

**A CRITICAL APPRAISAL OF THE DECISION IN *SONAP V PAPPADOGIANIS*
1992 (3) SA 234 (A), WITH REFERENCE TO THE BASIS OF
CONTRACTUAL LIABILITY IN SOUTH AFRICAN LAW AND
VARIOUS OTHER LEGAL SYSTEMS**

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ABSTRACT

In *Sonap Petroleum (formerly known as Sonarep) (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) the Appellate Division apparently approved the direct application of the reliance theory, without reference to prejudice or fault, to determine contractual liability in the absence of consensus.

The various approaches to contractual liability in South African law are examined, and a comparative study of English law and the law of the Netherlands is conducted.

It is submitted that the element of fault is not crucial to the enquiry, but rather, the elements of conduct, inducement and a reasonable reliance upon consensus. It is concluded that the test for contractual liability in the absence of actual consensus, as formulated by the court in *Sonap's* case, without reference to prejudice or fault, has established sound precedent in South African law.

KEY TERMS

consensual (intention) theory

declaration theory

estoppel by representation

iustus error

misrepresentation

mistake

objective principle

reliance theory

risk principle

reasonable reliance

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LIST OF ABBREVIATIONS

TITLES OF JOURNALS

<i>SALJ</i>	<i>South African Law Journal</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TSAR</i>	<i>Tydskrif vir die Suid Afrikaanse Reg</i>

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<i>BGB</i>	<i>Bundesgesetzbuch - Germany</i>
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1 Introduction

South African courts have not consistently applied any single theory of contractual liability. Two distinct approaches have emerged: first, the application of the subjective consensual (intention) theory, which requires *consensus ad idem*, a meeting of the minds of the respective parties, and, secondly, the application of the objective declaration theory, which requires correspondence of the declared intentions of the respective parties.

Where there is alleged *dissensus*, in some cases the consensual theory has been tempered with the application of the reliance theory, while in other cases the courts have resolved the issue on the basis of estoppel. Another approach has been to qualify the declaration theory by the application of the *iustus error* doctrine. In addition, regardless of which approach has been adopted, there has been controversy as to whether the elements of prejudice and fault play a decisive role.

In *Sonap Petroleum (formerly known as Sonarep) (SA) (Pty) Ltd v Pappadogianis*¹, the full bench of the Appellate Division rejected the estoppel approach and apparently approved the direct application of the reliance theory, without reference to fault. The test for contractual liability, as formulated by the court, in *Sonap's* case, appears to be a novel one. However, the decision is based largely upon the oft-quoted *dictum* of Blackburn J, made well over a century ago, in the English case of *Smith v Hughes*²:

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him,

¹ 1992 (3) SA 234 (A).

² (1871) LR 6 QB 597.

the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms..."³

I propose to examine the various approaches to contractual liability in South African law, with reference to the manner in which the Blackburn *dictum* has been applied. Consideration will also be given to some other legal systems, in particular those of England and the Netherlands, with a view to deciding whether the court, in *Sonap's* case, has correctly stated the requirements for the application of the reliance theory and whether its test for contractual liability, without reference to prejudice or fault, provides an adequate solution in cases in which actual consensus is lacking.

³ At 607.

2 Various approaches to contractual liability

The application of the two basic theories, namely the subjective consensual theory and the objective declaration theory have been qualified by the following:

2.1 Estoppel by Representation

The Blackburn *dictum* has been regarded by some courts as an expression of the estoppel doctrine⁴, which was received into South African law via the English law. After all, as Kahn⁵ points out, the word 'preclude'⁶ is a synonym for 'estop'.

Estoppel is of general application in our law and is not confined to contractual obligations. Estoppel is based on a representation. If one party represents to the other that a certain state of affairs exists or does not exist, and another party acts in reasonable reliance upon such representation to his prejudice, then the former cannot be heard to say (in other words, he is estopped from saying) that a different state of affairs existed. Traditionally, estoppel operates as a defence and not as a cause of action.

In the context of contractual liability, if X has induced Y reasonably to believe that X intends to bind himself on certain terms, then X may be

⁴ See, for example, *Van Ryn Wine and Spirit Company v Chandos Bar* 1928 TPD 417; *Peri-urban Areas Health Board v Breet NO and another* 1958 (3) SA 783 (T); *Benjamin v Gurewitz* 1973 (1) SA 418 (A). Cf *Petit v Abrahamson (II)* 1946 NPD 673 at 682 and *Ocean Cargo Line Ltd v F R Waring (Pty) Ltd* 1963 (4) SA 641 (A) at 653, where the question whether the Blackburn *dictum* embodied the doctrine of estoppel was expressly left open.

⁵ E Khan *Contract and Mercantile Law* Vol I 2 ed (1988) 15.

⁶ The word 'preclude' was used by Blackburn J in his *dictum*, in the sentence preceding the quotation at note 3.

estopped from denying that he agreed to those terms. Liability therefore rests on a fiction: there is no actual contract between X and Y, and X (who created the reliance upon consensus by Y) may not enforce the contract, yet neither may X deny the existence of it.

In South African law there is both case authority⁷ and some academic support⁸ for the estoppel approach to the basis of liability in the absence of actual consensus. Although, generally, it may be said that fault and prejudice are requirements for the operation of estoppel, this does not appear to be a hard and fast rule. While proof of fault has been held to be a requirement in some situations, it has not been required in others.⁹ It is noteworthy that the fault requirement was not mentioned by Blackburn J in his *dictum* in *Smith v Hughes*¹⁰, nor was fault required in *Freeman v Cooke*¹¹, the case referred to by Blackburn J in the formulation of his *dictum*. Furthermore, the requirement of prejudice does not necessarily

⁷ See note 4.

⁸ JC de Wet '*Estoppel by Representation*' in *die Suid-Afrikaanse Reg* (1939) 73; JC de Wet and AH van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 21; W de Vos '*Mistake in Contract*' (1976) *Acta Juridica* 181.

⁹ Van der Merwe et al *Contract General Principles* (1993) 24. In *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) Trollip J required fault on the part of the representor, in that he ought, as a reasonable man, to have foreseen that his conduct would mislead another. Cf *Coetzee v Van der Westhuizen* 1958 (3) SA 847 (T); *Credit Corporation of SA Ltd v Botha* 1968 (4) SA 837 (N); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Sunday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C), being cases in which fault was not required.

¹⁰ *Supra* notes 2 and 3.

¹¹ (1848) 2 Ex 654, referred to in *Smith v Hughes supra* at 607.

entail financial loss, but if a party enters into contract this may be viewed as sufficient alteration of his position to constitute prejudice.¹²

2.2 The Reliance Theory

Traditionally, the consensual theory has been tempered with the application of the reliance theory (also known as the theory of quasi-mutual assent) in the following manner: where there is alleged *dissensus*, where X has created a reasonable belief of consensus in the mind of Y, upon which Y relied, then Y may hold X bound to his expressed intention, even if this differs from his (X's) actual intention.

In *Saambou-Nasionale Bouvereniging v Friedman*¹³ the Appellate Division, per Jansen JA, first indicated a preference for the application of the consensual theory, tempered with the reliance theory. Jansen JA referred to the Blackburn *dictum*, which he considered to amount to a form of the reliance theory.¹⁴ Such an approach has been endorsed in subsequently reported decisions of the Appellate Division¹⁵, and, more recently, by the full bench, per Harms AJA, in *Sonap's case*, and per Botha JA in *Steyn v LSA Motors Ltd*¹⁶.

¹² *Peri-urban Areas Health Board v Breet NO and another* supra note 4 at 790. This line of reasoning is supported by *W de Vos op cit* note 8 at 181.

¹³ 1979 (3) SA 978 (A).

¹⁴ At 995.

¹⁵ See, for example, *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A).

¹⁶ 1994 (1) SA 49 (A).

The application of the doctrine of estoppel has been compared to the direct application of the reliance theory¹⁷. There are similarities between the approach of estoppel by representation and the application of the reliance theory, in that both involve elements of inducement and reasonable reliance. However, these two approaches are essentially quite different, the most significant distinction being that, in the case of estoppel, liability is based upon a fiction, whereas, with the application of the reliance theory, recognition may be given to an actual contract and full contractual liability, with concomitant rights, may arise.

As with estoppel, contention has arisen as to whether prejudice and fault are required. Christie submits that there is no necessity to prove prejudice, nor fault or blame, but that Blackburn J 'intended to advance the law a stage further so as to give the misled party something more than the defence of estoppel - to give him, in fact, the contract that he was entitled to think he had.'¹⁸

In *Saambou-Nasionale Bouvereniging v Friedman*¹⁹, Jansen JA, having referred extensively to various South African and overseas authorities, left open the question whether fault is a requirement for the application of the reliance theory. In *Sonap's* case, Harms AJA decided that the introduction of the fault principle 'appears to be unnecessary'.²⁰

¹⁷ See, for example, K Kritzinger 'Approach to Contract: A Reconciliation' (1983) *SALJ* 47; ADJ Van Rensburg 'Die Grondslag van Kontraktele Verbondenheid' (1986) *THRHR* 448.

¹⁸ RH Christie *The Law of Contract in South Africa* 2 ed (1991) 27.

¹⁹ *Supra* note 13.

²⁰ *Supra* note 1 at 240 G.

2.3 Iustus Error

In some cases²¹ the declaration theory²² has been qualified by the doctrine of *iustus error* in the following manner: Where X, by relying on his mistake, wishes to resile from a contract which he has apparently concluded with Y, X may only do so if his mistake was material and reasonable (*iustus*). If X has been 'to blame' in the sense that by his conduct he has led Y reasonably to believe that he (X) was binding himself on certain terms,²³ then X's mistake will not be regarded as *iustus* and X may not avoid liability. However, if X's mistake is due to a misrepresentation by Y, then Y is 'to blame' and X will not be bound, but may avoid liability on the basis of his mistake.²⁴

The doctrine of *iustus error* has been said to be 'a manifestation of the reliance theory, with elements such as reasonable reliance, inducement and possibly also fault and prejudice being relevant to its operation.'²⁵ Indeed, the application of the doctrine of *iustus error* has been regarded as the indirect application of the reliance theory.²⁶

²¹ For example, *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); *Nasionale Behuisingskommissie v Greyling* 1986 (4) SA 917 (T); *Kok v Osborne* 1993 (4) SA 788 (SEC).

²² MFB Reinecke 'Regstreekse of Onregstreekse Toepassing van die Vertrouensteorie' (1986) *TSAR* 510. Cf G Lubbe and C Murray *Farlam and Hathaway Contract* 3 ed (1988) at 165 and Van der Merwe et al op cit note 9 at 34, who view the *iustus error* doctrine as a qualification of the consensual (intention) theory.

²³ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471.

²⁴ *Ibid.*

²⁵ Lubbe and Murray op cit note 22 at 168.

²⁶ ADJ van Rensburg 'Die Grondslag van Kontraktele Gebondenheid' (1986) *THRHR* 453; Reinecke op cit note 22 at 509.

It has been explained thus²⁷: With the direct application of the reliance theory, once the contract-assertor has established that there is an apparent contract and the resiler has raised a doubt in the mind of the court as to whether he intended to be bound by such a contract, the contract-assertor must prove, on a balance of probabilities, that the resiler induced a reliance by the contract-assertor upon the former having the intention to bind himself on certain terms with the latter. On the other hand, in the application of the doctrine of *iustus error*, once the contract-assertor has proved the existence of an apparent contract, the resiler bears the onus of proving on a balance of probabilities that he laboured under a mistake which was material and reasonable. Where he establishes that the contract-assertor induced a reasonable reliance on his part that the contract-assertor intended to bind himself to terms other than those contained in the apparent contract, then he will be able to avoid liability. If he fails to discharge this onus then he may be contractually liable.

Thus, by the direct application of the reliance theory the induced reliance is directly and explicitly protected²⁸ by holding the person who induced the reliance (the contract-resiler) liable. On the contrary, through the application of the doctrine of *iustus error*, the induced reliance upon consensus is protected indirectly or obliquely: if it is the contract-assertor who induced the reasonable reliance on the part of the resiler, then the error will be regarded as *iustus* and the resiler may avoid liability; if it is the resiler who induced the reasonable reliance on the part of contract-assertor then he will be 'to blame'²⁹ for his error and he may not avoid liability.

Reinecke³⁰, while conceding that the *iustus error* approach is aimed at the protection of a reasonable reliance upon consensus, questions whether it

²⁷ Van Rensburg op cit note 26; Lubbe and Murray op cit note 22 at 168; Van der Merwe et al op cit note 9 at 33.

²⁸ Lubbe and Murray op cit note 22 at 168.

²⁹ See note 23.

³⁰ Op cit note 22 at 511.

will always yield the same results as the direct application of the reliance theory. He submits that the *iustus error* approach offers no basis for contractual liability, but is rather a recipe to establish whether a person can avoid liability on an apparent contract. In Reinecke's view the *iustus error* approach fails in a situation where there is no apparent contract, or where the party seeking to enforce the contract does so on the basis of a reasonable reliance upon terms which are not contained in an apparent contract.³¹ Reinecke prefers the direct application of the reliance theory as the more convincing and simple approach towards liability in the absence of consensus.

Van der Merwe et al³² submit that the doctrine of *iustus error* is not an alternative approach to contractual liability, but is rather the practical way in which the courts - albeit haphazardly - have allowed objective considerations to qualify the logical consequences of the will theory where one of the parties to an apparent contract raises a material mistake. They perceive the *iustus error* approach as the combination of two stages in the process of determining the existence of contractual liability: first the application of the will theory (where a material mistake will exclude consensus), qualified by the application of the reliance theory (where the party who nevertheless wishes to hold the mistaken party bound must prove a reasonable reliance upon consensus).

While there is strong case authority in South African law for the application of the doctrine of *iustus error* as basis for contractual liability, again, there has been much controversy as to whether the elements of fault and prejudice are requirements for its application.³³

³¹ Op cit note 22 at 512. See, for example, *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* supra note 21.

³² Op cit note 9 at 32 and 39.

³³ See, for example, *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* supra note 21 at 539 G; *Nasionale Behuisingskommissie v Greyling* supra note 21; *Du Toit v Atkinson's Motors Bpk* supra note 21; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* supra note 21.

Despite this apparently conflicting authority, Harms AJA, in *Sonap's* case, regarded neither prejudice nor fault as a requirement, and was of the opinion that the authorities, referred to by the judges in the cases in which the *iustus error* doctrine was applied, and to which the court, in *Sonap's* case, was referred, were mere adaptations of the Blackburn *dictum*.³⁴

³⁴

At 239 F - H.

3 The Sonap decision

3.1 A summary of facts

The respondent, Pappadogianis, in terms of a duly registered notarial deed of principal lease, let his property to the appellant, Sonap Petroleum, for a period of 20 years. Almost 12 years later a notarial addendum to the lease was signed by the respondent and the appellant's managing director. By the mistake of the appellant's attorney, the term of the lease was reflected in the notarial addendum as 15 years. Once this was detected, the appellant sought rectification of the addendum, to reflect a term of 20 years and, in the alternative, an order declaring the addendum, in the light of the mistake, to be void.

The Witwatersrand Local Division dismissed the claim with costs. In an appeal to the Appellate Division it was found³⁵, on the facts, that the respondent had read the addendum and had realised that the term had been amended. The dismissal of the claim for rectification was confirmed³⁶. Further, the Appellate Division held that 'the respondent was not misled by the appellant to believe that it was its intention to amend the period, but, on the contrary, that he was alive to the real possibility of a mistake and that he had, in the circumstances, a duty to speak and to enquire'.³⁷ It was held³⁸ that because he did not speak or enquire, but decided to "snatch the bargain", there was no consensus, actual or imputed, on this issue. The court accordingly declared void³⁹ that part of the addendum which stated that the lease was for a period of 15 years.

³⁵ At 238 C.

³⁶ At 238 F.

³⁷ At 242 A - B.

³⁸ At 242 B.

³⁹ At 242 E.

3.2 The legal basis of the decision

Harms AJA apparently approved the application of the reliance theory, in that he framed the decisive question thus:

'did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'⁴⁰

It was held that to answer this question a three-fold enquiry is usually necessary:

- 1 Was there a misrepresentation as to one party's intention?
- 2 Who made that representation?
- 3 Was the other party misled thereby?

This last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?⁴¹

If the respondent realised (or should have realised as a reasonable man) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and enquire whether the expressed offer was the intended offer. Only thereafter could he accept.⁴² Harms AJA concluded that '(t)he snapping up of a bargain in the knowledge of such a possibility would not be *bona fide*. Whether there is a duty to speak will obviously depend on the facts of each case.'⁴³

⁴⁰ At 239 I - J.

⁴¹ At 239 J - 240 B.

⁴² Harms AJA, at 241 B, found support for this proposition in *Sherry v Moss* (WLD 3 September 1952 unreported) which was quoted in Kahn op cit note 5 at 300. For additional authority referred to, see *Sonap's* case supra note 1 at 241 B - D.

⁴³ At 241 D.

Harms AJA rejected the estoppel approach to contractual liability on the basis that it 'merely bedevils the enquiry and that reliance thereon is not conducive to clear thinking.'⁴⁴ He also found that the introduction of the fault principle 'appears to be unnecessary.'⁴⁵ He observed that the application of the test, as formulated in the *Sonap* decision, would not have affected the outcome of certain earlier cases where fault had been considered⁴⁶ and he also mentioned Appellate Division authority where the court 'did not consider whether the representor was negligent, but merely whether a representation had been made, nor was the matter approached along the lines of estoppel.'⁴⁷

What is noteworthy about the decision in *Sonap's* case is that the court, in effect, reached its conclusion that fault was unnecessary in the direct application of the reliance theory by referring to cases decided on the basis of the doctrine of *iustus error*. Thus the decision seems to amount to an attempt by the court to reconcile the direct application of the reliance theory with the application of the doctrine of *iustus error*.⁴⁸

The decision in *Sonap's* case has been welcomed for its approval of the direct application of the reliance theory as basis for contractual liability in cases where actual consensus is lacking.⁴⁹ Kerr has welcomed the

⁴⁴ At 240 D - E.

⁴⁵ At 240 G.

⁴⁶ Harms AJA referred to *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* supra note 21, in which Coetzee J had said that 'the fault principle looms large' in determining whether an error is *iustus*, and also *Nasionale Behuisingskommissie v Greyling* supra note 21.

⁴⁷ At 240 I.

⁴⁸ TB Floyd and C-J Pretorius 'A Reconciliation of the Different Approaches to Contractual Liability in the Absence of Actual Consensus' (1992) *THRHR* 668.

⁴⁹ Floyd and Pretorius op cit note 48 at 670.

recognition of the requirement of good faith in entering into a contract.⁵⁰ However, the decision has also been the object of much criticism.⁵¹ The apparent rejection of fault as a requirement has been welcomed by Kerr⁵², yet it has been criticized by others. For example, Van der Merwe and Van Huyssteen⁵³ prefer not to interpret the judgment of Harms AJA as an express rejection of the fault principle but rather as the questioning of the fundamental role of fault in the context of reasonable reliance and reasonable error. They submit that while proof of fault is not an absolute requirement for the operation of a reasonable reliance upon consensus or upon a reasonable mistake, it nevertheless performs a useful function in deciding, upon consideration of the various relevant factors, whether a party's reliance is reasonable or not. Similar submissions are made by Van der Merwe et al.⁵⁴

Floyd and Pretorius⁵⁵ have submitted that blame, incorporating fault and risk, cannot be ignored in the enquiry into contractual liability in the absence of actual consensus, without the possibility of inequitable results.

⁵⁰ AJ Kerr 'Good Faith in Negotiating a Contract. The Duty to Enquire If There Is a Perceived or Apparent Mistake in Communication' 1993 *THRHR* 296.

⁵¹ Floyd and Pretorius op cit note 48; S Van der Merwe and LF Van Huyssteen 'Kontraksluiting en Toerekenbare Skyn' (1993) *TSAR* 493; Van der Merwe et al op cit note 9 at 40.

⁵² Kerr op cit note 50 at 298.

⁵³ Op cit note 51 at 496.

⁵⁴ Op cit note 9 at 38.

⁵⁵ Op cit note 48 at 671. The authors make the same submission, with regard to the application of the doctrine of *iustus error*, in 'Mistake and Supervening Impossibility of Performance *Kok v Osborne* 1993 (4) SA 788 (SEC)' 1994 (57) *THRHR* 325 at 327.

In order to evaluate the decision, in *Sonap's* case, in light of these criticisms, it may be useful to examine the extent to which the court's approach compares with that in other legal systems.

4 Comparative Approaches

I have chosen to compare, in particular, English law, the very system in which the Blackburn *dictum* originated. Another valuable comparison is the law of the Netherlands. Despite codification, the law of the Netherlands regarding contractual liability coincides to a large extent with South African law, and a study of it may yield useful guidelines which our law may follow.

4.1 English Law

As Kahn⁵⁶ points out, in English Law the Blackburn *dictum* has not achieved the status which it has in South African law. However, the Blackburn *dictum* has been regarded⁵⁷ as the expression of the 'objective principle', which plays a fundamental role in cases regarding mistake in contract.

At common law a mistake may *negative*⁵⁸ consent when it leads to a misunderstanding between parties so that they are at cross purposes and there is no actual agreement between them. There are three recognised types of mistake which may give rise to a lack of consensus, viz fundamental mistake as to the identity of the other party,⁵⁹ fundamental mistake as to the subject matter of the contract⁶⁰ and mistake as to the terms of the contract.⁶¹ The mistake must have induced the mistaken party to enter into

⁵⁶ Op cit note 5 at 15.

⁵⁷ G H Treitel *The Law of Contract* 8 ed (1991) 1.

⁵⁸ Treitel op cit note 57 at 261.

⁵⁹ As in *Cundy v Lindsay* (1878) 3 App Cas 459.

⁶⁰ *Falck v Williams* [1900] A C 176.

⁶¹ *Hartog v Colin Shields* [1939] 3 All ER 566; *Woodhouse A C Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] AC 320.

the contract.⁶² Further, the mistake must be operative. It is in determining whether a mistake is operative that the objective approach to contractual liability becomes relevant.⁶³

At common law, a mistake which negatives consent does not necessarily render the contract void.⁶⁴ In such a case, although genuine agreement is absent,⁶⁵ the 'objective principle' is applied.⁶⁶ This 'objective principle' is based on the needs of commercial convenience.⁶⁷ The question to be considered is not what was in the minds of the respective parties, but what reasonable third parties would infer from the words or conduct of the parties.⁶⁸ Steyn LJ has explained it thus:

'A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. it is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract.'⁶⁹

Furmston, referring to the Blackburn *dictum*, explains the objective approach thus: 'the result is that if, from the whole of the evidence, a reasonable man would infer the existence of a contract in a given sense, the court, notwithstanding a material mistake, will hold that a contract in that sense

⁶² Treitel op cit note 57 at 268.

⁶³ Treitel op cit note 57 at 270.

⁶⁴ *Robinson, Fisher & Harding v Behar* [1927] KB 513.

⁶⁵ *Van Praagh v Everidge* [1903] 1 Ch 434.

⁶⁶ *Smith v Hughes* supra note 2.

⁶⁷ Treitel op cit note 57 at 1.

⁶⁸ *Cornish v Abington*. (1859) 4 H & N 549; *Smith v Hughes* supra note 2; *Blay v Pollard & Morris* [1930] 1 KB 628; *Centrovincial Estates p/c v Merchant Investors Assurance Co Ltd* [1983] Com L R 158.

⁶⁹ *First Energy (UK) Ltd v Hungarian International Bank Ltd* 1993 BCLC 1409.

is binding upon both parties. The apparent contract will stand.⁷⁰ Furthermore, the party who alleges the mistake bears the onus of having to persuade the court to disturb what to outward appearances is a binding contract.⁷¹

While, as in South Africa, some have regarded the Blackburn *dictum* as an expression of the estoppel doctrine⁷², Treitel points out that estoppel requires detrimental reliance, 'while a person who invokes the objective principle need only show that he has entered into the contract in reliance on the appearance of the agreement created by the other's conduct.'⁷³ Smith⁷⁴ also rejects estoppel as the foundation of the objective approach, but explains the possible role of estoppel in precluding either party from setting up the objective meaning of the agreement against the other where both have reached actual agreement on terms which differ from the objective meaning of the agreement.

The mistake will be operative, in other words, the objective principle will not apply, where there is such ambiguity in the circumstances that a reasonable person could not draw any inference from them at all.⁷⁵ The contract would therefore be void.

Further, the objective principle will not apply where the mistake of the one party was known to the other.⁷⁶ In this context a man is taken to have known

⁷⁰ MP Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 12 ed (1993) 249. See *Wood v Scarth* (1858) 1 F & F 293; *Scott v Littledale* (1858) 8 E & B 815.

⁷¹ Furmston op cit note 70 at 248.

⁷² See *Halsbury's Laws of England* 4 ed (1974) 166.

⁷³ Op cit note 57 at 270.

⁷⁴ JC Smith *Smith and Thomas A Casebook on Contract* 9 ed (1992) 109.

⁷⁵ As in *Raffles v Wichelhaus Exchequer* (1864) 2 H & C 906.

⁷⁶ As in *Smith v Hughes* supra note 2.

what would have been obvious to a reasonable person in the light of the surrounding circumstances.⁷⁷

In spite of the common law, equity affords possible further relief for 'honest mistakes in contracts', when circumstances call for it.⁷⁸

Thus, it appears that in English law the issue of contractual liability entails a subjective approach, which requires a meeting of the minds, tempered with 'the objective principle', which is largely similar to the direct application of the reliance theory in South African law. Both approaches entail considerations of 'inducement' and 'reasonable reliance' upon consensus having been reached. Neither fault nor prejudice is a requirement for the operation of the 'objective principle'.⁷⁹

⁷⁷ As in *Hartog v Colin and Shields* [1939] 3 All ER 566 and *Cundy v Lindsay* (1878) 3 App Cases 459.

⁷⁸ *Furmston* op cit note 70 at 258. For instance, courts may, in the absence of fraud on the part of the mistaken party, refuse to grant a decree of specific performance, if it would impose a burden not contemplated by such mistaken party, or where it would grant an 'unconscionable advantage' to either party. See *Burrow v Scammell* (1881) 19 ChD 175 at 182. See also *Treitel* op cit note 57 at 275 and 279 ff with regard to rescission and rectification as forms of equitable relief.

⁷⁹ *Schriiven Bros & Co v Hindley & Co* [1913] KB 564 provides authority for the proposition that a mistake will be operative where it has been negligently induced by the other party. However, I submit that the outcome would have been the same had the decision been made on the basis of inducement of reasonable reliance by the other party, without any reference to negligence.

4.2 The Law of the Netherlands

In the Netherlands the subjective theory, or will theory ('wilsteorie'), was strictly applied until the second half of the nineteenth century.⁸⁰ Since then, two main theoretical approaches⁸¹ to the basis of contractual liability have emerged. While one approach uses the subjective intention of the parties as its basis, and the other the objectified intention of the parties⁸², both approaches use the reliance theory as supplementary basis for liability.⁸³

The law of the Netherlands has been codified and contractual issues must be decided according to the principles contained in the New Civil Code. The New Civil Code does not provide a solution to the theoretical problem of the basis of contractual liability.⁸⁴ Article 3.33 of the New Civil Code provides that a juridical act requires an intention to produce legal effect, which intention has manifested itself by a declaration, while article 3.35 protects a party's reliance on declarations or conduct of the other party, even if they do not conform to that other party's actual intentions. Thus, it has been submitted that the practical result of these provisions is something close to the reliance theory: 'that a party may be bound beyond

⁸⁰ AS Hartkamp *Asser-Rutten Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht Part II Algemene Leer der Overeenkomsten* 9 ed (1993) 89.

⁸¹ A third approach is advocated by JM Van Dunne *Normatieve Uitleg van Rechtshandelingen* (1971).

⁸² AR Bloembergen and WM Kleyn *Contractenrecht Part II* (1986) paragraphs 22 and 23.

⁸³ Asser-Rutten op cit note 80 at 90. In the absence of actual consensus the 'toerekenbare schijn' of a party's intention becomes relevant; parties will be contractually bound where one party has been responsible for the formation of a reliance ('op toerekenbare wijze opgewekte vertrouwen') upon consensus.

⁸⁴ Asser-Rutten op cit note 80 at 91.

his will, if it is due to him that another on good grounds believes him to consent.⁸⁵ In such a case there is a valid contract.

Further, the concept of good faith permeates Dutch contract law.⁸⁶ Article 6.1 para 2 provides that both parties to an obligation should behave in their relationship according to what is reasonable and equitable. Article 6.248 para 1 provides that contracts not only have the effects expressly agreed upon, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and equity.

Traditionally, in Dutch law a distinction is drawn between a '*oneigenlijke dwaling*', which results in *dissensus*, and an '*eigenlijke dwaling*', where there is consensus, but where the consent of one party is achieved by a misrepresentation.⁸⁷

Articles 6. 228 - 230 of the New Civil Code deal with defects in consent. Provision is made for a contract to be annulled, or its effect modified, where there is a mistake without which the contract would not have been made, provided

- a) the mistake was caused by information given by the other party; or
- b) had the other party been aware, or ought the other party to have been aware, of the mistake, the other party should have informed the mistaken party about his mistake ; or
- c) there has been a significant mutual mistake.

⁸⁵ AS Hartkamp 'The binding force of contract in Dutch law' *Binding Force of Contract* (1991) 43.

⁸⁶ Hartkamp op cit note 85 at 45.

⁸⁷ Asser-Rutten op cit note 80 at 153.

The contract may not be annulled for a mistake solely as to a future fact, or a mistake for which, according to 'common opinion in the circumstances of the case', the mistaken party must take the responsibility ('rekening').⁸⁸

The exact circumstances within which a party must take responsibility for a mistake has long been the subject of academic debate. It is not a requirement that prejudice be suffered by the mistaken party⁸⁹, neither is it necessary that fault be proved. Meijers⁹⁰ refers to the theoretical basis of *culpa in contrahendo* and submits that fault is not a requirement, although it may be relevant to apply the 'risk principle' on the basis that if a party created the danger that others would understand him to have intended to bind himself on certain terms, he should be held responsible for the consequences.⁹¹ However, Meijers questions whether the risk principle should be accepted and applied completely, as he has reservations about holding a party responsible, in all cases, for the mistakes, or fault, of a third party.

Bloembergen and Kleyn⁹², in their analysis of the various bases for contractual liability in terms of the reliance theory, mention, amongst others, *culpa in contrahendo* (which is based on fault), the 'toedoenbeginsel' (which does not necessarily require fault, but where the reliance upon consensus was caused by the action of one party, or, in other words, is attributable to him), and the risk principle, the 'gevaarzettings-

⁸⁸ Asser-Rutten op cit note 80 at 161; M Whincup *Contract Law and Practice: The English System and Continental Comparisons* 2 ed (1991) 210.

⁸⁹ Asser-Rutten op cit note 80 at 98, where the submission is made that the requirement of good faith ('de goede trouw') is sufficient to provide an equitable solution.

⁹⁰ EM Meijers *Versamelde Privaatrechtelijke Opstellen Part III Verbintenissenrecht* (1955) 84.

⁹¹ Meijers uses the case where a third party incorrectly communicates the intention of one contracting party to the other, for example, the case of the 'garbled telegram'.

⁹² Op cit note 82 paragraph 26.

of *risicobeginsel*'. The last mentioned is a variation of the '*toedoenbeginsel*', where a party who creates the risk of the incorrect communication of his intention to the other should take responsibility for any mistakes in communication. Bloembergen and Kleyn submit that the existence of '*toerekenbare schijn*' must be decided according to the circumstances of each case.⁹³

Van Dunne⁹⁴ submits that good faith pervades the application of the reliance theory. His view is that at the heart of contractual liability is not the requirement of consensus, but the '*toerekeningsleer*'⁹⁵: that a person should assume responsibility for the legal consequences which are attributable to him.

⁹³ Op cit note 82 paragraph 27.

⁹⁴ Op cit note 81 at 3.

⁹⁵ Ibid.

5 The Requirement of Prejudice

The requirement of prejudice has its origin in the doctrine of estoppel. Prejudice was required by Professor De Wet⁹⁶ in his work and many, relying upon De Wet, require the same. My submission is that in light of the rejection of estoppel as the basis of contractual liability, there is no need for prejudice or detriment to be proved.

Besides, even to the extent that one could interpret the Blackburn *dictum* as an expression of the doctrine of estoppel, Blackburn J relied on a line of estoppel cases which did not require prejudice. Moreover, if merely entering into a contract is sufficient alteration of one's position to fulfil the requirement of prejudice, then this seems to indicate that lip service is being paid to the requirement of prejudice and it is really unnecessary to the enquiry.

⁹⁶ See note 8.

6 The Fault Principle

In *Saambou-Nasionale Bouvereniging v Friedman*⁹⁷ Jansen JA, *obiter dictum*, left open the question whether proof of fault was a requirement for the application of the reliance theory. He referred to the various views of the academics: De Wet and Yeats⁹⁸ and De Vos⁹⁹ who regard the test (to be applied where there is *dissensus*) as one of *estoppel*, which requires fault on the part of the party who induced the reliance by the other party, and Kerr¹⁰⁰ who does not require fault for the application of his theory, which, I submit amounts to a form of reliance theory. Jansen JA further considered the legal position in the Netherlands: the application of the reliance theory without the requirement of fault.¹⁰¹

Since then, a decision which merits mention is *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd*¹⁰², to which Harms AJA referred in the *Sonap* case. In *Horty's* case, Coetzee J, in applying the doctrine of *iustus error*, said:

⁹⁷ Supra note 13.

⁹⁸ De Wet and van Wyk op cit note 8 at 19. See now JC De Wet and AH van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol I 5 ed (1992) 22.

⁹⁹ W de Vos "Mistake in Contract" *Essays in Honour of Ben Beinart I* (1978) 1 (also found in (1976) *Acta Juridica* 177 at 180-1, cited in note 8).

¹⁰⁰ AJ Kerr *The Principles of the Law of Contract* 2 ed (1975) 12. See now AJ Kerr *The Principles of the Law of Contract* 4 ed (1989).

¹⁰¹ Jansen JA, at 997 A, expressed the opinion that the reference to '*toerekenbaarheid*' did not impute a requirement of fault.

¹⁰² Supra note 21.

'Only to a limited category of mistakes will the law attach the quality of "*iustus*", and the fault principle looms large in the determination of this question.'¹⁰³

Coetzee J concluded that '(t)he mistaken party will ... not be able to rely on the lack of true consensus if his mistake was due to his own fault' and that 'the fault principle similarly applies to the second party who seeks to hold the mistaken one to the contract. He must be blameless. If he is also to blame then the first party is not bound.'¹⁰⁴

These conclusions were based on Coetzee J's interpretation of what Fagan CJ, in *George v Fairmead (Pty) Ltd*¹⁰⁵, regarded as the *iustus error* test, namely,

'Has the party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?'¹⁰⁶

As Sharrock¹⁰⁷ points out, Coetzee J's conclusion is based on the attribution of a sense, or meaning, of 'blame' which is not the sense, or meaning intended by Fagan CJ. If one intends using the test of Fagan CJ as authority for the proposition that 'blame' is required, then the concept of 'blame' cannot be equated with fault. It should rather be understood in the sense in which Fagan CJ intended to use it, namely, that one party is 'to blame' if he has conducted himself so as to lead the other party reasonably to believe that he was binding himself.

¹⁰³ At 539 G.

¹⁰⁴ At 540 C.

¹⁰⁵ Supra note 23.

¹⁰⁶ At 471 B - C.

¹⁰⁷ RD Sharrock 'Fault and *Iustus Error*' (1985) *SALJ* 1 at 3.

It should also be noted that Fagan CJ stated

'If his' (the first party's) 'mistake is due to a misrepresentation, *whether innocent or fraudulent,*' (my emphasis) 'by the other party, then, of course it is the second party who is to blame and the first party is not bound.'¹⁰⁸

Clearly, the learned Chief Justice postulated that the second party would be 'to blame', even if his representation had been innocently made!

Thus my submission is that the fault principle does not loom as large as Coetzee J might have believed. However, on a correct interpretation of the words of Fagan CJ, fault (on the part of the party who made a misrepresentation to the other, which led to the mistake being made) is not a requirement for the application of the *iustus error* doctrine.¹⁰⁹

Furthermore, as Sharrock, in my view, correctly submitted¹¹⁰, there is a wealth of authority which does not require fault. Blackburn J, in his *dictum*, never mentioned carelessness or negligence as a requirement¹¹¹ and there is Appellate Division authority¹¹² for the application of the doctrine of *iustus error* or the reliance theory without reference to any requirement of culpability.

¹⁰⁸ At 471 C - D.

¹⁰⁹ See also Beck 'Mistake and Fault' (1985) *SALJ* 8, who feels that the introduction of the fault principle may lead to confusion.

¹¹⁰ Op cit note 107 at 3.

¹¹¹ See also Christie op cit note 18 at 27, who submits that Blackburn J did not intend that fault should be a requirement.

¹¹² See, for example, *Diamond v Kernick* 1947 (3) SA 69 (A) at 83; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 430; *Benjamin v Gurewitz* 1973 (1) SA 418 (a) at 425; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984.

In *Sonap's* case Harms AJA felt, in my view quite correctly, that in holding that a mistaken party is not able to rely on the lack of true consensus if his mistake was due to his own fault, Coetzee J had obviously been influenced by the view expressed by JC De Wet¹¹³ whose thesis was based on the estoppel approach. Harms AJA also observed¹¹⁴ that Coetzee J had relied heavily on the use of the word 'blame' by Fagan CJ, yet Fagan CJ did not equate 'blame' with negligence but rather as conduct which led the other party, as a reasonable man, to believe that his apparent intention was his true intention.

In addition, Harms AJA took into account the practical difficulties inherent in the application of a test which incorporates the fault principle, by referring to Kahn who commented, with regard to the decision in *Nasionale Behuisingskommissie v Greyling*¹¹⁵ that if one weighs up the degree of fault on the part of each party then 'the unreasonable error by one party may be rendered reasonable by the greater unreasonableness of an error made by the other party!'¹¹⁶

Khan's comment was made in light of the statement by the court, in *Nasionale Behuisingskommissie v Greyling*, that because the buyer had been even more careless than the seller, the seller was entitled to an order that the contract was of no force. McLennan levels a similar criticism at the reasoning behind the decision in *Nasionale Behuisingskommissie v Greyling*, in that Schabert J 'seems to suggest that, since the respondent was also to blame for the mistake, the error became *iustus*.'¹¹⁷ My submission is that such an approach, namely that an unreasonable error may become reasonable

¹¹³ JC De Wet *Dwaling en Bedrog by Kontraksluiting* (1943).

¹¹⁴ In *Sonap's* case supra note 1 at 240 E.

¹¹⁵ Supra note 21.

¹¹⁶ Kahn op cit note 5 at 300.

¹¹⁷ J S McLennan 'Iustus Error, Snatching at Bargains, and Rectification' (1987) 104 *SALJ* 382 at 384.

by virtue of a less reasonable error on the part of the other party, flies in the face of fundamental principles of logic.¹¹⁸

The same criticism may be levelled at the views of Van der Merwe and Van Huyssteen¹¹⁹ and Van der Merwe et al¹²⁰, that the reasonableness of the reliance upon consensus by one party may depend upon the 'unacceptability' of the representation which was made by the other.¹²¹

Floyd and Pretorius¹²² submit that the relative blameworthiness of the parties must always be weighed up: that equal forms of blame will negate each other and prevent a contract from coming into being, while a "stronger" form of blameworthiness will override a "weaker" form.¹²³ If the party whose actual intention differs from his expressed intention is to be held bound his form of blameworthiness must always be the stronger.

¹¹⁸ See also C Lewis 'Caveat Subscriptor and the Doctrine of Iustus Error' (1987) 104 *SALJ* 371 at 376. Cf M Brassey who, in a paper entitled 'Mistake and Misrepresentation', delivered at the Law Teachers Conference at the University of Port Elizabeth in July 1994, submits that 'the relative degree of blame is the primary determinant: it seems unfair to saddle one party with the consequences of rescission if the other party is more to blame for the flawed contract.' See page 15 of the synopsis of the paper which was made available at the conference.

¹¹⁹ Op cit note 51 at 497.

¹²⁰ Op cit note 9 at 38.

¹²¹ JS Mc Lennan Review of Van der Merwe et al *Contract General Principles* (1994) *SALJ* 210.

¹²² Op cit note 48; see also Floyd and Pretorius op cit note 55 at 327.

¹²³ Intention, negligence and risk being forms of blameworthiness, becoming lesser, by degree, in the order mentioned.

With respect I cannot agree with the authors. My submission is that it is precisely such an approach which Kahn¹²⁴ apparently disapproved, and which Harms AJA quite correctly sought to avoid¹²⁵. The only authority cited for such an approach is a work on the law of delict.¹²⁶ I submit that, while weighing up the blameworthiness of the parties may be pertinent to the determination of issues pertaining to delictual liability, or involving contributory negligence or apportionment of damages, it is irrelevant to the present question of whether or not a contract has come into existence.¹²⁷

Where the party who creates the reliance does so by means of an intentional (fraudulent) misrepresentation and the other party is misled unreasonably, I submit that the situation is as follows:

If the misrepresentation is one in the sense in which it was used by Harms AJA in the formulation of his test¹²⁸, namely, a representation by one party that his declared intention is his actual intention, then this amounts to conduct on the part of one party which creates the impression that he intends to bind himself on certain terms. In such an instance the reliance theory is applicable in order to determine whether a contract has come into existence: if the one party induced the other party reasonably to rely on the belief that the former intended to contract on certain terms, then despite *dissensus*, a contract exists on the terms relied upon by the second party, regardless of whether the first party was at fault.

¹²⁴ Op cit note 5 at 300.

¹²⁵ In *Sonap's* case, at 240 F - G.

¹²⁶ Namely J Neethling, JM Potgieter and PJ Visser *Law of Delict* (1990) 134.

¹²⁷ See also NJ Grove '*Sonap Petroleum (formerly known as Sonarep) (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A)' (1994) *De Jure* 185.

¹²⁸ In *Sonap's* case, at 240 A.

On the other hand, if the misrepresentation is one in the "proper sense"¹²⁹, and by this I mean a statement by one of the parties which induces the other party to enter into the contract and which the parties did not intend to become a term of the contract,¹³⁰ there is not *dissensus*, but rather consensus which has been obtained by improper means. In this situation the reliance theory has no application; a contract has come into existence and the appropriate rules to be applied are those regarding misrepresentation. These rules have developed¹³¹ specifically to cater for fraudulent, negligent and innocent misrepresentation and to provide the remedies of rescission and restitution and, in some circumstances, an award of damages, where necessary.

Moreover, it is a fundamental principle of our law that a person who makes a fraudulent misrepresentation cannot be heard to say that the party who was induced by such misrepresentation to act, was at fault, or should bear the loss merely because he was careless or stupid.

As was so aptly stated in the American case *Chamberlain v Fuller*¹³²:

'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is a fool.'

This principle must prevail in any situation where a fraudulent misrepresentation in the "proper sense" has been made.

¹²⁹ JS Mc Lennan 'Reliance and *Iustus Error* Theories of Contract' (1994) *SALJ* 232 at 236 - 7 refers to such a misrepresentation as one in the 'narrow legal sense'.

¹³⁰ RH Christie *op cit* note 18 at 328.

¹³¹ See *Lourens v Genis* 1962 (1) SA 431 (T); cf *Otto v Heymans* 1971 (4) SA 148 (T), where the test for materiality was regarded as whether the reasonable person would have considered the fact misrepresented to him as important, in deciding whether to enter into the contract or not.

¹³² (1887) 59 Vt. 247 at 256.

Thus my submission is that there is not necessarily any relationship between fault on the part of one party and the reasonableness of the reliance by the other, but that the test for the existence of contractual liability is simply whether a representation made by one party as to the terms upon which he intended to contract (or, in other words, conduct by the one party) induced a reasonable reliance upon consensus by the other party. Of crucial importance are the following factors: conduct, inducement and reasonable reliance.

The position is the same where the mistake is brought about by the fraudulent conduct, or misrepresentation, of a third party for whose acts neither of the contracting parties is responsible.¹³³ The situation, without any reference to fault on the part of either of the two contracting parties, would be as follows: In terms of the consensual (intention) theory, there would be no consensus. In terms of the reliance theory, an enquiry must be held as to whether there was a representation, or conduct, on the part of one party which induced the other to form a reasonable reliance upon consensus.¹³⁴ If not, then there would be no contract between the parties; if the answer is in the affirmative, then the party who formed such reasonable reliance upon consensus may hold the other contractually bound. Of course, an independent delictual action may lie, at the instance of either of the contracting parties, against the third party, for any loss suffered in consequence of the fraudulent conduct of such third party.

This situation, I submit, is governed by, and is in accordance with, recognised, equitable principles of our law.

¹³³ As in *Standard Credit Corporation Ltd v Naicker* 1987 (2) SA 49 (N). Cf *Kok v Osborne* 1993 (4) SA 788 (SEC) where the fraudulent misrepresentation was made to the defendant by a third party whom the plaintiff permitted to enter into negotiations with, and convey legal documents to, defendant on her behalf.

¹³⁴ Of course, if the other party was aware or should have been aware of a mistake, then he would be under a duty to speak and enquire.

7 The Risk Principle

In *Sonap's* case no reference was made to the risk principle. However, in *Saambou Nasionale-Bouvereniging v Friedman*¹³⁵, Jansen JA, having raised the question whether fault was required for the application of the reliance theory, considered whether the risk principle applied in South African law. The learned judge of appeal was not conclusive on this aspect, and we may well ask ourselves whether, in light of the decision in *Sonap's* case, we are in a better position to determine whether the risk principle should apply in our law.

The risk principle may be explained thus: Where a party chooses a specific method of communication¹³⁶, or a messenger, or an intermediary, for the communication of his offer to the other party and such offer becomes distorted or garbled in its transmission, so that the offer is communicated to the other party incorrectly, in spite of the absence of fault on the part of the first party, he must bear the loss on the basis that he bears the risk of using that method of communication or a messenger or intermediary. The same applies to communication of acceptance.

With specific reference to the case of the garbled telegram, Jansen JA¹³⁷ observed that in the Netherlands the risk principle applies, although Meijers¹³⁸ has reservations as to whether it has universal application, in light of considerations that each party should be responsible for his circumstances, as far as they concern himself, but should perhaps not be held responsible for the mistake or fault of a third party.

¹³⁵ Supra note 13.

¹³⁶ A classic example is the use of the telegram.

¹³⁷ In *Saambou's* case supra note 13.

¹³⁸ Op cit note 90 at 98.

In Germany¹³⁹ the principle is that the sender of the telegram is not necessarily bound, but would be liable for damages. In English Law the sender is not liable.¹⁴⁰ In the United States of America there are conflicting decisions.¹⁴¹

In *Stewart v Zagreb Properties (Pvt) Ltd*¹⁴² the court made reference to Williston¹⁴³, on the position in the United States, but decided against applying the risk principle on the basis that it was contrary to the principle in our law that where an agent exceeds his mandate he cannot bind his principal. Lubbe and Murray¹⁴⁴ submit that this decision illustrates how poorly the risk principle and its requirements are understood in our law.

As far as South African writers are concerned, Kahn¹⁴⁵ and Francis¹⁴⁶ tend to favour the approach in the Netherlands. Francis submits¹⁴⁷ that '(t)he agency doctrine causes more problems than it solves; whereas the doctrine that the sender of the telegram is not responsible for errors in *transmissio*, but often has inequitable results.' Kahn¹⁴⁸ feels that the risk principle should apply, subject to two provisos. First, the sender of a telegram should take all reasonable steps to ensure that it will be

¹³⁹ In terms of sections 120-2 of BGB.

¹⁴⁰ As decided in *Henkel v Pape* (1870) 6 LR Ex 7.

¹⁴¹ S Williston *A Treatise on the Law of Contracts* revised ed (1957 - 76) 296.

¹⁴² 1971 (2) SA 346 (RA).

¹⁴³ Op cit note 141.

¹⁴⁴ Op cit note 22 at 163.

¹⁴⁵ E Kahn 'Some Mysteries of Offer and Acceptance' (1955) *SALJ* 246.

¹⁴⁶ MJD Francis 'Two Aspects of Contracting by Telegram' (1967) *SALJ* 278.

¹⁴⁷ Op cit note 146 at 286.

¹⁴⁸ Op cit note 145 at 266.

correctly transmitted, for instance, by stating amounts in words as well as figures. Secondly, there will be no contract where the party not initiating use of telegrams knew or suspected or should have known of the error, whether through the prior dealings of the parties, his knowledge of the market or any other cause. Kerr¹⁴⁹, whose approach is reminiscent of the German approach, feels that for the party who suggested the method of communication to bear the risk is a little harsh or burdensome and feels there should be no contract but should be liable for wasted expenditure.

These and other factors were considered by Jansen JA in *Saambou-Nasionale Bouvereniging v Friedman*¹⁵⁰.

Floyd and Pretorius¹⁵¹ submit that Harms AJA's test¹⁵² for liability based on the reliance theory, without reference to fault or risk, cannot be applied where there is no fault on the part of either party, but that the risk principle must be applied in order to bring about an equitable solution.

Floyd and Pretorius further submit that the court, in *Kok v Osborne*¹⁵³, in the absence of fault on the part of either plaintiff or defendant, effectively took into account the blameworthiness of the plaintiff, in creating the risk that her messenger could misrepresent her intention to the defendant, by deciding that defendant's mistake was *iustus* and that he could escape liability on the apparent contract.¹⁵⁴

¹⁴⁹ Op cit note 100 at 30.

¹⁵⁰ Supra note 13.

¹⁵¹ Op cit note 48.

¹⁵² In *Sonap's* case supra note 1.

¹⁵³ 1993 (4) SA 788 (SEC).

¹⁵⁴ Floyd and Pretorius op cit note 55 at 328. However, see also J S McLennan op cit note 129 at 235-6. It is submitted that the decision in *Kok v Osborne* may be explained on the basis that defendant was not bound as he was reasonably induced into his mistake by the words or conduct of a person whom plaintiff permitted to act for her.

The thesis that fault plays no role in the enquiry as to whether, in the absence of actual consensus, one party should be held bound to the other, does not logically admit the application of the risk principle. After all, why should the bearing of risk (which is apparently less reprehensible than being at fault) affect such enquiry? On the other hand, in the absence of fault on the part of both parties, how else would one equitably resolve the issue of which of the two innocent parties should bear the loss, without having recourse to the risk principle?

What must be borne in mind is that, in the factual circumstances of *Sonap's* case, it was unnecessary for the court to decide whether the risk principle should be applied or not. The test was formulated according to the facts before the court. However, I see no reason why, in appropriate circumstances, the enquiry (as formulated by Harms AJA in *Sonap's* case) should not be extended to cover the situation where the false impression (as to the terms upon which one party intended to contract with the other) was created by a third party.

What is relevant is a representation, or conduct, by one party which induces a reasonable reliance upon consensus by the other. One may view the conduct of the first party, in, for example, choosing a specific method of communication of his intention to the other party, as creating the situation in which the other party may reasonably be led to believe that the expressed intention of the former (as communicated to the latter via the chosen method) represents his actual intention. If this is the case, then the first party may be regarded as conducting himself in such a way as to induce the other party reasonably to believe that he is binding himself on certain terms. Consequently the second party may hold the first party contractually bound.

It must not be forgotten, however, that the reliance by the second party (to whom the intention of the first is incorrectly communicated) must be reasonable. Therefore, if the second party realised, or should have realised as a reasonable man that there was a real possibility of a mistake in the communication¹⁵⁵, or that the representation made by the third party was incorrect, then he would have a duty to speak and to enquire whether the expressed intention was the actual intention,¹⁵⁶ or whether the representation was correct. In such circumstances, failure to do so, and acting in reliance upon the expressed intention, or representation, will not result in the first party being held bound.

To the extent that the first party is being held 'responsible' for the incorrect communication of his intention by another, where he created the situation which led to it, one may regard this as the application of the risk principle. However, my submission is that we are concerned, not so much with 'blameworthy' conduct, in the sense of the reprehensibility of the taking of a risk, but rather, with the causative effects of the method employed by the first party to communicate his intention to the other.¹⁵⁷

¹⁵⁵ For example, if some words contained in the telegram are garbled, or if for some reason it does not make sense.

¹⁵⁶ See *Sonap's* case *supra* note 1 at 241.

¹⁵⁷ Whether the incorrect communication, by a third party, of the intention of the first party may be regarded as a *novus actus interveniens*, for which the first party may not be held responsible, will have to be considered according to the particular facts of each case. It may well be argued, however, that, in any event, the incorrect communication of one's intention may well be a 'risk inherent' in permitting a third party to act on one's behalf, and consequently cannot be regarded as a *novus actus interveniens*.

8 Conclusion

I submit that the court, in *Sonap's* case, attempted to put behind it the complications that had been experienced in the past. An attempt was made to extract from the quagmire of academic debate and apparently conflicting judicial precedent, a clear, workable formula for the direct application of the reliance theory in cases of actual *dissensus* between parties to an apparent contract.

The enquiry, as formulated by Harms AJA, admits the practical application of the doctrine of *iustus error*, for which there is firmly established precedent in South African law. It also recognizes the requirement of good faith, in that it imposes upon the parties a 'duty to speak and enquire'. Further, a flexible application of the enquiry, to suit the various factual circumstances which may arise, by, for example, incorporating the risk principle to the extent discussed above, provides scope for a fair and equitable solution which would conform with development and practice in foreign jurisdictions.

Sonap's case has been cited and applied with approval by our courts.¹⁵⁸ The test for contractual liability in the absence of consensus, as stated in *Sonap's* case, without reference to fault, is based upon the *dictum* of Blackburn J which has stood for more than a century. The precedent established in *Sonap's* case may very well, similarly, stand the test of time.

¹⁵⁸*Steyn v LSA Motors Ltd* supra note 16 at 61 F.

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