the parties to reach a consensus. Acceptance by the third party, therefore, does not bring about consensus.

Thirdly, acceptance must be a conscious response to the offer.[21] In the case of *Bloom v American Swiss Watch and Co*[22] the issue was under discussion. What transpired, in this case, was that thieves broke into American Swiss Watch and Co (hereinafter referred to as the company) stealing some items. The company made an offer to anyone who provides information that will lead to the arrest of the thieves. The company attached a reward of 500 to anyone who provides the required information to assist with the arrest of the thieves in question. Bloom, without being aware of the offer made, including the reward, provided information that led to the apprehension of the thieves. Subsequent to the provision of the information, Bloom became aware of the offer and claimed the reward. The company argued that it had not entered into a contract with Bloom and therefore refused to give the reward to Bloom. The question that the court had to answer was whether there was a valid contract between the parties, and this had to be determined by testing whether the parties had reached a consensus. Put it differently, whether there was a valid offer made to Bloom and whether Bloom's provision of information was an acceptance to the offer made by the company. The court held that Bloom was not entitled to receive the award. This is because one cannot accept the offer if he or she is not aware of the existence of the offer. Consensus requires the meeting of two minds, and where one of the parties does not know of the offer and the terms being

[21] Ibid.
[22] *Co 1915 AD 100*

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proposed in such an offer, there can be no valid acceptance.

When the offeror makes an offer, he or she normally prescribes the manner in which the acceptance must be made. Therefore, it is essential that acceptance must be made in the manner as proposed by the offeror. As a general rule, any deviation from the manner set by the offeror may negate acceptance. However, the courts, after considering the surrounding circumstances, may rule that a particular method of acceptance followed in a given case does not affect acceptance, irrespective of it being contrary to the method of acceptance set by the offeror. This is normally where the reliance theory is followed.[23]

IV. FACTORS AFFECTING CONSENSUS

Consensus as a key aspect in establishing a contractual relationship is affected by various factors. The factors that affect consensus include mistake, misrepresentation, duress and undue influence. This means that the presence of any of these factors may render a contract either void or voidable, depending on which of the factors are present.

Mistake refers to a situation where either one or both parties to the purported agreement are mistaken regarding the material terms of the contract. The parties that rely on mistakes must prove that the mistake is material and reasonable in order to have the contract set aside based on such a mistake. A mistake is a material where the parties are, for example, mistaken about the material elements of an agreement. For instance, in a contract of sale, a mistake will be material where the parties are mistaken about the purchase price of the item that is being sold, where party A thinks that the purchase price is N$ 300 while party B thinks that the purchase price is N$ 3 000. A mistake is reasonable if any reasonable person in the shoes of the contracting party would be mistaken about the same or similar sets of events. PROVIDE AN EXAMPLE. Only once a party to a contract is able to establish that a mistake in question is a material and reasonable mistake can the contract be set aside on the basis of mistake. Hence, the mistake renders the contract *void ab initio.*

Misrepresentation refers to the false information given by one contracting party or his or her agent to the other contracting party, with the result that the latter concludes a contract on the faith of such false information. Misrepresentation has various forms, namely, fraudulent misrepresentation, negligent misrepresentation and innocent misrepresentation. In order for the claim of fraudulent misrepresentation to succeed, it must be evident that a contracting party knowingly deceive the other contracting party by giving false information to induce him into

[23] Hutchison, D *et al* ''The Law of Contract in South Africa' Op cit note 12 at 58

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contracting. In the case of negligent misrepresentation, a contracting party, provides false information, not knowing that such information is false and without taking reasonable steps to establish that such information is false. Innocent misrepresentation results from the giving of false information by a contracting party after taking reasonable steps to find out the true state of affairs but to no avail. All types of misrepresentation render the contract voidable, however, damages can only be claimed under fraudulent and negligent misrepresentation.

Duress is another factor that affects consensus. It refers to a ''*threat or intimidation, which engenders fear in a person, causing him to conclude a contract as a result of this fear*.''[24] In other words duress relates to a situation where one party acts in manner that places another party in a condition of fear, causing the latter to conclude a contract as a result of the said fear. The requirements that must be established to show that a party was under duress where set out in the case of *Broodryk v Smut NO*[25] as follows:

'a) there has to be actual violence or reasonable fear;

b) the fear must be caused by the threat of some considerable evil to the party or his family;

c) it must be threat of some considerable evil to the party or his family;

d) the threat or intimidation must be contra bonos mores; and

e) the moral pressure used must have caused damaged.'

It is important to note that the pressure exerted must result in the conclusion of the contract. The court said in the case of *Dama v Old Mutual Life Assurance Limited*[26] that the pressure must be directed towards the formation of the contract. The court, furthermore stated that ' *'the improper influence must have been the direct cause of entering into the transaction*.''[27] In other words, a party must stand to suffer some form of harm or damage, if he or she fails or refuses to conclude the contract. Hence, the contract must be concluded as a result of threat in order for one to successfully raise duress as defence affecting consensus.

The party who raises the defense of duress as a ground to have a contract set aside can only succeed if consenting to the contract is the only way to escape from threat or danger. In the case *Alexander Forbes Namibia Group (Pty) Ltd v Andrew Nangombe* the court stated the following:

' *Duress is not satisfied if one exerts pressure in circumstances in which it is open to the*

[24] Fouche M, (2015) 'Legal Principles of Contracts and Commercial Law' LexisNexis 60.
[25] 1942 TPD 47. Also see Fouche M, (2015) 'Legal Principles of Contracts and Commercial Law' LexisNexis 60.
[26] (CA 03/2016) [2017] NAHCNLD 117 (04 December 2017).
[27] Ibid.

affected party to adopt an alternative cause of action for dealing with his predicament.'[28]

Another factor that affects consensus is referred to as undue influence. The definition of undue influence was formulated in the case of Preller v Jordan as '*'the influence which one person has over another which weakens the latter's resistance and renders his resolve malleable so that the other person may exercise his influence in an unscrupulous manner to persuade the victim to conclude a harmful transaction which he would normally not have concluded*.''[29]

The requirements of undue influence can be deduced from its definition as set out above. Thus, a party who relies on undue influence to have the contract set aside must prove that:

(a) one party obtains an influence over the other party;
(b) this influence weakens the other party's resistance and renders his resolve malleable;
(c) the party exerting the influence uses this influence in an unscrupulous manner;
(d) *this influence leads to the conclusion of a contract, which is to the detriment of the other party*.'[30]

The concept of undue influence was originally inherited from English law. Once a party successfully raise the defense of undue influence, the courts are likely to grant the remedy of restitutio in integrum. This is after the court in *Preller v Jordan*[31] held that *restitutio in integrum* is wide enough to cater for claims of undue influence.

It must be noted that a mere raising of a defense of mistake, mispresentation, duress or undue influence does not mean that the contract will automatically become void or voidable. The courts will at all times look at the merits of each case and determine whether the defense raised was present at the time of 'consenting' and whether it negates consensus. Where a particular defense raised lack merit, the court will mostly likely not order that consensus was affected. This reasoning is founded in the courts role to respect the intention of the parties to a contract.[32]

V. CONSEQUENCES OF THE FAILURE TO OBTAIN CONSENSUS

It is crucial for parties to the alleged agreement to have reached consensus. If the parties are unable to proof the existence of consensus, it will be impossible to proof the existence of a contractual relationship between the parties. In the case of *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* the court said that, in our law there are two

[28] I 2452-2014) [2015] NAHCMD 167 *(24/07/2015*
[29] 1956 (1) SA 483.
[30] *Patel v Grobbelaar* 1974 1 SA 532 (A). Also see Fouche M, (2015) 'Legal Principles of Contracts and Commercial Law' LexisNexis 61.
[31] Ibid.
[32] *Op cit* note 26.

fundamental grounds upon which a person **X** can prove the existence of a contract, namely, 'consensus' and 'reasonable reliance'.[33] The principle of he who alleges must proof places the onus of proving the existence of a contract on the person who alleges that the contract exists.[34]

In contracts, that involves large sums of money, it could become extremely important to proof consensus. Large corporations normally enter into agreements with other juristic persons, involving transactions where large sums of money is the sub-matter of such transactions. In these types of contracts, it is very important to ensure that the consensus is present and that such consensus was obtained in a proper manner. This could avoid law suits aimed at setting the contract aside for lack of consensus.

Proving the existence of a contract becomes paramount, when it comes to performance of the 'obligations' and possible breach of contract committed. In terms of the law of contract, as was stated in the previous paragraphs, the parties to the contract, create the rights and obligations through consensus. Neither party can therefore hold another party to perform, without first establishing that they have reached consensus, which led to the existence of valid contract. In the absence of consensus and subsequent creation of a valid contract, no party will be required to perform and in the same vein, no party has a right to claim performance from another party. In order to avoid performance of his or her obligations a party may endeavour to look for a loophole in the contract and the failure to obtain proper consensus may just be one of the defenses one can use for non-performance of contractual obligations.

Furthermore, any claim for specific performance and damages or any other remedy arising from the existence of a contract, cannot be successful, if the parties concerned cannot establish that they have reached consensus. If one is unable to proof consensus, then it will be impossible to proof the existence of valid contract.[35] It is only a valid contract that can give raise to a claim of breach of contract and subsequent remedies. In other words, where consensus is absent, there are no grounds upon which a contractual claim can be based.

Where consensus is absent, the contract is automatically is void ab initio. However, where the consensus is present but was obtained in an improper manner, such a contract will be voidable at the instance of the aggrieved party. In other words, the aggrieved party can choose to have

[33] (I 2115/2015) [2021] NAHCMD 455 (5 October 2021)
[34] *Muvangua v Hiangoro* [2020] NAHCMD 292 (16 July 2020); paragraph 8.
[35] Proving the existence of a valid contract is normally difficult in the event where the parties have entered into an oral contract. However, in terms of a written agreement, it is normally less burdensome to proof the existence of a valid contract, as the written document is the prima facie proof the existence of the contact. In terms of Rule 46 of the Rules of the High Court of Namibia, a claims that involves a written contract requires the claimant t attached a copy of the a written contract to the claim.

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the contract set aside or enforced, and still claim for damages irrespective of the choice so made. Some may argue that allowing the aggrieved party the right to claim damages may be unfair towards to guilty party. However, in an instance where the aggrieved party as suffered some form of financial loss as a result of the guilty party's conduct as far as consensus is concerned, it is only fear that the aggrieved party be compensated for such a loss.

VI. CONCLUSION

Parties who intend to conclude a valid agreement must ensure that they are ad idem regarding all the material terms and conditions of the purported agreement. All contracts are based on consensus. Neither party can claim performance or enforce any right against the other if no consensus has been reached. Apart from consensus, the parties must meet other requirements of a valid contract, namely, contractual capacity, legality and formalities and certainty. Furthermore, it must be possible for the parties to render performance in respect of the contractual obligations. In order to avoid facing severe economic losses, all parties to the contract must ensure that they reach a consensus.

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