

RELIANCE PROTECTION AS THE BASIS OF CONTRACTUAL LIABILITY

by

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DECLARATION

"I declare that: Reliance Protection as the basis of contractual liability is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references".

ABSTRACT

It is traditionally accepted that the basis of contractual liability is either **consensus**, that is the actual meeting of the minds of the contractants, or the reasonable belief by one contractants that there is **consensus**.

In this paper the various approaches to contractual liability are examined. The conclusion that is reached is that the direct application of reliance protection can effectively serve as the basis of contractual liability in our law today.

It is submitted that the elements to found contractual liability are representation or conduct, unducement; a reasonable reliance upon **consensus**, and detriment or prejudice. It is forcefully argued that although blameworthiness (fault) may play a substantial role in determining whether reliance upon **consensus** should be protected, it is not the decisive element to the enquiry: rather regard should be had to all the surrounding circumstances relating to the contractual relationship.

KEY TERMS

consensual (will / intention theory)

declaration theory

detriment

estoppel by representation

fault

iustus error

mistake

objective approach

reliance theory/protection

risk principle

reasonable reliance

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soli Deo gloria !

LIST OF ABBREVIATIONS**TITLES OF JOURNALS**

ASSL	The Annual Survey of South African Law
SALJ	South African Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

BOOKS

LAWSA	The Law of South Africa
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TABLE OF CASES

- Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA (D).
- Anon (1477) YB Edw. 4, fo. 1, pl 2.
- Bhikagee v Southern Aviation (Pty) Ltd 1949 (4) SA 105 (E).
- Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A).
- Constantia Graswerke Bk v Snyman 1996 (4) SA 117 (W).
- Darter & Son v Dold 1928 EDL 42.
- Diedericks v Minister of Lands 1964 (1) SA 49 (N).
- Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands 1994 (2) SA 518 (C).
- Du Toit v Atkinson's Motors Co (Pty) Ltd 1985 (2) SA 893 (A).
- George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A).
- Henkel v Pape (1870) 6 LR Exch. 7.
- Horty Investments (Pty) Ltd v Interior (Pty) Ltd 1984 (1) SA 537 (W).
- Jonnes v Anglo-African Shipping Co (1936) Ltd 1972 (2) SA 827 (A).
- Kantorechter of Haarem N.J. 1923 650.
- Kennedy v Lee (1817) 3 Mer 441.

Maritz v Pratley (1894) 11 S.C. 345.

Maresky v Morkel 1994 (1) SA 249 (C),

Minister of Home Affairs v American Ninja IV Partnership 1993 (1) SA 257.

Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer 1979 (4) SA 74 (A).

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Peri-Urban Areas Health Board v Breet NO & Another 1958 (3) SA 783 (T).

Pieters & Company v Salomon 1911 AD 121.

Raffles v Wichelhaus and Another (1864) 2 H & C 906

Rechtbank te Tiel 1909 W. 8886.

Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A)

Smith v Hughes (1870-1) LR 6 QB 597.

Sonap Petroleum (SA) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A).

South African Railways and Harbours v National Bank of South Africa Ltd 1924 AD 704.

Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A).

Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A).

Steyn v LSA Motors (Pty) Ltd 1994 (1) SA 49 (A).

Stewart v Zagreb Properties (Pty) Ltd 1971 (2) SA 346 (RAD).

Usher v A W S Ley Elektriese Kontrakteurs 1979 (2) SA 1059 (O).

Van Deventer v Louw 1980 (4) SA 105 (O).

Van Ryn Wine and Spirit Co. v Chondos Bar 1928 TPD 417.

Weinerlein v Goch Buildings Ltd 1925 AD 282.

Wilson Bayly Holmes (Pty) Ltd 1995 (4) SA 340 (T).

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RELIANCE PROTECTION AS THE BASIS OF CONTRACTUAL LIABILITY

INTRODUCTION

This paper attempts to establish when reliance protection may serve as the basis of contractual liability. It has traditionally been contended that the basis of a contract is 'either **consensus**, that is an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contractants that there is **consensus**'¹. This statement of law reflects the two approaches to contractual liability, the one subjective and the other objective.²

In this paper I shall, however, attempt to indicate when and how reliance upon the existence of actual or imputed **consensus** should be protected and when not.

THE WILL THEORY AND THE PSYCHOLOGICAL APPROACH

De Wet and Van Wyk³ categorically state that **consensus** is the basis of a contract⁴.

¹ Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz, Contract, General Principles, 1993ed, at 11; Lubbe and Murray, Farlam and Hathaway, Contract, 3ed, 1988 at 96.

² Floyd and Pretorius, A Reconciliation of the different approaches to Contractual Liability in the absence of Consensus, 1992 THRHR 668.

³ at 9. (hereinafter frequently referred to as De Wet since he is solely responsible for this Volume of the work). De Wet seems to have been greatly influenced by the writers of the Netherlands who also approach their treatment of the law of Contract in the same manner as he does. Compare Hartkamp, Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Deel II, Algemene Leer Der Overeenkomsten, 8ed, 1989, par. 97 likewise holds that the consensual theory is the basis of a contract and that in exceptional cases the reliance theory may be applied. In the *locus classicus* in English law, *Raffles v Wichelhaus and Another* (1864) 2 H & C 906, the court accepted the argument of Counsel for the defendants that no binding contract came into existence since there was no **consensus ad idem** between the parties. In like vein is the proposition in American Law Institute, Restatement of the Law, Contracts, at par. 71 (c). Also see Lubbe and Murray, *supra*, at 106.

⁴ See D.2.1.15; D.2.14.1.3; D.39.20; D.50.16.219; D.17.116.2; See van der Merwe *et alii*, *supra*, at 13. Van der Merwe, Die Duiwel, Die Hof en Die Wil van die Kontraktant, in Gauntlett JJ (ed) ., J.C. NOSTER, 1979, at 25; Also see *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) 978

'Kontraktuele aanspraaklikheid berus logies en histories op **consensus** en **consensus** sien op die "wil" van die kontrakterende partye. Die aangewese uitgangspunt is dus die "wil". Die hele kontraktereg rus op die "wil" as bron van aanspreeklikheid'.⁵ This approach is termed the subjective approach, whilst the theory which underlies it is called the consensual or the will theory ('wilsteorie').⁶ This approach may also be termed as the psychological approach to contracts⁷. According to this theory a contract comes into being if the parties are **ad idem** (of one accord or have a **concursum animorum**) in respect of the obligation (i.e. a **vinculum iuris**) they intend creating between them.⁸ A premise for contractual liability that underlies **consensus** and enhances the doctrine of the sanctity of contracts is, 'belofte maakt skuld'.⁹

De Wet¹⁰ indicates that this basis is not uncritically accepted by everyone. This is

(A) at 993F; Malan, Horty Investments v Interior Acoustics (Pty) Ltd 1984 3 SA 537 (W), 1985 THRHR 227; Van Rensburg, Die Grondslag van Kontraktuele Gebondenheid, 1986 THRHR 448; Atiyah, Essays on Contract, Clarendon Press-Oxford, 1986, at 13, refers to this approach as the 'classical model'; Van der Merwe and Van Huyssteen, Kontraksluiting en Toerekenbare Skyn, 1993 TSAR 493. Van der Merwe and Van Huyssteen, Reasonable Reliance on Consensus, Iustus Error and the creation of Contractual Obligations, 1994 SALJ 679.

⁵ Estoppel by Representation, at 72 note 3.

⁶ Kerr and a host of other academics likewise have **consensus** as the premise for contractual liability. Van Dunné, *supra*, at 8. Also see R. H. Christie, The Law of Contract in South Africa, 2ed, 1991, at 1; A.S. Burrows, The Will Theory of Contract Revived - Fried's 'Contract as Promise', 1985 Current Legal Problems 141, asserts that in terms of this theory a contract is 'based on a promise and a promise as being a voluntary acceptance of an obligation'.

⁷ See Van der Merwe, Die Duiwel, *supra*, at 15.

⁸ Van der Merwe *et alii*, *supra*, at 13. Also see Van Der Merwe, Die Duiwel, *supra*, at 16; Kerr, *supra*, at 3. Van Rensburg, *supra*, at 448. Van Dunné, *supra*, at 8; Kritzinger, Approach to Contract : A Reconciliation, 1983 SALJ 47 at 54; L.C. Hofmann, The Basis of the Effect of Mistake on Contractual Obligations, 1935 SALJ 432; Kahn, Some Mysteries of Offer and Acceptance, 1955 SALJ 246.

⁹ Dunné, *supra*, at 15; Hartkamp, *supra*, paras. 37 - 38; Atiyah, *supra*, at 10, 15; A. De Moor, Are Contracts Promises?, Oxford Essays in Jurisprudence Third Series (Eekelaar and Bell eds) 1987 103; C. Fried, Contract as Promise : A theory of Contractual Obligation, Harvard University Press, 1981, at 1, 16. Fried is of the view that the obligation 'to keep a promise is grounded not in arguments of utility, but in respect for individual autonomy and in trust'.

¹⁰ *supra*, at 9 *et sequuntur*; for the three theories, see Hartkamp, par. 99.

especially so where **dissensus** exists between the parties by virtue of an error where the real intention of the parties is at variance with their declared or manifested intention.¹¹ **A mistake or error is a material or operative or essential wrong impression or belief with regard to some material fact relating to the contract.**¹² The will of the contractants can thus be vitiated or nullified by **dissensus**¹³.

Consequently other theories such as the declaration theory and the reliance theory have also been propounded as bases for contractual liability. The consensual theory is no longer regarded in many circles as being reflexive of social and commercial interaction.¹⁴

In terms of the declaration theory contractants are bound to their contract on the basis of their 'objective, coinciding declarations of will'¹⁵. In this case the express or declared or manifested intentions of the parties take precedence over their actual or real intentions.

THE OBJECTIVE APPROACH

It is generally agreed that the objective approach is contained in the **iustus error** test. Fried remarks that 'contracts generally are a device for allocating risks... The court cannot enforce the will of the parties because there are no concordant wills. Judgment must therefore be

¹¹ Meijers, Verzamelde Privaatrechtelijke Opstellen, Verbintenissenrecht, Derde Deel, Leiden, 1955, at 81 -82. In the United States, by virtue of this very fact, Patrick Atiyah in his The Rise and Fall of the Freedom of Contract regards the imposed obligations of compensating for detrimental reliance and unjust enrichment as underlying contract. For writers holding views similar to those of Atiyah, the contract disappears as a branch of the law worthy of separate demarcation and study. See Burrows, *supra*, at 142. Harker, The Role of Contract and the Object of Remedies of Breach of Contract in Contemporary Western Society, 1984 SALJ 121, at 127 - 128 the learned writer discusses the shortcomings of the will theory.

¹² In general see Joubert (ed), LAWSA, Vol. 5, at 36 *et sequuntur*. Also see Floyd and Pretorius, *supra*, at 668. According to Murray and Lubbe, a mistake, 'in the broadest sense of the word, entails a 'state of mind that is not in accord with the facts', *supra*, at 132.

¹³ Hofmann, *supra*, at 432. Hence Burrows in analysing the works of different academics, indicates that Fried's view is that in the event of a mistake a contractant has 'not voluntarily accepted an obligation to do anything, i.e. in the circumstances he has made no promise' (*supra*, at 145).

¹⁴ See Lubbe and Murray and the authorities cited there, *supra*, at 107.

¹⁵ Van der Merwe *et alii*, *supra*, at 28; De Wet and Van Wyk at 12.

based on principles external to the will of the parties...One such device is the reference to presumed intent'.¹⁶ Under the influence of Anglo-American law, an objective approach¹⁷ is adopted by some writers here and abroad to found contractual liability : It is the manifestation of the intention and not the actual intention of the contractants which matters most. This does not mean, however, that an objective approach to contractual liability necessarily incorporates the declaration theory¹⁸. Kahn is not correct in my view in his contention that the objective approach is as a matter of cause automatically equivalent to the declaration theory.¹⁹ Corbin²⁰ asserts that "the 'objective theory' is based upon a great illusion - the illusion that words, either singly or in combination, have a 'meaning' that is independent of the persons who use them...that is to say that parties are bound in accordance with the meaning that reasonable third parties would give to their expressions without regard to the meaning given by either of the parties themselves. The actual decisions do not justify this statement". The objective approach is often referred to as the normative approach by the Dutch writers.²¹

In this essay I shall use the words objective and normative interchangeably. Van

¹⁶ *supra*, at 59 - 60.

¹⁷ The underlying rationale for this approach in the United States is the requirement of fairness that the other contractant's expectations should not be disappointed. See Burrows, *supra*, at 145; Bamford, Mistake and Contract, 1955 SALJ 166 at 171; Ramsden, Iustus Error Reconsidered, 1973 SALJ 393 at 400; Atiyah, *supra*, at 13, 21; A. De Moor, Intention in the Law of Contract : Elusive or Illusory? 1990 Law Quarterly Review 632, 634, 638 '...the presumed intention of the parties'.

¹⁸ Cf Van der Merwe *et alii*, *supra*, at 29.

¹⁹ Hahlo H.R. and Kahn E, The Union of SA, The Development of its Laws and Constitution, 1960ed, at 441.

²⁰ On Contracts, par. 106. At par. 104. Corbin asserts that there may be a valid contract even though there is no mutual 'meeting of the minds', but for such a result there must be agreement of expression. The language used should, however, lead the offeror to reasonably believe that the acceptance is unconditional. Also see Christie, *supra*, at 383 'whatever his subjective state of mind.' Burrows points out that the objective theory of intention is according to Fried based on a non-promissory principle and hence this theory does not explain a great deal 'of contractual enforcement' (*supra*, at 147).

²¹ J.M. van Dunné, Normatiewe uitleg van rechthandelingen, Kluwer - Deventer, 1972, at 1, 3 *et sequuntur*.

Rensburg²² talks of 'oënskynlike wilsuiting' which is obviously a term used to embrace the objective approach.

Furmston and Simpson²³ indicate that English law adopts an 'objective test of agreement'. In 1478 Chief Justice Brian proclaimed that the 'intent of a man cannot be tried, for the Devil himself knows not the intent of a man.'²⁴ Hence Lord Eldon has indicated that it is not the task of an English-law judge 'to see that both parties really meant the same thing, but only that both gave their assent to that proposition which, be it what it may, **de facto** arises out of the terms of their correspondence'.²⁵ If a reasonable man would find that the parties 'gave their assent' to the terms of the contract, then one party's reliance upon that fact (finding) should be protected.

To reconcile the psychological with the objective approach, Harker²⁶ contends that the internal will of the parties is regarded as significant in so far as it co-incides with the objective meaning that a reasonable man would attribute to the parties' expression of intention.

RELIANCE PROTECTION

An alternative basis of contractual liability is what I shall term 'reliance protection' ('the reliance theory', 'vertrouwensteorie' or the theory of belief²⁷). According to this theory the

²² *supra*, at 449. It is submitted that this is the starting point of the **iustus error** test. Lubbe and Murray, *supra*, at 106, who maintain that the most important variants of the objective postulate are the declaration and reliance theories. They furthermore contend, quite correctly, that our law does not subscribe to the consensual theory of contract without qualification, and that in cases of **dissensus** a corrective liability embedded upon an objective basis is applied. See *supra*, at 163.

²³ Cheshire, Fifoot and Furmston's Law of Contract, 11ed, 1986, at 28.

²⁴ Anon (1477) YB Edw. 4, fo. 1, pl 2.

²⁵ *Kennedy v Lee* (1817) 3 Mer 441.

²⁶ *supra*, at 135.

²⁷ De Vos, *supra*, at 179; Van Dunné, *supra*, at 4; Meijers, *supra*, at 82 *et sequuntur*; Hartkamp, *supra*, at par. 302.

belief which one contractant has created in the mind of the other regarding his intention forms the basis of the contract²⁸. This theory 'postulates that enforceability depends on the reasonable expectations conveyed to the mind of each party by the words or conduct of the other.'²⁹

THE DIRECT APPLICATION OF RELIANCE PROTECTION

By the direct application of this theory the reasonable impression or reliance held by one contractant that the other party had the same intention is contractually protected.³⁰ It is immediately clear why the reliance protection theory has traditionally been regarded as only supplementary to the will theory. The rationale for this contention is that if two parties have coinciding intentions there is **consensus** and no need to inquire whether one of the parties had any particular impression of the other's intention.³¹

Reinecke indicates that the requirements for direct application of reliance protection are stated positively.³² He thus contends that once the requirements are satisfied, a valid contract comes into being.³³

²⁸ Van der Merwe, Die Duiwel, *supra*, at 31; Kritzinger, Approach to Contract : A Reconciliation, 1983 SALJ 47, at 49; An Anglo-American Law writer proposes the following basis for contractual liability : 'that expectations engendered by a binding promise should be fulfilled', Burrows, *supra*, at 149. This proposition is in my submission but another formulation reliance protection. Burrows thus refers to his theory as his 'expectation theory of promising'. He asserts that this theory will encourage contractants to **rely on the other's promises** (my emphasis). He asserts that this theory encourages mutual co-operation and trust which is to the benefit to the entire society.

²⁹ Christie, *supra*, at 1. Van der Merwe and Van Huyssteen, 1994 SALJ, at 686.

³⁰ Reinecke, Regstreekse of onregstreekse toepassing van die vertrouenteorie?, 1989 TSAR 509.

³¹ Van der Merwe, *et alii*, *supra*, at 29.

³² 1989 TSAR 509.

³³ *supra* at 509, 513. He designates this contract as a 'vertrouensktrak'. This is a term that he has borrowed from Malan, 1985 THRHR 227, at 231. Also see De Wet, Dwaling by Kontraksluiting, at 4; De Moor, *supra*, at 635.

According to Reinecke³⁴ the requirements for the direct application of reliance protection are :

- (a) The contract-denier should have created the impression in the mind of the contract-assertor that the former intended to be bound by the apparent contract (i.e. there must be a some form of conduct or representation of the will or at times referred to as a misrepresentation);
- (b) The contract-denier should have induced the reliance on **consensus** with the contract-assertor, or in other words, the contract-denier should have acted upon that representation ('moet regtens aan die kontraktkenner **toerekenbaar** wees');
- (c) The contract-assertor's reliance must be reasonable, i.e. that a reasonable man would have drawn the same inferences from the conduct of the contract-denier.

Other writers require additional requirements such as fault on the part of the contract-denier, and that the contract-assertor should actually have suffered prejudice. On these two requirements the writers are divided. According to De Wet³⁵, in the absence of damage or prejudice, 'bestaan daar geen rede waarom die ander persoon gebonde sal wees aan 'n kontrak wat hy nie gewil het nie'. The writer adds that if there is no fault on the part of the contract-denier, then 'het hy sy waan aan sy eie skuld te wyte³⁶. Hierdie laaste vereiste verklaar waarom die vertrouë 'n redelike vertrouë³⁷ moet wees.

'Dat dit 'n billike oplossing is, kan niemand betwyfel nie. Dit is nie alleen billik nie maar ook juridies te regverdig deur skuld as die grondslag van aanspreeklikheid aan

³⁴ 1994 TSAR 372, at 376.

³⁵ Dwaling en Bedrog by die Kontraksluiting, at 4 - 5. Also see Floyd and Pretorius at 671; Kahn, Contract and Mercantile Law, 2ed, Vol. 1 at 300.

³⁶ Christie, *supra*, agrees that the fault principle applies to both parties (at 383 note 4). Christie seems totally confused. On the one hand he refers to the fault principle as the 'fifth wheel to the coach' and now he admits that the element of fault may be of importance to avoid contractual liability. Also see Meijers, *supra*, at 91.

³⁷ Van Dunné, *supra*, at 4.

te wys.³⁸

It is my contention that apart from the elements mentioned by Reinecke as adumbrated above, prejudice/detriment or damage/loss must also be present to found contractual liability. As far as this element is concerned, I would support the attenuated meaning ascribed to it in *Peri-Urban Areas Health Board v Breet NO & Another*³⁹ per Trollop AJ (as he then was): 'the very act of the one contracting party in entering into contract in reliance of the other's conduct will be regarded in most bilateral contracts as a sufficient alteration of his position to his detriment to meet the requirement of prejudice'. I agree with De Vos that by virtue of the demands of commercial certainty, this wide connotation given to prejudice is tenable. After all, in most cases, when this requirement, as set out here is satisfied, the contractant would have suffered a loss or harm, or in the very least, the likelihood thereof. There is no need, in my view, to prove the extent or to quantify the loss suffered or likely to have been suffered in the present context. The mere fact that it existed, factually or potentially, is sufficient. Turpin⁴⁰ and Christie are of the view that prejudice or detriment of any sort need not be proved in the present context. I disagree. Proof of prejudice or detriment in the way that I have indicated above should be a requirement, and such proof does not pay lip-service to this requirement, with respect.

Finally then, it would appear that in the absence of an allegation of **prima facie** actual **consensus**, the contract-assertor would have to rely upon direct reliance protection to hold the contract-denier liable to the contract.

THE INDIRECT APPLICATION OF RELIANCE PROTECTION AND IUSTUS ERROR

The **iustus error** approach to the problem of **mistake** is regarded as being the indirect

³⁸ Dwaling en Bedrog by die Kontraksluiting, at 4 - 5. Malan, *supra*, fully supports these requirements of De Wet, at 228. As at 1979 Van Der Merwe indicated that the courts had by then not paid much attention to the content of the reasonableness criterion in respect of the reasonable belief which is required to exist.

³⁹ 1958 (3) SA 783 (T) at 790.

⁴⁰ 1958 Annual Survey of South African Law, 46 at 47 - 49; Christie, *supra*, at 27.

application of reliance protection⁴¹ : it is a particular way in which reliance protection is applied when there appears to be an ostensible contract. There must be a material mistake which constitutes the intention theory and the mistake must be reasonable which in turn is tested by the indirect application of the reliance theory.

According to Reinecke the **iusustus error** doctrine was the most popular approach used by our courts in the context of **dissensus per errorem** until 1989⁴². A person who relies on a **iusustus error** alleges that he was labouring under a mistake which is operative, material and reasonable (**iusustus**). The issue of mistake is thus viewed and approached from the perspective of the party relying on his **error**. If a party relies on a **iusustus error**, he alleges that a contract is a nullity or void - of no force or effect. A mistake is reasonable if one contractant was induced by a representation caused by the other party or if the other party knew that the contract-denier laboured under a misapprehension. This will be the case if the misapprehension or error is based on the false reliance created on the mind of the contract-denier by the other party. The contract-denier can then rely on the nullity of the contract on the basis of a **iusustus error**. An **error** would be **iusustus** when the party who is under a misapprehension is not to blame for it.⁴³

One view is that by employing the **iusustus error** approach the courts appear to assume that the declaration theory provides the basis for contractual liability⁴⁴. The better view is : 'It must be stressed that the reliance theory as expressed in the **iusustus error** approach is at most merely an additional basis of contract, applied only in exceptional circumstances. It has not been substituted for the intention theory'⁴⁵, i.e. the intention theory is tempered by the reliance theory in this context. 'Die vertrouens-teorie bied 'n aanneemlike

⁴¹ Lubbe and Murray, *supra*, at 168; Reinecke, 1989 TSAR 509; 1994 TSAR 376.

⁴² 1989 TSAR 509.

⁴³ De Vos, *supra*, at 181. This does not mean, however, that the contract-assertor has to prove fault on the part of the contract-denier to succeed in holding the latter to the contract on the basis of reliance protection.

⁴⁴ Reinecke, *supra*, at 510.

⁴⁵ Joubert (ed), *supra*, at 58 par 127.

verklaring vir die **iusus error**-benadering.⁴⁶ In this regard one would thus speak of the indirect application of reliance protection.⁴⁷ Thus as Van der Merwe and Van Huyssteen⁴⁸ indicate that there are Appellate Division decisions in which the reliance protection was employed instead of following the so-called **iusus error** approach. The **ratio** for this is nothing other than the fact that the former theory encapsulates the latter approach as well, in the sense that it can be equally effectively applied in the same manner as when the latter approach is resorted to. When the reliance protection theory is applied in this context, then reliance upon the justifiable, material and reasonable error made by the contract-denier will nullify the contract. It is against this background that Reinecke poses the question : 'Indien die **iusus error** benadering inderdaad neerkom op 'n onregstreekse toepassing van die vertrouensteorie en dus op 'n bevredigende grondslag berus, ontstaan die vraag nietemin of vertrouensbeskerming daarmee net so goed of beter as met 'n regstreekse toepassing van die vertrouensteorie gedien kan word'⁴⁹ . Reinecke positively asserts the **iusus error** approach has reliance protection as its objective.⁵⁰ Lubbe and Murray⁵¹ consider the choice between the 'protection of an induced reliance directly as illustrated in the Smith v Hughes doctrine, or indirectly by means of the **justus error**' as a complex one. They support Van Rensburg, an exponent of the **iusus error approach**, since they contend that this doctrine 'affords a more nuanced approach to the problem'. On this issue, before questioning whether to assimilate the two versions of the reliance theory in our case law to a single doctrine, I would like to add that 'the **justus error** doctrine, properly understood, should not be discarded lightly, a conclusion which is supported by its resurgence in the case law'⁵².

⁴⁶ Van Rensburg, *supra*, at 459.

⁴⁷ Van der Merwe, *Die Duiwel*, *supra*, at 31, Van Rensburg, *supra*, at 453. Also see Van der Merwe and Van Huyssteen *et alii*, *supra*, at 40.

⁴⁸ 1994 SALJ 679, at 680.

⁴⁹ 1989 TSAR 509.

⁵⁰ *supra*, at 509, 510.

⁵¹ *supra*, at 180.

⁵² Van Rensburg, *supra*, at 181.

Reinecke is correct in asserting that a contract cannot arise from a **iustus error**.⁵³ Reinecke asserts that in most cases where the **iustus error** approach is adopted it ultimately leads to the same results as the direct application of the reliance theory since both have as common denominator the protection of reasonable reliance, but questions whether the two approaches will always lead to the same results. One reason that he raises for asserting the negative, is the fact that the **iustus error** approach does not provide a basis of contractual liability, but merely a recipe for evading contractual liability⁵⁴ - this thus appears to be its main shortcoming. It serves as a mechanism to establish whether a person can escape liability from an apparent contract.⁵⁵ Although it is conceded that the **iustus error** doctrine brings about a shift in the **onus probandi** since it places the burden of proof on the party who has personal knowledge of the facts and circumstances which led to the dissensus, i.e. the contract-denier, Reinecke rejects the argument that the doctrine is more suitable from an evidentiary point of view for there is nothing that prevents one from altering the **onus probandi** without sacrificing the direct approach. Further he contends that the proposition that the **iustus error** approach is more nuanced holds no water, since the requirements for liability on the basis of the reliance protection can be formulated in a positive form so as to eradicate the need to resort to the **iustus error** approach⁵⁶. He thus concludes that the direct application of reliance protection (with or without a change in the **onus probandi**) is the more convincing and simple approach towards the question of contractual liability in the absence of actual **consensus**.

Lubbe and Murray contend that the elements of the **iustus error** approach are reasonable reliance, inducement and possibly also fault and prejudice⁵⁷. According to Reinecke⁵⁸,

⁵³ **Idem**.

⁵⁴ **supra**, at 511.

⁵⁵ **supra**, at 512; also see Reinecke, 1989 TSAR 509. The absence of culpability on the part of the contract-denier, will serve to intensify the reasonableness of the **error**, although in the **stricto sensu**, the absence of fault need not be proven by the contract-denier.

⁵⁶ **supra**, at 513.

⁵⁷ **supra**, at 168.

⁵⁸ 1994 TSAR 376 - 7.

a reasonable mistake can only exist if one of the requirements for the direct protection of reasonable reliance as indicated above is absent. Consequently, if a contract-denier asserts that his **error** is reasonable, he must also prove that one or other requirement for reliance protection is lacking.

From our discussion so far it is clear that there is much overlap in the elements of direct and indirect reliance protection. The fundamental question of the enquiry still remains whether the contract-denier 'op 'n regtens toerekenbare wyse 'n redelike vertrouwe van wilsooreenstemming by die kontrakbeweerder veroorsaak het'⁵⁹. For this very reason it is thus not necessary to ascertain whether in this context a misrepresentation was created by an omission or if other unlawful conduct existed, since the crucial issue is the protection of reliance⁶⁰.

A party will be able to rely on indirect reliance protection where the contract-assertor alleges that both parties **prima facie** expressed consensual declarations to be bound by the contract. In such a case the contract-denier would then have to aver that his mistake was reasonable and material which will be the case if one of the elements to found direct reliance protection is absent, namely that there was no representation which could reasonably be relied upon, or no causal connection, or no reasonable reliance, nor was any prejudice or loss sustained.

THE POSITIVE LAW

Smith v Hughes⁶¹ is the case which serves as the **fons et origo** for the debate in South African law. Blackburn J⁶² enunciated the following:

'I apprehend that if one of the parties intends to make a contract on one set of terms, and

⁵⁹ Reinecke 1994 TSAR 377.

⁶⁰ *Idem*.

⁶¹ (1871) L.R. 6 Q.B. 597; De Moor refers to the Blackburn J - dictum as the origin of the objective principle, *supra*, 641 note 34.

⁶² *supra*, at 607.

the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not **ad idem**, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he agreed to the terms of the other'.

Blackburn J⁶³ then went on to enunciate the following dictum which forms the cornerstone of our debate and I shall hereinafter refer to it as the **Blackburn J - dictum** : 'If, whatever a man's real intentions 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 whom that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'.

'And I agree that even if the vendor was aware that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, **unless the vendor was guilty of some fraud or deceit upon him**, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is **no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor**'⁶⁴ (my emphasis). **This was the actual ratio decidendi of the court or the ESSENCE thereof.** It is quite clear from the above dicta that the court will apply reliance protection 'directly' if the contract-denier caused the contract-assertor to believe that the former was concluding a contract on the terms understood by the latter. Conversely, the court will protect the mistaken belief held by the contract-denier, if he created in the mind of the contract-assertor the reasonable reliance that they had reached **consensus**, and the contract-assertor induced by that reliance, acted thereupon to his detriment or prejudice.

The essence of the case is that S did **not induce** H's misapprehension or there was no reasonable reliance to be protected.

⁶³ at 607.

⁶⁴ at 607.

As far back as 1924 Wessels JA stated the following⁶⁵ :

‘The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore from a philosophical standpoint if the minds of the parties do not meet, yet by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement’.

De Wet⁶⁶ asserts that this approach of merely concentrating on the external appearance of the parties at the expense of the real intention has already been rejected nearly two **millenia** ago. De Wet indicates that on the facts the issue was one party’s reliance upon the content of a letter as opposed to the other’s reliance on the oral agreement. Kahn is equally critical of this dictum and asserts that such a principle which is ‘linked to the mind of neither party, is clearly untenable’.⁶⁷

A more convincing view is that of Van der Merwe and Reinecke who assert that this dictum is entirely reconcilable with the reliance theory.⁶⁸ These writers indicate **ibi** that the real intention of the parties can ‘immers gewoonlik slegs met verwysings na uiterlike manifestasies van die bedoelings bepaal word; die uiterlike wilsverklaringe is per slot van sake primêre getuienis oor die wil’.⁶⁹ Hence it follows that this dictum must not be taken literally or at face value. The external manifestation or facts relate to **facta probantia** to prove a **factum probandum**, i.e. **consensus**. That this was the intention of Wessels JA is

⁶⁵ South African Railways and Harbours v National Bank of South Africa Ltd 1924 AD 704, at 715 - 716.

⁶⁶ **supra**, at 24.

⁶⁷ **supra**, at 442.

⁶⁸ 1979 THRHR 439; Lubbe and Murray share their views at 113.

⁶⁹ **supra**, 439 - 440; Van Dunné, who claims that the will of the parties is deduced from the external manifestations thereof, **supra**, at 2; ‘...the courts interpret contracts objectively, simply because this is the ordinary way in which we interpret what people say’, De Moor, **supra**, at 644. The main contention of De Moor in this article seems to be that contractual obligations need to be intentionally undertaken, i.e. the rehabilitation of intention in the law of contract; Van der Merwe and Van Huyssteen, 1993 TSAR 493; Minister of Home Affairs v American Ninja IV Partnership 1993 (1) SA 257 (A) at 269D - F.

clear from his own writings.⁷⁰

In *George v Fairmead (Pty) Ltd*⁷¹ Fagan CJ enunciated the following **locus classicus dictum**:

'When can an **error** be said to be **justus** for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered the position. They have, in effect, said : Has the first party - 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?...If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then of course, it is the second party who is to blame and the first party is not bound'.

The court held that where a party signs a contract without acquainting himself with the contents thereof, he cannot repudiate his assent to such contents on the basis that his error was **iustus**. Under such circumstances his **error** is unreasonable and hence he is bound by the contract. Christie refers to various authorities requiring fault in applying the doctrine of 'quasi-mutual assent', but asserts that in the light of this dictum to 'talk of blame now the Appellate Division has defined blame in this context as no more than conduct inducing a particular belief is to add a fifth wheel to the coach'.⁷² He distinguishes the reasonableness or reasonable person test from that of negligence.

Commenting upon this **dictum** Février-Breed⁷³ asserts that Fagan CJ explained that he was

⁷⁰ Wessels, *The Law of Contract in South Africa*, 2ed, 1951, par. 62. Also see Christie, *supra*, at 21 *et sequuntur*. How jurists can claim that to prove subjective intention is nearly an impossibility and then to use this ridiculous reason for objecting to the will theory, is dismissed out of hand. Daily in all our criminal courts, offences are prosecuted which have intention as an element, and there, provided that the **quantum** of evidence is sufficient, perpetrators of crimes are convicted. See for example, Lubbe and Murray, *supra*, at 108 - 109. This reason which is advanced by certain jurists is absolutely unconvincing and indeed silly to say the least.

⁷¹ 1958 (2) SA 465 (A), at 471A/B - C.

⁷² *supra*, at 26.

⁷³ *The "fault principle" and justus error in mistake in contract*, 1996 THRHR, 209 at 213.

using the words 'to blame' in the sense that the first party has by his conduct led the other party reasonably to believe that he was binding himself to the contract. She furthermore contends that 'conduct and words forming part of the alleged declaration of intent are interpreted in accordance with the understanding of a reasonable man in the circumstances - this is not a test for negligence, but a rule of interpretation'.⁷⁴ She asserts negligence is arguably always unreasonable, whilst an unreasonable act is not always a negligent one. He correctly indicates that the well-known test for negligence as enunciated in *Kruger v Coetzee*⁷⁵ has not found application in cases relating to mistake in contract.

In *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer*⁷⁶ Rumpff CJ held⁷⁷ that as the parties were not *ad idem*, no contract came into being. Jansen JA could, with respect, not resist the temptation to once again (i.e. after the *Saambou* decision) address the issue of the basis of contractual liability. In a minority judgment Jansen JA accepted that there was **dissensus** between the parties. Thus on the basis of the consensual theory no contract came into being due to the absence of actual **consensus**⁷⁸. The court accepted without any fear of contradiction that the **consensual theory** ('die wilsteorie') is the basis of contractual liability in our law.⁷⁹ The court then relied upon the Blackburn J-dictum to test whether an 'objective' contract came into existence based on the reliance theory. The court in adjudicating this issue mentioned that it is still undecided in our law whether fault and detriment are elements which have to be satisfied for the application of the reliance theory.⁸⁰ The court held, without deciding these issues, that L had in any event acted blameworthily and that D acted upon the belief created by L to the detriment of K and D.

⁷⁴ *supra*, at 213, This view is reiterated at 215 - 216.

⁷⁵ 1966 (2) SA 428 (A) 430. This he mentions at 217.

⁷⁶ 1979 (4) SA 74 (A).

⁷⁷ at 78A.

⁷⁸ at 78E - F.

⁷⁹ at 78G - H.

⁸⁰ at 78H.

It is imperative to note that **in casu** Jansen JA held that M was 'kontraktueel aanspreeklik'⁸¹, which means that the learned judge of appeal accepted that reliance protection is a source of contractual liability.

In *Horty Investments (Pty) Ltd v Interior (Pty) Ltd*⁸² Coetzee J stated that '(o)nly to a limited category of mistakes will the law attach the quality of **iusus**, and the fault principle looms large in the determination of this question'.⁸³ The mistaken party will therefore not be able to rely on the lack of true consensus if his mistake was due to his own fault. The other party is then entitled to rely on the doctrine of quasi-mutual assent ('die skyn van 'n kontrak') which renders the contract binding and enforceable despite **dissensus**.⁸⁴ The other contractant must also be blameless. 'If he is to blame then the first party is not bound.'⁸⁵

Coetzee J furthermore held that the 'fault principle underlies the **iusus error** doctrine'.⁸⁶ The court held that as both parties were at fault in so far as their belief of the period of the lease was concerned, consequently the lease as it read was null and void, and the plaintiff should be allowed to amend its particulars of claim. Beck concerns himself with the order which was granted : he questions that if no agreement exists between the parties, what then was the actual relationship between the parties?⁸⁷ Beck concludes that only a portion of the lease agreement should have been held to be void and not the entire agreement. There is possibly merit in this argument: I submit that the period which was common cause between the parties should have been considered as the duration of the valid contract. Malan indicates that by virtue of the finding of the court, it was unnecessary for it to decide

⁸¹ at 79D/E.

⁸² 1984 (1) SA 537 (W).

⁸³ at 539G.

⁸⁴ at 540.

⁸⁵ at 540. Lubbe and Murray, *supra*, at 165 argue that 'recognition of reliance will, furthermore, make it unnecessary to import the notion of fault on the part of the enforcer as an element of the doctrine' as was done **in casu**.

⁸⁶ at 541.

⁸⁷ Mistake and Fault, 1985 SALJ 8 at 9.

on the issue of prejudice.⁸⁸ Sharrock admits that the result of this decision cannot be faulted but he correctly questions the need for the fault principle since there is confusion as to the precise meaning of 'fault' or blame' in this context.⁸⁹ 'Carelessness' or 'inattention' are words indicating negligence⁹⁰ and should thus be avoided as a **factum probandum**, but such qualities in a person may serve as **facta probantia** of the **reasonableness of a party's reliance**. Sharrock concludes that in the light of certain Appellate Division decisions cited by him, Coetzee J erred in requiring the existence of fault since he implicitly did not regard himself bound by these **dicta**. According to Sharrock : 'Hitherto the great weight of authority has been in favour of resolving problems of contractual liability without resorting to any principle of culpability to do so'.⁹¹ Sharrock seems to have been prophesying the inevitable which had to take place, and indeed it did in Sonap's case, dealt with below. Kerr is of the view that the issue which was really involved in the instant case is **disensus**, i.e. the parties have not reached agreement in respect of material provisions of a contract, and hence no contract.⁹²

In *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*⁹³ the legal questions which fell to be decided were whether S and P have concluded an agreement in terms of which A purchased certain equipment from P, and if not, whether P could be estopped from denying the existence of such an agreement.

The first question was answered in the negative.⁹⁴ Hence the court was once again invited

⁸⁸ *supra*, at 230.

⁸⁹ Fault and Iustus Error, 1985 SALJ 1 at 3. De Wet has set out quite clearly what the content of fault should be that I fail to see the confusion. What needs to be asked is whether it is necessary requisite to be established not because it is a confusing concept but because it does not serve the needs of the commercial world, for example.

⁹⁰ *Patel v Le Clus (Pty) Ltd* 1946 TPD 30 at 34. De Wet would have used the word 'onagsaam' in accordance with his subjective or psychological approach to the will.

⁹¹ *supra*, at 4.

⁹² Mistakes in Communication of which a Reasonable Man would be aware : Contract or no contract? Error in negotio? 1985 SALJ 5, at 6.

⁹³ 1983 (1) SA 978 (A).

⁹⁴ at 984C - D.

to apply the oft-quoted dictum of Blackburn J. The question to be determined was thus whether 'irrespective of what Papae's real intention was, (whether) a reasonable man would have regarded his conduct in issuing and delivering the respondent's invoice to Smith of Transterra for transmission to the appellant, as constituting in the circumstances an offer to sell the equipment to the appellant'.⁹⁵ Since the question was answered in the negative the court held that P could not be estopped by S. Reinecke views this case as the most important one as at 1989 which expressly applied the reliance protection theory.⁹⁶ Malan⁹⁷ remarks that the court did not specifically require the elements of fault and prejudice.

In *Sonap Petroleum (SA) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis*⁹⁸ the court held that P could not rely on the mistake of S to snap up the bargain by P not acting in good faith. S's failure to speak up and enquire about the apparent error resulted in S committing a unilateral error, and hence there was no contract by virtue of the dissensus which existed between the parties.

Harms AJA stated that the mistake relied upon by S was one committed during the expression of its intention : 'it mistakenly believed that its declared intention confirmed its actual intention'.⁹⁹ P's declared intention was consistent with his actual intention. The **dissensus** between the parties was thus as a consequence of S's unilateral error.¹⁰⁰ Harms AJA accepted that the law concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract.¹⁰¹ The court held that in the case of an

⁹⁵ at 984G - H.

⁹⁶ *supra*, at 509.

⁹⁷ *supra*, at 229.

⁹⁸ 1992 (3) SA 234 (A).

⁹⁹ at 238G - H.

¹⁰⁰ at 238H.

¹⁰¹ at 238I - J.

alleged **dissensus** the court must resort to the reliance theory.¹⁰² The court held that in a number of cases in the past, the courts adapted the well-known dictum of Blackburn J. Harms AJA held that the relevant question to ask is: '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?'¹⁰³

Harms AJA stated that he could not find any authority for the view expressed by Coetzee J in *Horty Investments* that the 'fault principle looms large' in determining whether an error is **iustus** (excusable).¹⁰⁴ Harms AJA gives 'blame', as used by Fagan CJ, the meaning of indicating to another, as a reasonable man, by his conduct to believe that his apparent intention was his true intention. It does not mean culpable.¹⁰⁵ The court thus rejected the need for the element of fault to found contractual liability based on direct reliance.¹⁰⁶ Thus conduct in the form of a reasonable representation suffices. There is no additional need for the representation to be blameworthy, whether intentional or negligent. The court correctly indicated that if one contractant is aware that the other is labouring under a misapprehension, then such a party cannot snap up the bargain with this knowledge : such conduct would not be **bona fide**.¹⁰⁷ In such a case there will be a duty to speak. **In casu** the court held that there was no **consensus**, actual or imputed, hence the addendum was void. For Kerr, one of the highlights of the instant decision is that the court declared that there are circumstances in which a prospective contracting party has ' a duty to speak

¹⁰² at 239A.

¹⁰³ at 239I - J; See my discussion of the Wessels JA -dictum above.

¹⁰⁴ at 240C.

¹⁰⁵ at 240E.

¹⁰⁶ at 240G - I. The reasons for this are: there is little authority for such a requirement, it has induced much academic criticism, it is unnecessary. See Floyd and Pretorius, *supra*, at 670. Lubbe and Murray, Farlam and Hathaway : Contract - Cases, materials and commentary, 1988ed, 165 where these writers contend that recognition 'of reliance will, furthermore, make it unnecessary to import the notion of fault on the part of the enforcer as an element of the doctrine'; 'Mens wil dus graag die uitlatings van die hof in die Sonap-saak so vertolk dat dit nie bedoel is om aan skuld in hierdie konteks hoegenaamd enige funksie te ontsê nie, maar om te beklemtoon dat skuld hier geen selfstandige beginsel verteenwoordig nie', Van der Merwe and Van Huyssteen, 1993 TSAR 496. These learned professors *ibi* assert that the presence of fault may be relevant to determine the reasonableness or otherwise of the reliance.

¹⁰⁷ at 241B - D.

and to enquire'.¹⁰⁸ 'Alles in ag genome, is die uitspraak in die Sonap-saak versoenbaar met die standpunt dat by gebrek aan werklike **consensus**, kontraktuele gebondenheid op 'n redelike vertroue van **consensus** kan berus'.¹⁰⁹

According to Reinecke¹¹⁰, **in casu** the court came to the conclusion that the **iustus error** approach is based on the reliance theory. I am respectfully of the view that the court could have reached the same equitable result by having directly applied the reliance protection theory without resorting to the **iustus error** approach. The real reason why the contract-assertor **in casu** could not hold the contract-denier liable to the contract, was that the former did not create a reasonable reliance by the latter that the former intended to bind himself to the contractual terms as understood by the latter. In this regard the question of mistake was, with respect, not dealt with satisfactorily. What is, however, important, and that is that the court in this case adopted an objective approach to determine the intention of the parties as is clear from the following: '...external manifestations, and not the workings, of the minds of the parties'¹¹¹, but in the event of **dissensus** the court would resort to the reliance theory¹¹². Reinecke¹¹³ declares that the Sonap decision 'moet

¹⁰⁸ Kerr, Good Faith in Negotiating A Contract. The Duty to enquire if there is a perceived or apparent mistake in Communication, 1993 THRHR 296, at 298; Sonap, *supra*, at 242B; Kerr *ibi* points out that **in casu** there seems to have been no reliance on any representations by any of the parties. What happened **in casu** is that the parties were at cross purposes. The **ratio decidendi** in the Sonap case seems to accord very much with the following proposition of Kerr : 'If a party makes use of words (whether orally or in writing...) which do not express his intention and the other party knows that they do not express, or if a reasonable man in the other party's position would know this, then that other party is not entitled to snatch at advantage,' Kerr, Principles, *supra*, at 26, Hawthorne and Lotz, Contract Law Case Book for Students, 1994, indicate that the misrepresentation upon which the contract-denier relied occurred tacitly, at 40.

¹⁰⁹ Van der Merwe and Van Huyssteen, 1993 TSAR 497, 495.

¹¹⁰ *supra*, at 374 and 375. Also see Floyd and Pretorius, *supra*, at 668 who contend that this was so held for the first time in SA. This view is also shared by Lubbe and Murray, *supra*, at 164. They propose : 'In the absence of agreement, it is the expectation or belief (reliance) of one of the parties which must form the basis of the contract'. Cf. De Vos, Mistake in Contract, in Essays in Honour of Ben Beinart 181; Kritzinger 1983 SALJ 47; Van Rensburg 1986 THRHR 448 at 453; Hutchinson and Van Heerden 1987 SALJ 523.

¹¹¹ at 238J.

¹¹² *supra*, at 239A. Hawthorne and Lotz, *supra*, indicate that the merit of this decision lies in the fact that it expressly rejected : (a) estoppel as a possible solution for the mistake problem; (b) the necessity for requiring fault in determining whether or not fault (blameworthiness), whether **dolus** or **culpa**, is an element of reliance protection, at 40.

vanweë verskillende oorweginge as 'n belangrike mylpaal in die ontwikkeling van die onderhawige regsgebied gesien word'.

According to Floyd and Pretorius the court 'glossed over the contradictory approaches in the positive law by not discussing them but merely accepting that they are all interpretations and applications of the Blackburn J - **dictum**'.¹¹⁴ I agree with this finding and commentary wholeheartedly! These writers, in the school of De Wet, question whether fault should be rejected entirely. They contend that the 'reason for holding a party to an entirely incorrectly expressed intention can only be found in blameworthiness, whether it be **dolus** or **culpa**. They contend that there must be some form of reproachable conduct such as fault or the creation of risk to found liability.¹¹⁵ Meijers¹¹⁶ holds a similar view. These writers assert that the degree of each party's blameworthiness should be weighed up against the other's.¹¹⁷

Although there is much to be said for the view expressed by the writers, I prefer the viewpoint that blameworthiness should not be an element of reliance protection. Février Breed also welcomes the Sonap decision as it regarded the application of the fault principle unnecessary in the case of mistake. She asserts that the fault principle was entirely absent in Roman and Roman-Dutch Law - accordingly fault should not be the decisive factor in

¹¹³ *supra*, at 375.

¹¹⁴ *supra*, at 670.

¹¹⁵ *supra*, at 671. Also see De Wet, Estoppel, *supra*, at 73; Van Der Merwe, Duiwel, *supra*, at 19; Malan, *supra*, at 230 -231 and the cases there cited; Cf. Kritzinger, *supra*, at 270; Christie, Contracts, at 204, 387.

¹¹⁶ De grondslag der aansprakelijkheid bij kontraktuele verplichtingen in Verzamelde privaatrechtelijke opstellen, deel III, 1955ed, 84 - 85.

¹¹⁷ Corbin asserts where there are two innocent parties it is unconvincing to hold one party liable to bear the entire loss, but the reason for holding one party liable is to be found in actual business practices and **mores** or in business convenience. Also see Joubert (ed), LAWSA, Vol 5, *supra*, at par. 112. Fried asserts that in many cases 'both parties are harmed, neither is at fault, neither benefits'. He argues that in these cases a remedy possibly lies in the creation of a Fund by the state to which everybody contributes, as the MVA Fund for example, and i.r.o. which every aggrieved may institute a claim for loss suffered by the eventuation of a risk, as in the case of a garbled transmission of intention.

determining the effect of an alleged mistake in contract.¹¹⁸ She contends that the test applied in practice to the communication of the declaration of the will is the reasonableness test, and not the accepted well-known reasonable man test for negligence. With this I agree. Hence the possibility raised by Floyd and Pretorius that 'the test for reasonableness of the reliance should therefore be seen as a test for negligence'¹¹⁹ is rejected out of hand.

The requirement of fault would place contractual liability on par with delictual liability, so that the distinction between these two branches of the law would become blurred. Furthermore, current commercial needs and interests militate against it. In a dispensation of contractual freedom, it would cut against the grain of commercial equity to limit contractual freedom by the application of the fault requirement to found contractual liability in the absence of actual **consensus**. I do not require proof of the additional element of **culpa** in whichever form, for to require this would place a burden too onerous upon the contract-assertor or denier which would be tantamount to gross unfairness and inequity. Such an additional requirement of fault, in the instant circumstances, would be at variance with the practice and interests of commerce. 'The overriding consideration seems to be whether the reliance is reasonable when all the circumstances are taken into account, and not so much whether particular, separate requirements pertaining to the parties' conduct have been met'¹²⁰. That is really the crux of the matter. There is no need to give the word 'material' when used in the context of a 'material mistake' any other meaning than the one just adumbrated. It is true that reliance alone is insufficient to found liability : hence the requirement of reasonable or material reliance. It is trite that in our law the element of 'materiality' is correlative with that of 'reasonableness' and it behoves no further debate or even authority.

In *Steyn v LSA Motors (Pty) Ltd*¹²¹ Botha JA held that to disregard the subjective intention of a contractant and postulating 'the outward manifestation of the intention as the sole and conclusive touchstone of the respondent's contractual liability' as 'fundamentally

¹¹⁸ *supra*, at 218.

¹¹⁹ *supra*, at 672.

¹²⁰ *Van der Merwe, Van Huyssteen, et alii, supra*, at 31.

¹²¹ 1994 (1) SA 49 (A).

fallacious'¹²². The court said that this was contrary to legal principle. The court indicated that in the absence of **consensus** the 'outward appearance of agreement flowing from the offeree's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention'.¹²³ According to the court the decisive question to be asked in the circumstances is whether 'a reasonable man in the position of the appellant' would have held the belief held by the contractant.

Reinecke¹²⁴ indicates that the point of departure in the instant case was that the will or intention of the parties in principle forms the basis for contractual liability, and that in the case of **dissensus** not the declaration theory, but rather the reliance protection theory could supplement the consensual theory.

In *Maresky v Morkel*¹²⁵ Farlam AJ held that as the respondent had committed a **iustus error in corpore**, the purported agreement was void. The court correctly expressed that it could not 'agree that the parol evidence rules apply in this case'.¹²⁶

In *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands*¹²⁷ the court held that if a contract-denier is able to show that he had been induced to sign a contract whilst labouring under a misapprehension concerning its nature, purport or contents of a document, then the **caveat subscriptor** rule cannot avail the contract-assertor, since the contract-denier would have acted under a **iustus error**. This is also the position in

¹²² at 61B - D.

¹²³ at 61C - D.

¹²⁴ 1994 TSAR 372 at 374.

¹²⁵ 1994 (1) SA 249 (C) at 256F-G; 258F. Also see D.18.1.9pr.

¹²⁶ at 256E/F.

¹²⁷ 1994 (2) SA 518 at 524H - I.

American Law.¹²⁸ I submit that the contract-denier would only succeed in his defence if his mistake was reasonable, which would have been the case if one of the requirements for the direct application of reliance protection was absent.

In *Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others*¹²⁹, Nugent J held that contractual liability is based on what the parties actually intended, whether expressly or tacitly. **In casu**, since A had voluntarily assumed that a state of affairs existed, it could not claim that its **error** was **iustus**.

It is clear, and I forcefully submit that gleaning from the last three cases cited, our courts (other than at the Appellate Division) are at this stage of their development not prepared to directly apply reliance protection in cases relating to mistake in contract : In each case the court was only prepared to do so in a roundabout way by applying the **iustus error** doctrine. In most cases where a contract-denier laboured under a reasonable mistake, the court will invariably hold that the contract-assertor could not simultaneously have held a reasonable belief that the former's imputed or apparent intention accorded with the latter's actual intention. That being so, the contract-assertor's reliance upon the contract-denier's apparent **consensus** will not be protected, since in the light of the surrounding circumstances, the belief held would have been an unreasonable one.

Finally it is submitted that there exists no **causa** in law which prevents the courts from doing so based on the **facta probanda** and the **onus probandi** indicated in this treatise. For reasons of equity our courts should develop towards a presumption of reasonable reliance in favour of the contract-assertor who can prove that by some conduct of the contract-denier the former laboured under an alleged reasonable reliance of **consensus**. The **onus** would then be on the contract-denier to rebut any **prima facie** proof which the contract-assertor may have established for the operation of the presumption¹³⁰.

¹²⁸ Restatement of Contract, 2ed, 211. Also see Calamari and Perillo, Contracts, 2ed (1977) at 336 - 347. For English Law, cf. Halsbury's Laws of England, vol 9, sv Contract, par. 295 at 171.

¹²⁹ 1995 (4) SA 340 (T) at 345.

¹³⁰ See Van der Merwe, Van Huyssteen *et alii*, *supra*, at 31.

RISK LIABILITY

This treatise would be incomplete if I do not very briefly give my view appertaining risk liability in cases relating to mistake in contract. In *Saambou Nasionale Bouvereniging Jansen JA*¹³¹ questioned whether the risk principle applied in the South African Law. The court left the teasing question unsolved as to which principle or theory should serve as the basis of contractual liability in the situation where one party elects a particular mode of communication to convey his intention, but in the transmission of his intention to the other contractant the former's intention is incorrectly conveyed to the latter, as in the case of the garbled telegram.

Meijers¹³² indicates that if a person creates a dangerous situation ("gevaarsetting") then the person has to bear the risk thereof. The professor questions whether the contractant should bear the full liability for having created the risk particularly if the contractant's conduct was unaccompanied by fault : he thus has his doubts. He asserts that the protection of 'goede trouw' must be weighed up against the conduct without fault, whether fraudulent or negligent. According to Kahn¹³³ the risk view of Meijers is consistent with the reliance theory of contract, and seems 'commendable in this form' subject to the necessary rider that no man may take any advantage of an obvious error. As it appears to me, the concept or principle which underlies Hartkamp's¹³⁴ sentiments is liability, in the present circumstances, based on 'toerekenbare schijn' which is but, in my view, another form or appearance of reliance protection.

The view of Kahn may be neatly summed up as follows : he who 'initiates the use of so fallible a means of communication as a telegram must take the risk of an error in transmission, subject to the reservation that any party sending a particular telegram must take all the reasonable steps to ensure that it is correctly committed and the overriding rule

¹³¹ at 997 - 998.

¹³² E.M. Meijers, Verzamelde Privaatrechtelijke Opstellen, Derde Deel, Verbintenissenrecht, Leiden, at 97 - 98.

¹³³ Kahn, Lewis and Visser, Ellison Kahn Contract & Mercantile Law., Vol. 1, 2ed, at 146.

¹³⁴ *supra*, at par. 119.

prohibiting the snatching' of a bargain is not violated.¹³⁵ A sombre view of the situation is adopted by McLennan¹³⁶ who opines that it would 'surely be an injustice to penalize one party for the mistake which could, after all, have happened just as easily to the other'. He then correctly adds that 'just as the sender of a telegram must be taken to know the dangers of garbling, so the recipient must be taken to know that the telegram may not have been accurately transmitted'.

For Christie the question is simply 'whether the doctrine of quasi-mutual assents finds a place here'¹³⁷. According to Christie a contract will come into being if the one party initiating the mode of communication has so conducted himself as to induce or cause the other party reasonably to believe that there is a contract on the terms understood by the other party. One way of tackling the problem according to De Wet is to hold that in this exceptional case a contractant may be held liable for the reasonable belief or impression which his conduct has created in the mind of the other, i.e. a reliance based liability or liability based on reliance protection¹³⁸. On this approach De Wet argues that the belief created should have been caused by blameworthy conduct. Floyd and Pretorius¹³⁹ as well as Malan¹⁴⁰ seem to support this approach. Thus based on their contentions, in the absence of fault, the contract-denier will not be bound to the contract; if both parties are at fault, no contractual liability arises; or if fault lies on the contract-assertor and not on the contract-denier, then no contract comes into being in terms of the reliance theory. There is much to be said for this viewpoint.

Sonap's case did not deal with the issue to hand. This notwithstanding, Floyd and Pretorius contend that the risk principle should be applied in order to effect an equitable and fair

¹³⁵ Mistake in a Telegram, 1971 SALJ 417, at 419. Also see E. Kahn, Some Mysteries of Offer and Acceptance', 1955 SALJ 246, at 266.

¹³⁶ 1971 Annual Survey of South African Law 82.

¹³⁷ *supra*, at 88.

¹³⁸ De Wet and Van Wyk, 5ed, *supra*, at 15 - 16; De Wet, Estoppel, *supra*, at 73.

¹³⁹ *supra*, at 672 - 673.

¹⁴⁰ Malan, *supra*, at 230 - 231.

result in the instant situation as well as in other instances where the **iustus error** approach cannot be applied. In my view, the creation of risk in the present context relates to the element of representation or conduct. A possible solution which I wish to postulate is that when a contract-denier has created the risk by initiating negotiations by utilising a particular form of communication such as a telegram (i.e. made a representation by using a telegram), and caused the contract-assertor to reasonably believe that a certain state of affairs existed which in fact did not exist, and the latter acted upon that reasonable belief to his detriment or prejudice, then the contract-denier should be held contractually liable.

I with respect disagree with the viewpoint that it is only when 'die redelike vertroue van die een deur verwytbare gedrag teweeggebring is, kan daar rede bestaan om die redelike vertroue te handhaaf.¹⁴¹ Blameworthy conduct is a major factor to consider when determining contractual liability based on reliance protection, but I am of the view that it is not the only element which can prove the reasonableness of the reliance. It should not be elevated to an independent element as I argue below. In the present context, I do not require the additional element of **culpa** in whichever form, for to require this would place too onerous a burden on the contract-assertor which would be tantamount to gross unfairness and inequity, and would also cut against the grain of commercial practice and convenience. It should also be stressed that it is not any belief that results in liability, but a reasonable one. This means that regard must objectively be had to all the surrounding circumstances of the given situation. In the instant situation the direct application of the reliance theory (reliance protection), with the application of the requirements as I have just enunciated, would in my view be the best solution to the issue raised under this head.

CONCLUSION

It is my submission that based on reliance protection, 'a contract can come into existence either if there is actual **consensus** between the parties to an agreement or if the will of one party coincides with the reasonable reliance created in his mind by the other party about the latter's will'¹⁴². **In either case the reasonable reliance of one contractant on the**

¹⁴¹ De Wet and Van Wyk, 4ed, at 14.

¹⁴² **Idem.**

actual or imputed consensus of the other is protected.¹⁴³ This may either be achieved psychologically in terms of the will theory or normatively, in accordance with the traditional reliance theory. Whenever the former approach leads to inequitable results, then the consensual theory must be tempered or corrected by the reliance theory (i.e. has to be applied) to achieve fair and equitable results. This approach undoubtedly serves the needs of the garbled telegram, the **caveat subscriptor** rule circumstances, mistake, parol evidence etc. Previous dealings, negotiations etc. between the contractual parties should play a major role in determining whether or not reliance upon **consensus** should be protected.¹⁴⁴ For example, to allow a party, knowing that the other party is labouring under a misapprehension, to snatch a bargain cannot be permitted under any circumstances¹⁴⁵ - such conduct would be **mala fide**. Surely it cannot be contested that a contractant has a duty to speak or act if it is deemed reasonable in the circumstances that the contractant should speak or act so as to prevent the other contractant from acting to his detriment.¹⁴⁶

Hofmann, an exponent of the subjective approach to contract and the will theory, rejects the reliance protection theory as a starting point of contractual liability for he argues that it takes the abnormal case as the starting point of a general theory¹⁴⁷ since people in the main do not commit errors in concluding contracts. However, this rejection loses sight of

¹⁴³ In the Netherlands as well as in America the view has been held that not the will theory but the 'reasonable expectation raised by the other party' should be considered as the basis of the contract. In my view, this theory is but another version or label for reliance protection. Harker also indicates at 125 that the importance of actual **consensus** as the basis of contractual liability has declined, and that there has been a resurgence of 'benefit-based and reliance-based liability in contractual affairs'.

¹⁴⁴ See Restatement of the Law of Contract, par. 72 (1) (c).

¹⁴⁵ as was also held by Harms AJA in *Sonap*, *supra*, at 241D, 242B - C; Kahn, *supra*, at 266; 1971 SALJ 419.

¹⁴⁶ See Joubert (ed), LAWSA, Vol 9, per The Honourable Former Chief Justice P.J. RABIE, at par. 371 note 3.

¹⁴⁷ *supra*, at 436. According to De Vos, both the declaration and the reliance protection theories are 'based on **consensus** as the bedrock of liability'. He argues that when applying the consensual theory **in strictu sensu**, the general rule is that in the absence of **consensus**, there is no contract. However, in exceptional circumstances, the demands of commercial certainty demand our courts to depart from it and in fact abandon the consensual theory and to apply the reliance protection theory as a corrective to the consensual theory where the latter leads to an unsatisfactory result. In my opinion I see no need for the latter theory to be a corrective to the former : the former theory is a subset or one aspect of reliance protection.

the fact that the reliance protection theory can also embrace the consensual theory as indicated above.

'Die vertrouens teorie word in die genoemde rol(le) algemeen as billik beskou. Dit lewer na my wete geen besondere probleme vir die handelsverkeer op nie en kan ook sonder oormatige akrobatiek by ons regsistematiek ingepas word.'¹⁴⁸ A legal principle or theory should give rise to a result which is fair and equitable. The time of the fulfilment of the following prediction of Van der Merwe and Van Huyssteen has arrived: 'Eventually the substantive rules may actually change due to the continued application of estoppel : a reliance on the existence of consensus may become the basis of an actual contract'.¹⁴⁹ This is of course nothing other than reliance protection which I have postulated in this paper.

Reliance protection has been termed as the doctrine of 'quasi-mutual consent or assent'¹⁵⁰ or as estoppel¹⁵¹. Kahn is undoubtedly correct in asserting that the theory of 'quasi-mutual assent' has at times been thought to be estoppel by representation.¹⁵² As at 1976 when De Vos wrote this article he claims that the court did not use the term reliance protection theory, instead it used the term estoppel, as enunciated in *Smith v Hughes*¹⁵³. In the most recent decision that I encountered, *Constantia Graswerke Bk v Snyman*¹⁵⁴ Heher J held *obiter* that the reliance upon quasi-mutual assent may give rise to the conclusion that legal **consensus** existed between the parties. However, *in casu*, the court

¹⁴⁸ Van Rensburg, *supra*, at 458.

¹⁴⁹ A Perspective on the Elements of Estoppel by Representation, 1988 TSAR 568, at 571. Also see *Saambou Nasionale v Friedman* at 993 - 996.

¹⁵⁰ Christie, R. H., The Law of Contract in South Africa, 2ed, 1991, 2, 23 *et sequuntur*; Kerr, The Principles, *supra*, at 10.

¹⁵¹ Atiyah, *supra*, is undoubtedly correct in asserting that estoppel is an illustration of what can only be 'rationally regarded as reliance-based liability'.

¹⁵² *supra*, at 442 note 10 and the authorities cited there.

¹⁵³ (1870-1) LR 6 QB 597 at 607, per Blackburn J.

¹⁵⁴ 1996 (4) SA 117 (W), at 1241 - 125C.

found that the Defendant had not created a reasonable reliance of **consensus** in the mind of the Plaintiff to be bound by the apparent contract, and hence the reliance held by the Plaintiff could not be protected. This is, with respect, a classical case in which the court could have applied the principles expounded in this treatise as a basis to ascertain whether a contractual relationship came into being or existed between the Plaintiff and the Defendant.

I agree wholeheartedly with Jansen JA who opined in *Saambou* that the doctrine of estoppel 'skyn in 'n mate dié van die vertrouensteorie by kontraksluiting te oorvleuel.'¹⁵⁵ Thus in the arena of the reliance theory the label of estoppel is often used. Hence the court indicated in *Saambou* that it would be preferable not to speak of true estoppel in this instance 'as ware estoppel nie bedoel word nie'.¹⁵⁶ In *Sonap* the court went so far as to reject the estoppel approach as a possible solution to contractual liability, as it merely confuses the topic.¹⁵⁷ Be that as it may, that does not mean that we should altogether ignore past decisions and treatises dealing with estoppel in relation to contractual liability. I would rather assert that the term "estoppel" not be used in the present setting, but that those of its aspects which accord with reliance protection should fruitfully be used in future so as to develop this branch of our law as we are seeking to develop a uniform and acceptable basis for contractual liability. So even as regards estoppel in a contractual context, it is submitted that fault should be discarded as an element to bring it in line with the requisites of the reliance protection.

To conclude my discussion, I respectfully submit that our law has reached that stage of its development that the concepts mentioned in the foregoing paragraphs should be merged. Reliance protection is in my opinion the most scientific and practical basis for such a **confusio**. In my submission the elements of the direct application of reliance protection should apply equally to the instances mentioned above to found contractual liability. Obviously, contractual liability based upon reliance protection can be avoided when a contract-denier succeeds in proving that a contract-assertor has failed to establish all the

¹⁵⁵ at 1002C - E.

¹⁵⁶ at 1004H; at 1006C - D.

¹⁵⁷ at 240D.

prerequisites for contractual liability.

Finally, on a conspectus of the foregoing, it is my submission that the direct application of reliance protection as enunciated above can effectively serve as the basis of contractual liability.

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