

NOTES / AANTEKENINGE

THE BASIS OF COMMON ERROR

1 Introduction

Not being one of the simplest areas of the law of contract, mistake has had somewhat of a chequered past (see generally Hutchison "Contract Formation" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 165 180-194). Although more recently commentators have noted that the legal position has by and large been settled (compare, eg, Reinecke "Toepassing van die Vertrouwensteorie by Kontraksluiking" 1994 *TSAR* 372; and Van der Merwe and Van Huyssteen "Reasonable Reliance on *Consensus*, *Iustus Error* and the Creation of Contractual Obligations" 1994 *SALJ* 679), there remain anomalies surrounding the ascription of contractual responsibility in certain circumstances, such as whether liability should lie where a third party has caused a material mistake between contracting parties (see Floyd and Pretorius "A Reconciliation of the Different Approaches to Contractual Liability in the Absence of *Consensus*" 1992 *THRHR* 668 672-673). What is further apparent is that the courts still at times have difficulty in applying the principles pertaining to error (see Hutchison "'Traps For the Unwary': When Careless Errors are Excusable" in Glover (ed) *Essays in Honour of AJ Kerr* (2006) 39; and Pretorius "General Principles of the Law of Contract" 2007 *Annual Survey* 469 477-479). But a type of mistake that evidently still poses conceptual and practical difficulties is common error. This note attempts to shed some light on the underpinnings of this doctrine against the backdrop of English law, which had a marked effect on its development in South African law.

2 Unilateral, mutual and common mistake

Under the influence of English law (compare Beale (gen ed) *et al Chitty on Contracts Volume 1: General Principles* 29ed (2004) 371-372; Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 14ed (2001) 252-253; and Grubb and Furmston *The Law of Contract* 2ed (2003) 766-777), the courts have classified mistakes as unilateral, mutual or common (see Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3ed (1988) 132ff). A unilateral mistake occurs where one party is mistaken and the other party is aware of the former's mistake (eg, *Prins v ABSA Bank Ltd* 1998 3 SA 904 (C); and see, however, *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 238H, where the court interpreted a unilateral mistake as being one where a party incorrectly believed that his

declared intention conformed to his actual intention); while on the other hand mutual mistake refers to the situation where both parties are mistaken about each other's intention and are at cross purposes (eg, *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D)). Both instances encompass the situation where *consensus ad idem* between the parties is lacking and at times the term "unilateral mistake" is used to describe either of them (see eg, Van Rensburg, Lotz, Van Rhijn and Sharrock "Contract" in Joubert (founding ed) 5(1) *LAWSA* (2004) par 141). Consequently, this distinction has been criticized as being of little practical significance since more often than not the mistake in question will be a mutual one (Hutchison and Pretorius *The Law of Contract in South Africa* (2009) 82-83; and cf Lubbe and Murray 144). The simple question actually seems to be whether a mistake is material in that it vitiates consensus (or rather an element thereof), irrespective of whether it is strictly unilateral or mutual in nature (cf De Wet and Van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg Vol 1* 5ed (1992) 10-11; and Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 3ed (2007) 29).

Instances of material mistake, whether unilateral or mutual, are cases of mistake proper in that they preclude the existence of a consensual agreement (see Van der Merwe *et al* 25-26; Van Rensburg *et al* *LAWSA* par 143; and Hutchison and Pretorius 82). But there the matter does not end. Although the question as to the basis of contractual liability in South African law is fairly complex and often controversial (see Pretorius "The Basis of Contractual Liability in South African Law" 2004 *THRHR* 179, 383 and 549; and Hutchison and Pretorius 13-20 and 91-107), the courts and writers tend to favour the reliance theory or doctrine of *quasi*-mutual assent as corrective to the will theory in the event of material mistake (see eg, *Mondorp Eiendoms-agentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 2 SA 599 (SCA) par 6; *Pillay v Shaik* 2009 4 SA 74 (SCA) par 55; Van der Merwe *et al* 38-42; Reinecke 1994 *TSAR* 372ff; and Van der Merwe and Van Huyssteen 1994 *SALJ* 679ff). In contradistinction to material mistake, common error is not generally regarded as an instance of mistake proper and differs fundamentally from the former in that it does not lead to a lack of agreement or *dissensus*. The parties appear to be in complete agreement as to all the aspects constituting *consensus ad idem*, but common error nonetheless results in an agreement being void. The reason for this state of affairs, however, is not entirely clear (see generally Van Rensburg *et al* *LAWSA* par 145-146; Van der Merwe *et al* 29; Lubbe and Murray 135-136; Hutchison and Pretorius 108; and Hawthorne and Pretorius *Contract Law Casebook* 3ed (2010) 65-66).

It is further important to note that quite often common errors relate purely to an attribute or quality of the subject matter of a contract (*error in qualitate/error in substantia*) (cf *Papadopoulos v Trans-State Properties and Investments Ltd* 1979 1 SA 682 (W); and *Fourie v CDMO Homes (Pty) Ltd* 1982 1 SA 21 (A)). An *error in qualitate* is regarded as non-material in that it does not impact upon the formation of *consensus ad idem* between prospective contractants (Van der Merwe *et al* 27-28; Van Rensburg *et al* *LAWSA* par 144; Lubbe and Murray 125-126; and cf *Trollip v Jordaan* 1961

1 SA 238 (A)). Moreover, an *error in qualitate* will often, if not always, amount to an error in motive, and the latter form of mistake is similarly regarded as non-material (*Banks v Cluver* 1946 TPD 451 458-459; *Diedericks v Minister of Lands* 1964 1 SA 49 (N) 56; *Wilson Bayley Holmes (Pty) Ltd v Maeyane* 1995 4 SA 340 (T) 343; Hoffmann "The Basis of the Effect of Mistake on Contractual Obligations" 1935 SALJ 432 434; Hutchison and Pretorius 87; Van der Merwe *et al* 26-27; and Van Rensburg *et al* LAWSA 232 fn 6). A doctrine of *error in substantia* did enjoy a measure of support in Roman law (compare *eg*, *D 18.1.41.1*; *D 18.1.9.1*; *D 18.1.10*; see further Wessels *The Law of Contract in South Africa* Vol 1 2ed (1951) par 912ff; Lubbe and Murray 125; and Palley "Comparative Study of Mistake" 1961 *The Rhodesia and Nyasaland LJ* 140 197-198). Some writers also contend that a unilateral error as to quality can be operative and exclude consensus where a fundamental attribute is part of the substance or essence of the object of performance; for instance, if vinegar was bought under the impression that it was wine (*cf D 18.1.9.2*; and see further Wessels par 914). Accordingly, provided that such a mistake is also reasonable the agreement should be void (see *eg*, Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 460; and *cf* Kahn, Lewis and Visser *Contract and Mercantile Law: A Source Book* 2ed (1988) Vol 1 279). The distinction as to whether a mistake is a non-material one relating to quality or a material one concerning the object of performance (*error in corpore*) may at times be rather fine (*cf* Kahn *et al* 282), and there certainly seems to be a measure of merit in recognizing that in instances where an attribute is a fundamental part of the essence of performance a mistake in relation thereto may be material (see further Pothier *A Treatise on the Law of Obligations* (translation by Evans) (1806) par 18; Wessels par 912-926; Hahlo and Kahn 460-462; Palley 1961 *The Rhodesia and Nyasaland LJ* 197-198; and the authorities cited by Lubbe and Murray 126).

Nonetheless, the general weight of authority seems to be that in light of other suitable remedies there simply is no need for a separate doctrine of *error in substantia* (*Van Reenen Steel (Pty) Ltd v Smith* 2002 4 SA 264 (SCA) par 17; Lubbe and Murray 125-126 136; Van der Merwe *et al* 27-28; and *cf* De Vos "Mistake in Contract" 1976 *Acta Juridica* 177), or that it has not enjoyed general acceptance in our law (see *De Wet Dwaling en Bedrog by die Kontraksluiting* (1943) 8 and 11; Hoffmann 1935 SALJ 440; and *Papadopoulos v Trans-State Properties and Investments Ltd supra* 687ff). It also seems doubtful whether the courts will be prepared to revisit the matter in the near future. Although the party who labours under an *error in qualitate* apparently does not have an action within the realm of mistake (unless the mistake concerns the fact that the quality of the performance is warranted) he may in principle have one on the basis of misrepresentation of sorts (Van Rensburg *et al* LAWSA par 142; and Hutchison and Pretorius 87), or perhaps even initial impossibility of performance (De Vos 1976 *Acta Juridica* 177). However, for present purposes, common error is of particular significance for being a doctrine that may permit the avoidance of a contract on the basis of a common *error in qualitate* (see generally Lubbe and Murray 136).

3 Basis of common error in English law

The reason why common error results in an agreement being void is a fairly thorny issue, to which there seems to be no simple answer. As point of departure one may have recourse to English law where the doctrine has had a long history (see generally Cartwright "The Rise and Fall of Mistake in the English Law of Contract" in Sefton-Green (ed) *Mistake, Fraud and Duties to Inform in European Contract Law* (2005) 65; and MacMillan *Mistakes in Contract Law* (2010) 257ff). But the courts are not always consistent in their use of terminology, and mutual mistake and common error are at times used interchangeably (see the discussion by Beale *et al* 371 fn 3; and *cf* Beatson, Burrows and Cartwright *Anson's Law of Contract* 29ed (2010) 251). Furthermore, while it is generally accepted that common error can result in the nullification of an agreement, the rationale behind this is difficult to pinpoint (see generally Cooke and Oughton *The Common Law of Obligations* 3ed (2000) 442ff).

Probably as a result of the fact that English law has traditionally followed a generally objective approach to contract formation (see Hutchison *Southern Cross* 182; Atiyah *Essays on Contract* (1986) 21-22; MacMillan 207ff; and Cooke and Oughton 27-28) there is a lingering tendency to view any form of subjective mistake with suspicion. Consequently, where the parties have laboured under a common error of fact or law the courts are often reluctant to relieve one of them from contractual liability (see Collins *The Law of Contract* 4ed (2003) 123-127). It seems that contractants are normally expected to provide for the allocation of risk to deal with such circumstances in their contract (see generally Grubb and Furmston 770-773; and *cf* Collins 126), and common mistake will only prevail in exceptional instances (Beatson *et al* 278; and *cf* Adams and Brownsword *Understanding Contract Law* 4ed (2004) 129). Moreover, there is authority to the effect that to obtain relief a party must have had reasonable grounds to have entertained his mistaken belief (*Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 913; Grubb and Furmston 774). In equity a court had a wider fairness-based discretion in such instances, so that even if a contract was not void at common law it nevertheless may still have been voidable in equity in accordance with a less strict approach (see Beale *et al* 394-396; and Adams and Brownsword 132-133). However, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* ([2002] EWCA Civ 1407, [2003] QB 679) the Court of Appeal took a dim view of this wider equitable discretion and seems to have dispelled any distinction between the common law and equity approaches to common error (see further Beatson *et al* 282ff; and Adams and Brownsword 134-135).

Beale *et al* (379) summarize the rather complex position regarding common error at English law as follows:

"Where the mistake is common, that is shared by both parties, there is *consensus ad idem*, but the law may nullify this consent if the parties are mistaken as to some fact or, possibly, point of law which lies at the basis of the contract. While it is clear on the authorities that a doctrine of common mistake exists in English law, the situation is complicated by the fact that there are three possible conceptual routes which have been employed in

considering whether a fundamental mistake has prevented the formation of an effective contract: (1) that there has been a total failure of consideration; (2) that the contract is subject to an express or implied condition that the facts were as the parties believed them to be or (to use a modern formulation derived from the same argument) that it would be invalid if, on the true construction of the contract, the essence of the obligations are impossible to perform; and (3) that there is a separate doctrine of mistake. We will see that these grounds were not always kept distinct and the leading cases seem to combine the three in a way that makes it hard to state the rules in a simple form.”

Since the doctrine of consideration is not part of the South African law of contract (Christie *The Law of Contract in South Africa* 5ed (2006) 8-10; and Joubert *General Principles of the Law of Contract* (1987) 30-33), the first of these three possibilities requires only brief mention. In earlier case law (preceding *Bell v Lever Brothers Ltd* [1932] AC 161) there are instances concerning sale agreements where, unknown to the parties, the *merx* was very different to what they thought it was or it did not exist at all, and the purchaser was entitled to recover the purchase price on the basis of a complete failure of consideration (eg, *Strickland v Turner* (1852) 7 Exch 208; *Gompertz v Bartlett* (1853) 2 El & Bl 849; and see further Beale *et al* 379-380). These cases seem to have contributed to the eventual development of a doctrine of mistake in English law (Beale *et al* 381-382).

The second proposition as to the basis of common mistake is that the agreement is subject to an express or implied condition that the facts were in accordance with what the parties believed them to be. This approach has conceptual ties with cases that base the English doctrine of frustration upon an implied condition that the facts would remain as they were upon conclusion of the contract. Accordingly, should performance subsequently become impossible or the common object of the contract be undermined (frustration of purpose) as a result of a change of circumstances, the contract would become frustrated and the parties would be freed from their obligations (see Smith *Atiyah's Introduction to the Law of Contract* 6ed (2005) 182-192; Adams and Brownsword 136-140; Cooke and Oughton 454-456; cf McBryde *The Law of Contract in Scotland* 3ed (2007) 597ff; and MacQueen and Thomson *Contract Law in Scotland* 2ed (2007) 177ff). By the same token common mistake based on an incorrect implied supposition rendered the contract void (eg, *Griffiths v Brymer* (1903) 19 TLR 434). The courts later departed from the notion of an implied condition in the case of frustration (see Beale *et al* 382-383; and cf McBryde 599) and common error has followed a similar path (see Peel *Treitel: The Law of Contract* 12ed (2007) 311-312; and Beale *et al* 391).

Thirdly, there is the issue of an independent doctrine of common mistake that has developed in English law. Although the decisions are not always clear in their reasoning it seems that at common law such an error must be fundamental to render a contract void (Grubb and Furmston 774). In the seminal decision of *Bell v Lever Brothers Ltd* (*supra* 218), in a majority speech, Lord Atkin formulated a narrow doctrine of (fundamental) common mistake as to quality as follows:

“Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.”

This test has drawn criticism for being overly strict (*eg*, *Adams and Brownsword* 130*ff*; and *cf* *Collins* 124-127) and for resting on dubious authority (see *Beale et al* 389; and *Collins* 124-125). Also it has apparently been satisfied so rarely that it has been suggested that fundamental mistakes at common law have been restricted to instances where the subject matter of the agreement does not exist and, therefore, the agreement is devoid of content (*Furmston* 254-255; and *cf* *Grubb and Furmston* 774). Although Lord Atkin preferred his initial formulation he also seemed to acknowledge an alternative mode of expressing “mutual mistake”, but which clearly boils down to common error (225):

“[I]f the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true.”

This alternative formulation is strongly reminiscent of the “express or implied condition” scenario previously mentioned and the parallels between common error and frustration (see *Beale et al* 391). In contrast to Lord Atkin, Lord Thankerton (*Bell v Lever Brothers Ltd supra* 237) rejected the implied term approach and eschewed any connection between frustration cases and error “rendering a contract void owing to failure of consideration.” But it was the majority speech of Lord Atkin that prevailed and ultimately had ripples in South African law (see *eg*, *Van Reenen Steel (Pty) Ltd v Smith supra* par 10). Although the implied term approach has fallen out of favour in English law, the underlying link between frustration and common mistake remains strong (*Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd supra* par 73; *Beale et al* 391-392; and *Peel* 311-312).

Subsequently, a doctrine of common mistake as formulated in main by Lord Atkin in *Bell v Lever Brothers Ltd* has on occasion been endorsed by the courts (see *eg*, *Associated Japanese Bank (International) Ltd v Crédit du Nord SA supra*; *Re Cleveland Trust plc* [1991] BCLC 424; see further *Beale et al* 390; and *Collins* 125-126). However, more recently in the influential matter of *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd (supra* par 76), Lord Phillips MR veered somewhat from the concept of an independent doctrine of common mistake by holding that a mistake, including one as to a quality of the subject matter of a contract, would cause the contract to be void if the non-existence of the state of affairs rendered “performance of the contractual adventure” impossible. He further elaborated (par 73):

“The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of the agreement.”

In this result the most recent trend suggests that common mistake is largely linked to initial impossibility of performance, while the doctrine of frustration deals with events subsequent to contracting that lead to impossibility or frustration of purpose. Lord Phillips MR's judgment has been criticized, notably for doing away with the distinction between the common law and equitable approaches to this doctrine (see *eg*, Adams and Brownsword 134-135) and apparently rendering common error dependent on impossibility of performance, whereas "[i]mpossibility does not seem to lie at the core of mistake cases" (McKendrick *Contract Law: Text Cases, and Materials* 4ed (2010) 557).

Although rather superficial, the discussion above illustrates just how difficult it is to find a general justifying principle for common mistake in English law, and case law indeed reveals several interwoven possibilities. Nevertheless, there are a few lessons to be learnt: for one thing it appears as if nullification of a contract at common law by way of common mistake tends to occur only in exceptional cases, so common error is applied with caution. Furthermore, arguably the primary reason in modern law for declaring a contract void on this basis relates to impossibility of performance. However, if one takes into consideration the similarities between common error and frustration, as well as earlier case law, the former may yet prevail where performance remains possible but the common purpose of the contract has been undermined due to unforeseen circumstances that render performance significantly different to what the parties apparently contemplated. Common links between these two doctrines seem to be the inability to perform (objective impossibility of performance) on the one hand and the undermining of a common, fundamental reason for the conclusion of the contract (frustration of purpose) on the other. In both instances performance is significantly affected by circumstances which the parties did not envisage. And conceivably the purpose of both doctrines is to provide an equitable remedy where performance is impossible or the common object of a contract has been undermined due to unforeseen reasons, save that the doctrine of frustration relates to a change of circumstances subsequent to the conclusion of a contract, while common error pertains to the state of affairs prevailing at its conclusion (see further Smith 172-181; McKendrick 557-558; Cartwright 79ff; Collins 123-127; and Adams and Brownsword 129-136).

4 Basis of common error in South African law

Noticeably English case law tends to conflate terms such as "condition" and "assumption" (supposition). Without attempting to unravel this phenomenon, it should be noted that in terms of South African law, although the courts have often borrowed the English terminology, one would strictly speaking be dealing with assumptions where common error is involved (relating to past or existing facts – see Christie 328; Van der Merwe *et al* 285; and Hutchison and Pretorius 250), and not conditions (relating to uncertain future events – see Van der Merwe *et al* 286-287; and Hutchison and Pretorius 247). There appears to be little authority in Roman-Dutch law for a doctrine of common mistake, but it has been suggested that this doctrine descended from *error in*

substantia in Roman law (Palley 1961 *The Rhodesia and Nyasaland LJ* 196-197). Whether this is indeed the case is unclear, but there is little doubt that English law has had a prominent influence on South African law in this regard (compare *eg*, approval of the *dictum* by Lindley LJ in *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 CA 280-281 in *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 1 SA 443 (A) 450; and see further Kerr *The Principles of the Law of Contract* 6ed (2002) 255 fn 1), and certain parallels between the two systems are quite evident. Unfortunately, as in English law, the relevant principles are not always consistently applied (compare *eg*, *Double Option Trading 197 (Pty) Ltd v Grimbeek* [2010] JOL 25409 (WCC), where the court seems to have employed a mixture of principles relating to material mistake and common error) and they may even be considered confusing (*cf* Lubbe and Murray 135). Nevertheless, notions of impossibility of performance and tacit suppositions feature prominently within the South African context. The courts tend to favour an independent doctrine of common mistake, but invariably this doctrine leans heavily on other principles (see generally Christie 325-329; Van Rensburg *et al* LAWSA par 146; Van der Merwe *et al* 29; and Lubbe and Murray 135-136).

First and foremost, where common error and initial impossibility of performance converge within the same factual setting the contract simply may be viewed as being void on the basis of the latter (see Christie 326; Kerr 261; and *cf* De Wet and Van Wyk 84-89). Such an approach suggests that error is not directly a prerequisite for the avoidance of the contract: initial impossibility of performance precludes contractual liability irrespective of the fact that at least by implication the parties laboured under some sort of common mistake regarding the viability of performance (compare *eg*, *Scrutton and Scrutton v Ehrlich & Co* 1908 TS 300; *Theron Ltd v Gross* 1929 CPD; *Lediker and Sacke v Jordaan* (1895) 15 CLJ 217; *cf* *Rossouw v Haumann* 1949 4 SA 796 (C); see further Christie 93-95; Joubert 124-128; and Lubbe and Murray 301). Coincidentally some authors suggest a link between the subjective theoretical basis for contractual liability (will theory) and not holding a party liable in the event of impossibility of performance (see Van der Merwe *et al* 187), but preferably it may be said that contractual liability is precluded by initial impossibility for objective reasons grounded in considerations of reasonableness and fairness (see Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 59-60; Pretorius "The Basis of Contractual Liability (3): Theories of Contract (Consideration, Reliance and Fairness)" 2005 *THRHR* 575 591; *cf* Van der Merwe *et al* 187; and Lubbe and Murray 301-306). Nevertheless, it seems that common error may well be marginalized within the context of initial impossibility and only be obliquely relevant in explaining why the parties did not allocate the risk attendant upon impossibility in the circumstances. This situation bears a strong resemblance to recent developments in English case law, linking common mistake to impossibility of performance (see par 3 *supra*).

Perhaps more difficult to ascertain is why a common error in motive or *in qualitate* may in appropriate circumstances cause an agreement to be void, notwithstanding the fact that strictly speaking performance remains possible (see generally Christie 326ff). The courts have not always been clear as to

the rationale underlying such cases, often preferring to give piecemeal direction as to when common error will avoid a contract. In the influential matter of *Dickinson Motors (Pty) Ltd v Oberholzer* (supra 450) Schreiner JA stated:

“The £291 was paid under a common mistake in regard to a matter which was vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through. In *Huddersfield Banking Co., Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273 Lindley LJ states the proposition

‘that an agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.’

This seems to me to express in clear language a principle which is inherent in all developed systems of law.”

Interestingly Kerr (256) notes that the word “condition” was misquoted; Lindley LJ actually referred to “consideration.” Apparently Schreiner JA took it upon himself to correct what seems to have been a mistake, unless “consideration” somehow relates to the consideration cases dealing with common mistake referred to under English law above. Nevertheless, in *Dickinson Motors* the parties were under a misapprehension as to the identity of a certain motor vehicle that the plaintiff wished to obtain possession of. But, more importantly, obtaining the vehicle provided the motive for the transaction and when it proved to be a completely different vehicle, the reason for the transaction fell away, as did the contract. In *Wilson Bayley Holmes (Pty) Ltd v Maeyane* (supra 344 H-I) Nugent J, in referring to *Dickinson Motors*, construed the words “vital to the transaction” to mean “that both parties intended the contract to bind them only if that state of affairs existed.” Nonetheless, that still does not quite provide the reason for the effect of common error on an agreement.

A prominent theory as to the basis of common mistake that has strong links with earlier English case law (see *eg, Bell v Lever Brothers Ltd supra* 225) and has gained a fair measure of support involves the construction of a tacit supposition that underlies the parties’ agreement but which turns out to be incorrect. According to this implied-term approach the parties tacitly render the validity of their contract dependent on a supposition as to a particular state of affairs (factual and perhaps even legal – see Van Rensburg *et al LAWSA* par 146; and Christie 328-329), and further that the contract would be void should this underlying premise prove to be false. In effect this means that if a common, implied basis or motive upon which consensus was reached is incorrect no contract arises (see Van Rensburg *et al LAWSA* par 145-146; Van der Merwe *et al* 29; De Wet and Van Wyk 27-28 and 154-155; Bamford 1955 *SALJ* 289ff; and Palley 1961 *The Rhodesia and Nyasaland LJ* 197). Van der Merwe *et al* (29) explain:

“This kind of mistake can be related to the concept of a common underlying supposition (‘veronderstelling’) on which the parties base their contract. In this manner the parties can introduce a common motive into the (terms of the) contract so that a mistake in their common motive will render the contract without further effect.”

In *Van Reenen Steel (Pty) Ltd v Smith* (*supra* 270C) Harms JA quoted these words with approval and pronounced on when common error vitiates an agreement as follows (269B-F):

“Whether or not a motive leading up to an agreement is based upon an assumption of fact, it remains a motive. A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common, unless the contract is made dependent upon the motive, or if the requirements for misrepresentation are present. The principle is as stated in *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403:

‘But as a court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication.’

In *Bell v Lever Brothers Ltd* [1932] AC 161 (HL), Lord Atkin dealt likewise with common mistakes (although he referred to them as mutual mistakes) and pointed out that there is an alternative mode of dealing with their effect (at 224) –

‘It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties ...’

and that (at 225)

‘If the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true.’

The latter statement accords with the views of De Wet and Yeats [*Kontraktereg en Handelsreg* 4ed (1978) 138-139] that were quoted with approval by this court in *Fourie v CDMO Homes (Pty) Ltd* 1982 (1) SA 21 (A) at 27 esp *in fine*.”

In therefore appears as if the Supreme Court of Appeal has generally accepted the proposition that the doctrine of common error rests on, or at least may be equated to, a supposition that expressly or by implication has been made a contractual provision. Express assumptions do not pose a problem, but the implied-supposition theory has been subjected to some very persuasive criticism, the most convincing of which is that it rests on a fiction (Hunt “Mistake in the Formation of Contract: The Case of the Careless Clerk” 1964 *SALJ* 153 160; cf Lubbe “Onskuldige Wanvoorstelling” 1978 *THRHR* 374 388; and Lubbe and Murray 136). Here it deserves to be reiterated that the English courts have recently departed from the notion that common error rests on an implied term for the very same reason (*Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* *supra* par 73; see further Beale *et al* 391-392; Peel 311-312; and Smith 176). Even a cursory examination of the basis for the implication of incidental contractual terms reveals the veracity of this argument: though tacit terms usually are implied under the guise of the “presumed intention” of the parties, it is fairly evident that the supplementation of contractual content in this manner has more to do with normative considerations than actual intention. Quite simply the inference of contractual provisions on the basis of party intention entails a fiction (see Findlay and Kirk-Cohen “On Fictitious Interpretation” 1953 *SALJ* 145 146-147; Vorster “The Bases for the Implication of Tacit Terms” 1988 *TSAR* 161 173-174; Neels “Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg” 1999 *TSAR* 684 695-696;

Pretorius "The Basis of Contractual Liability (2): Theories of Contract (Will and Declaration)" 2005 *THRHR* 441 452; and Lubbe and Murray 418-419). Rather, in effect, more often than not the court is supplementing the terms of the contract with a view to orchestrating a reasonable and fair outcome in the circumstances (Cockrell 1992 *SALJ* 53-54; Zimmermann "Good faith and Equity" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 244-245; and Pretorius 2005 *THRHR* 452).

In addition, as noted by Lubbe and Murray (136), "[d]oes the complete certainty which usually exists in the minds of the parties labouring under a common mistake leave any room for a finding that they intend liability to depend on whether the state of affairs existed or not?" Stated slightly differently, can a term really be implied relating to something that the parties apparently expressly agreed on at the conclusion of the contract? (See also Lubbe 1978 *THRHR* 388.) All of which suggest that the doctrine of common error has little to do with actual party intention, and the reason for its effect on contractual liability seems to be largely normative in nature. In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (*supra* par 73) the court remarked:

"Where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding."

On a peripheral note the relationship between *error in substantia* and common mistake also deserves mention. Hunt (1964 *SALJ* 156 fn 1) observes:

"Perhaps common *error in substantia* is merely a species of common fundamental underlying assumption. Alternatively and conversely, it may be said that *error in substantia* is only operative if the qualities are fundamental underlying facts".

Both unilateral and common *error in substantia* actually seem to amount to no more than mistakes as to motive (*cf* Hoffmann 1935 *SALJ* 434; Hutchison and Pretorius 87; Van der Merwe *et al* 26-27; and further par 2 above) and according to positive law are only respectively actionable if the requirements for a form of misrepresentation have been met or a common motive has been elevated to a contractual term (see *Van Reenen Steel (Pty) Ltd v Smith supra* 269B). Likewise common mistake as such merely seems to amount to no more than a shared error in motive (see *Van Reenen Steel (Pty) Ltd v Smith supra* 269A; *Dutch Reformed Church Council v Crocker* 1953 4 SA 53 (C) 61 (*obiter*); Wessels par 952; Hunt 1964 *SALJ* 161; and *cf* Lubbe and Murray 136). The fact that both *error in substantia* and error in motive are generally considered to be non-material perhaps explains why the courts, somewhat reminiscent of their English counterparts, are not always overly keen to come to the aid of a contractant on the basis of the doctrine of common mistake (compare *eg*, *Van Reenen Steel (Pty) Ltd v Smith supra*; *Wilson Bayley Holmes (Pty) Ltd v Maeyane supra*; *Maritime Motors (Pty) Ltd v Von Steiger* 2001 2 SA 584 (E); *cf* *Krapohl v Oranje Koöperasie Bpk* 1990 3 SA 848 (A); and see further Kerr 256ff). The fact that

common *error in substantia* is but a species of common mistake still fails to provide a satisfactory rationale for the latter doctrine, but it does offer a means for *error in substantia* to impact vicariously upon contractual liability.

5 A corrective device based on reasonableness and fairness

The preceding discussion suggests that common error seems to be a doctrine without a convincing underlying theory. It appears, however, if one takes English law into consideration that by nature common mistake actually broadly relates to two precepts: on the one hand initial impossibility of performance and on the other the concept of frustration (see also Hunt 1964 *SALJ* 160-161). Initial impossibility of performance is an accepted principle of South African contract law and where a common error relates to impossibility of performance the nullification of contractual obligations would probably not be contentious. The same cannot be said of the doctrine of frustration, more specifically frustration of the common purpose of a contract. On occasion the concept of frustration has received judicial acknowledgment (compare *eg*, *African Realty Trust v Holmes* 1922 AD 389 400; and *Kok v Osborne* 1993 4 SA 788 (SE) 801ff), but it is not generally recognized as part of South African law (see Hutchison *Fundamental Change of Circumstances in Contract Law* unpublished doctoral thesis (2010) University of Cape Town 16-31). In English law the ties between common error and frustration are well documented (see *eg*, *Great Peace Shipping Ltd v Tsaviris Salvage (International) Ltd supra* par 61; Smith 182-183; Beale *et al* 391-392; Peel 311-312; and see further par 3 above). Although frustration tends to deal with a change of circumstances subsequent to contracting while common mistake generally relates to circumstances that exist at the conclusion of a contract, these doctrines tend to serve comparable functions and in some instances the facts might plausibly fit into either category. Their tests have also been regarded as broadly similar in substance (Smith 182-183; *cf* Adams and Brownsword 136-140; McKendrick 557-558; and Lubbe and Murray 136).

Generally South African law remains averse to upsetting contractual undertakings where a change of circumstances has occurred but performance nevertheless remains possible (see Van der Merwe *et al* 541; Hutchison "Change of Circumstances in Contract Law: The *Clausula Rebus Sic Stantibus*" 2009 *THRHR* 60 61; and Van Huyssteen and Van der Merwe "Good Faith in Contract: Proper Behaviour Amidst Changing Circumstances" 1990 *Stell LR* 244). Conceivably, however, the doctrine of common error borrows from the concept of frustration of purpose (or perhaps *vice versa*) in that where such a mistake has bearing on facts pertaining to an important common reason or basis for contracting, which transpire to be incorrect, the contract is nullified because of the undermining or frustration of its common purpose. In such instances performance becomes something significantly different to what the parties apparently contemplated. In discussing the concept of frustration of the "common venture of a contract" Smith (185) notes:

“In practice, therefore, ‘common object’ does not mean what it appears to mean, but, instead something closer to ‘common assumption’ or ‘common foundation.’ This idea is often expressed by saying that a contract will only be frustrated where the change in circumstances makes performance ‘a thing radically different from that which was undertaken by the contract.’ This closely resembles the test for mistake; indeed, it is sometimes explicitly mentioned when courts try to explain what qualifies as ‘fundamental’ mistake. The tests are also similar in that their application is typically explained by illustrations rather than further definition. A final similarity is that, impossibility cases aside, successful pleas of frustration are extremely rare.”

Notionally a motive for contracting would be common where one would reasonably have expected the parties to have contracted on that basis in the circumstances (*cf Dickinson Motors (Pty) Ltd v Oberholzer supra* 450), irrespective of what they actually intended. Here one breaks from the implied term approach inasmuch as that theory relies on a *tacit consensual* term, whereas one is actually dealing with something akin to the imposition of a *legally implied* term based on policy considerations peculiar to the circumstances of the case (*cf Vorster 1988 TSAR 173-174; Neels 1999 TSAR 695-696; and Great Peace Shipping Ltd v Tsaviris Salvage (International) Ltd supra* par 73).

Perhaps more difficult to determine is when a court will uphold a plea of common error when the mistake does not rest on initial impossibility but rather the undermining of the purpose of the contract. Once again, because one is usually dealing with some or other error in motive the courts probably will not readily come to the aid of the contract denier. To this must be added that certainly not all contracts have a common purpose (see Smith 185). Nevertheless, common error would probably nullify a contract where the frustration of common purpose is such that a party could not reasonably be expected to abide by the agreement because performance has been significantly altered or perhaps even become meaningless. Seen from this perspective, common mistake functions as a corrective mechanism based on considerations of reasonableness and fairness where apparently the parties are in full agreement, but due to unforeseen circumstances insistence on performance would be manifestly unjust and contrary to the legitimate expectations of the contract denier (*cf Van Huyssteen and Van der Merwe 1990 Stell LR 244; Adams and Brownsword 138; and Pretorius “The Basis of Contractual Liability (4): Toward a Composite Theory of Contract” 2006 THRHR 97 115ff*) (one could also regard the functioning of the doctrine in this manner as a manifestation of the principle of good faith – *cf Van der Merwe et al 545 fn 220*). More specific considerations could be whether upholding the contract would cause irretrievable loss, other significant prejudice or undue hardship to the contract denier and entail an unwarranted benefit for the contract enforcer (*cf Smith 187*). In effect in such cases a court is allocating risk pursuant to a common error and a variety of policy considerations could sway its decision in the circumstances (see generally Cooke and Oughton 443ff). Although infusing the enquiry with notions of reasonableness may appear controversial there is in fact authority to the effect that the contract denier’s conduct must be reasonable in the case of common error (see Bamford 1955 SALJ 294-295; and Lubbe and Murray 136), which is something that once again has echoes in English law

(see par 3 *supra*). Potentially, however, a court would not only focus on the conduct of the parties but also the actual effect of upholding the contract in the circumstances (*cf* Pretorius 2006 *THRHR* 118).

6 Conclusion

The courts seemingly favour the notion that the doctrine of common error rests on, or at least is analogous to, a supposition that by implication has been made a consensual contractual term. It is suggested that such an approach seems to rest on pure fiction and tends to mask the fact that policy considerations may often play a significant role in determining whether a court will uphold a plea of common mistake or not. The English courts, whose judgments have had a fairly pronounced influence on the development of the doctrine in South African law, have wisely departed from the implied-term theory and seem to have acknowledged that common error is an instrument of legal policy. They have also repeatedly affirmed that common error has close ties with the doctrine of frustration, which serves a similar purpose save that the former focuses on circumstances prevailing at the conclusion of a contract while the latter relates to a change of circumstances pursuant to contract formation. In addition, both doctrines deal with the allocation of risk by a court attendant upon circumstances being different to what the parties initially contemplated.

It is suggested that, much like objective impossibility of performance, common error is a doctrine that has its basis in normative considerations of reasonableness and fairness, and acts as a corrective mechanism where apparently the parties are in full agreement, but the circumstances upon which consensus was reached actually differ materially from what was initially contemplated, resulting in either impossibility of performance or the frustration of a common contractual purpose. In instances where insistence on performance would be manifestly unjust and contrary to the legitimate expectations of a party a court may be inclined to apply the doctrine to absolve the parties from contractual liability. However, especially as regards frustration of a common contractual purpose, a court will probably have to be convinced that the equities clearly favour the contract denier for a plea of common error to succeed in the circumstances.

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