

A CRITICAL APPRAISAL OF THE PRINCIPLES RELATING TO MISTAKE AND MISREPRESENTATION AS FACTORS AFFECTING CONSENSUS IN CONTRACTUAL AGREEMENTS IN THE NAMIBIAN CONTEXT: DISCUSSION THROUGH THE USE OF EXAMPLES

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SUMMARY

This article suggests that when those engaging in commercial undertakings have a proper understanding of the principles of the law of contract, particularly, the law pertaining to consensus, they will limit the risks of engaging in conduct that will cause them financial loss. The definitions of mistake and misrepresentation (being factors affecting consensus) need to be amplified to avoid existing confusion between the two terms. Misrepresentation and mistake may lead to different respective outcomes and possible remedies, thus necessitating a proper distinction between the two terms. In this light, the article explores and proposes similarities and differences between mistake and misrepresentation. The article further emphasises the fact that misrepresentation involves some form of incorrect representation of facts, whereas in the case of mistake, there is essentially no incorrect representation. Mistake can be said to involve misapprehension of given information, although such information may not be incorrect. It is submitted that the courts should go further than merely looking at the black-and-white before them; they must also pay attention to the conduct of the parties, the intention of the parties and the resulting consequences.

1 INTRODUCTION

Commercial undertakings have been part and parcel of our daily lives for millenia. Men and women have been buying and selling items – including bartering – even before the trade in money came into being.¹ Thus, people

¹ Valenzuela-Garcia “Barter, Commodity Exchange, and Gift Giving” 2008 *The International Encyclopaedia of Anthropology* 1.

have entered into contractual relationships in the past even if those contractual relationships differ from the ones we know today. We must be cognisant of the fact that society changes over time and this inevitably influences the change in law and as the law evolves, there is a need to constantly revisit the way in which we do things and to take the necessary steps to ensure that our dealings are in conformity with global changes. With global changes in the legislative landscape, the legislature and the judiciary of every jurisdiction is continuously faced with the challenge and responsibility of enacting new laws and/or developing the law as far as its respective mandates are concerned. In the Namibian context, the law of contract is largely based on common-law principles and is informed by decisions made by courts.

Although the principles of the law of contract have been laid down in various court decisions, misrepresentation and mistake as factors affecting consensus seem to be confusing to the extent that some litigators ask courts for relief based on the wrong cause of action. Some cases include the elements of both mistake and misrepresentation; an example of can be seen in the South African case of *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*,² where the court stated as follows:

“Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.”

One other case in which the issues of both mistake and misrepresentation were raised is that of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC*.³ The court in this case was called upon to determine whether consensus was obtained, and discussed mistake and misrepresentation as factors affecting consensus. The court, however, did not take the opportunity to distinguish between mistake and misrepresentation. One can argue that the reason for this is that the court was not expressly called upon to do so and, furthermore, the facts did not call for such a distinction to be made. However, if the court had expressly taken the opportunity to lay a clearer distinction between mistake and misrepresentation, it could have aided later cases applying the law in accordance with the principle of *stare decisis*.

Cases that involve allegations of both mistake and misrepresentation must be treated carefully, considering that the elements that need to be proved for mistake are not the same as those for misrepresentation and *vice versa*. The leading of wrong evidence can lead to losing out on relief that could have been available if the correct evidence had been properly laid out.

This article discusses with a critical eye the distinction between mistake and misrepresentation as factors affecting consensus. The analysis of different types of mistake and misrepresentation falls outside the scope of

² 1958 (2) SA 473 (A).

³ [2015] NASC 10.

this article and as such the article simply provides an analytical overview of the two factors affecting consensus. Consisting of seven parts, including this introduction, the article proceeds to heading 2 to provide a descriptive analysis of the concept of “contract”. Heading 3 examines the law of mistake as it affects consensus. Heading 4 explains how misrepresentation is applied to show that consensus was obtained in an improper manner. In heading 5, the article alludes to, and critically discusses, the differences between mistake and misrepresentation. Heading 6 outlines the lessons learned and proposes the way forward. Heading 7 draws a conclusion.

2 DEFINITION OF A CONTRACT

A contract is an agreement between two or more persons that has the intention to create legally binding rights and duties.⁴ A contract thus sets out the terms upon which the parties to the contract intend to bind themselves. A contract must contain all terms and conditions by which the parties are to abide.⁵ This is important because it places both parties in a position to know their rights and obligations. The enforcement of rights and performance of obligations becomes easier and more effective if the parties are well aware of their rights and obligations. A valid contract can be concluded orally or in writing.⁶ However, it is advisable for agreements to be reduced to writing to serve as proof. This is extremely important for future reference, in the event of possible disagreements between the parties regarding the conclusion of the contract as well as the terms created in such a contract.

Consensus is the cornerstone of any agreement. If the party claiming performance is unable to establish the conclusion of the agreement and subsequent breach of contract, the claim will not succeed. Hence, the first step in proving the existence of an agreement requires establishing that there was *consensus ad item* between the parties. This means that there must have been *animus contrahendi*, which is the intention to contract. In principle, there must be an express or implied intention to contract. In order for the parties to be said to have reached consensus, they must agree regarding all the material aspects of the contract and each party must be well aware of the other’s intention. Thus, apart from *animus contrahendi*, common intention and communication of this intention are two elements of consensus. Common intention relates to the parties being on par regarding the terms of the contract, whereas communication of intention is communicated through offer and acceptance.⁷ All contracts must therefore meet all three requirements of consensus to avoid the contract being vulnerable to allegations of dissensus.

There are certain factors that may cause the parties not to reach consensus or, even where consensus has been reached, it may be argued

⁴ Hutchison, Pretorius, Naude, Du Plessis, Eiselen, Floyd, Hawthorn, Kuschke, Maxwell and De Stadler *The Law of Contract* 4ed (2017) 6.

⁵ Hutchison *et al The Law of Contract* 246.

⁶ *Geomar CC v China Harbour Engineering Company Ltd Namibia* [2021] NAHCMD 455.

⁷ Awarab “Consensus as a Requirement of a Valid Contract from a Namibian Perspective: Issues and Solutions” 2022 5(1) *International Journal of Law Management & Humanities* 521.

that consensus was reached in an improper manner. Mistake, misrepresentation, duress and undue influence may negatively affect a party's intention to conclude an agreement. Although all four factors have an impact on consensus, the focus of this article is limited to discussions relating to mistake and misrepresentation.

3 THE LAW OF MISTAKE

The scenario described below provides some of the elements to be found in a contract of sale. Consider this example in relation to the principles relating to the law of mistake.

X was the owner of three different residential properties located in Windhoek. The three houses were located next to each other in Pioneerspark, extension 1, Summer Street, with erf numbers, 60, 61 and 62 respectively. Upon retiring, X, who was working as a law professor at a local university, decided to sell two of the three properties, namely erven 60 and 61, and relocate to Swakopmund on the West Coast of Namibia to be close to his children and wife. X decided to keep the house on erf 62 as it was bigger in size and could accommodate his family should they wish to spend family time in Windhoek. Erven 61 and 62 were both 500m² in size. X placed an advertisement in the local newspaper, indicating the sale of the two properties. Y saw the advertisement and contacted X with an offer to purchase one of the houses. Y's intention was to purchase the house located at erf 61. However, X was of the view that Y's intention was to purchase the property located at erf 60, because the price Y offered for the purchase of the property was below what X expected. The parties exchanged the paperwork, and the agreement of purchase and sale was thus concluded. Upon receiving the purchase price, X was unhappy and called Y, who explained that he was under the impression that the price N\$ 1.6 million (which he had paid) was the purchase price of the house located at Erf 61. The actual purchase price of the house at erf 61 was N\$ 2 million, while that of erf 60 was N\$ 1.6 million. X refused to accept the amount of N\$ 1.6 million received from Y and wanted the contract to be set aside, stating that there was no agreement between him and Y. Y on the other hand maintained that an agreement had been signed, he had performed, and therefore X must also perform by effecting the transfer of the property into his name.

There are various issues in this example that need to be determined.

First, was consensus obtained between the parties? Secondly, did X breach the agreement? And thirdly, what are the possible remedies Y has against X?

Consensus is an agreement between two or more parties regarding the material facts or the essential elements of an agreement.⁸ In terms of the above example, it is clear that the agreement that the parties purported to conclude is that of sale. In a contract of sale, the parties must agree on the essential elements of a sale – namely, the merx and the purchase price.⁹

⁸ Fouche *Legal Principles of Contracts and Commercial Law* 8ed (2015) 40.

⁹ *Westinghouse Brake v Bilger Engineering (Pty) Ltd* [1986] ZASCA 10.

Furthermore, we can establish from the example that two items were on sale, namely, erven 60 and 61 with two different prices. In addition, it is clear that the parties “reached” an agreement on different items of sale in terms of the same transaction. This resulted from miscommunication. This therefore means that there was no consensus at all; there was actually dissensus. What hampered the parties from obtaining consensus? The parties were mistaken regarding the item of sale and therefore, the factor that made it impossible for parties to reach consensus is mistake. One party (the seller) had a clear knowledge of the property he was selling. The other party (the buyer) also knew what he was buying. The fact that the parties were in agreement regarding the fact that they concluded a commercial undertaking cannot be debated. The mistake, however, comes from the fact that the parties were not in agreement regarding the subject matter of the sale.

Hutchison explains mistake as referring to the situation where a party to a contract acts while under an incorrect impression regarding some or other facts that relate to the contract between the parties.¹⁰ Fouche states that a mistake relates to a misunderstanding regarding the facts, events or circumstances of the contract, which misunderstanding can be from one or both parties.¹¹

If a party successfully proves the existence of a mistake, the contract can be set aside on that basis.¹² In order for a party to prove successfully the existence of a mistake, they must establish two important elements, namely materiality and reasonableness.¹³ In other words, only a material and reasonable mistake negates consensus, with the result that the contract may be set aside. The section below provides a snapshot of what materiality and reasonableness comprise.

3 1 Materiality

A mistake cannot be relied upon lightly; certain requirements must first be pleaded successfully. In order to succeed in a claim based on mistake, a party is required to show that the mistake is material. A material mistake relates to material aspects of the contract. When one reads an agreement, it is often possible to distinguish between material facts and immaterial facts. A party relying on mistake must show that the mistake being raised relates to the material facts of the purported agreement. The question that is normally raised with regard to a material mistake is whether the mistake in question goes to the root of the contract. In other words, would X have entered into the contract if he had not been “mistaken” about a particular aspect or fact of the contract. If this question is answered in the negative then the mistake is material and thus the contract can be set aside as void *ab initio*, provided that the other requirement(s) of mistake are met. For instance, in a contract of sale, if X’s mistake relates to the item of sale or the purchase price, such a mistake will be regarded as a material mistake, thus negating consensus. It could therefore be correct to say that a

¹⁰ Hutchison *et al The Law of Contract* 84.

¹¹ Fouche *Legal Principles of Contracts and Commercial Law* 52.

¹² Fouche *Legal Principles of Contracts and Commercial Law* 55.

¹³ See Fouche *Legal Principles of Contracts and Commercial Law* 52–53.

misunderstanding regarding the essential elements of a particular contract will qualify as a material mistake.

An immaterial mistake does not relate to the material or essential elements of the contract. In other words, it does not affect any of the elements of a contract.¹⁴ The effect of an immaterial mistake is that a party could still have entered into the contract even if their decision to contract was affected by an immaterial mistake. Thus, although an immaterial mistake may influence or affect the contracting party's decision in concluding a contract, it does not do so to the extent of affecting the elements of consensus. Hence, the existence of such a mistake is "immaterial" to the process of obtaining consensus and the subsequent conclusion of the contract.

In the scenario given above, X's mistake was material since the mistake related to the subject matter of the sale, namely, the immovable property. In other words, there was a misunderstanding regarding an essential element of the contract of sale as one party had the intention to sell erf 60 while the other party was of the view that he was buying erf 61. The subject matter of the sale is an essential element of the contract of sale. Since the mistake pertains to the essential elements of the contract, such a mistake is material and therefore negates consensus.

3 2 Reasonable mistake

The second leg to be met when relying upon the existence of a mistake is proving that it was a reasonable mistake, also known as *iustus* error. In the absence of this requirement, any person can claim that they were mistaken about one or any material fact of the contract, in order to get out of the contract. The reasonableness requirement, therefore, sets a safeguard and aims to protect contracting parties who have performed or intend to tender performance. The reasonable requirement therefore places a much stricter burden on a party who alleges that they were mistaken as to a particular fact of the contract. A "reasonable man" test is therefore employed to determine whether the "mistake" in question indeed qualifies as a mistake sufficient to negate consensus. The question to be asked therefore is whether a reasonable person in the same shoes as the party alleging mistake could be mistaken about the same facts. In other words, would any reasonable person finding themselves in a similar position to that of the contracting party possibly be mistaken regarding a particular fact or facts of the contract? If the answer is in the affirmative, the mistake raised by the contracting party is reasonable and therefore the contract can be set aside on that basis. A contracting party who claims that they were under a misapprehension as to a particular fact or fact must plead such and must indicate that the mistake was reasonable.¹⁵ The party alleging mistake must show grounds indicating that the mistake was reasonable and thus that any other reasonable person could be mistaken about what they claim to have been mistaken about.

¹⁴ Hutchison *et al* *The Law of Contract* 89.

¹⁵ *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra*.

In the case of *Botha v Road Accident Fund*,¹⁶ the court cited with approval the following statement of Christie:¹⁷

“However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention.”

If courts do not meticulously apply their minds to the facts before them, it could be easy for someone to interpret a term of a contract carelessly and raise a defence of mistake with the aim of escaping liability. Taking it a step further, a party may even act negligently by failing to understand the terms of the contract properly and claim that they were mistaken owing to the “misrepresentation” of the other party, thus aiming to escape contractual liability.

The “dirty hands” principle holds equally true for the concept of mistake. In other words, a party cannot conduct themselves in an unethical fashion and thereafter raise “mistake”. For instance, before entering into a contract, a party needs to take active steps to acquaint themselves with the contents of the agreement before binding themselves to the purported agreement. In the case of *George v Fairmead (Pty) Ltd*,¹⁸ the court relied on the principle of *caveat subscriptor*, stating that “he who signs must be aware”. In other words, a contracting party cannot be negligent in their affairs relating to the contract and want the contract to be set aside based on alleged misapprehension caused by their own negligence.

However, the court in the case of *Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis*¹⁹ stated that “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”. In other words, if a party fails to understand the true facts as a result of misrepresentation committed by the other contracting party, the mistaken party will be allowed to resile from the contract. The party whose conduct (whether innocent or fraudulent) amounts to misrepresentation will thus be held accountable for his or her actions and liable for any claims that may arise because of such misrepresentation. Hence, before instituting action based on either mistake or misrepresentation, it is important to investigate and determine the conduct of the contracting parties during negotiations and ultimate conclusion of the contract.

Regardless of the form the parties give to their understanding of the particular facts, their subsequent conduct and the resulting consequences, any misunderstanding complained of will not succeed as a mistake if it is

¹⁶ (463/2015) [2016] ZASCA 97; 2017 (2) SA 50 (SCA) (2 June 2016).

¹⁷ Christie and Bradfield *Christie's the Law of Contract in South Africa* 6ed (2011) 329–330.

¹⁸ 1958 (2) SA 465 (A).

¹⁹ 1992 (3) SA 234 (AD).

not material and reasonable. In other words, the courts are required not simply to accept the arguments and rely on claims by the parties. Courts have a duty to look at the substance of an alleged “mistake” and make a ruling as to whether it is material and reasonable and can therefore negate consensus.

3 3 The consequences of mistake on consensus

The conclusion of any contract is based on “agreement” or “consensus” between the parties. In other words, the parties to a contract must consent to the material facts or aspects of the contract before a binding and legally enforceable agreement is formed. In the absence of an agreement between the parties, one cannot speak of a valid contract giving rise to rights and obligations. Mistake that is material thus negates consensus.

4 THE LAW OF MISREPRESENTATION

Before discussing the elements of misrepresentation, consider the following example:

Wayne is the owner of a double-storey house located at Brand Street, Auasblick, Windhoek, Namibia. The house has four bedrooms, a spacious dining area, a kitchen, a courtyard and two garages. The property is valued at N\$ 1.8 million and has only had one owner (that is, the current owner) since it was constructed six years ago. Wayne and his wife, Teressa, and their two minor children aged three and five have resided in the property for the past six years. One fateful night, while driving from Swakopmund on their way to Windhoek, the family of four is involved in a car accident and Wayne sustains serious head and spine injuries and is rushed to the Lady Pohamba hospital in Windhoek. After being in a coma for a period of six weeks, Wayne recovers. On regaining consciousness, Wayne is told that his wife and two children have succumbed to their injuries and that their bodies have been kept in the state mortuary awaiting his recovery for burial to be conducted. Although emotionally distraught, Wayne handled the news well and the burials take place a week after Wayne’s recovery. Wayne can no longer stand the thought of living in his big house all by himself and decides to sell the property and move to Swakopmund on the coast to start a new life. Wayne is cognisant of the fact that the new life at the coast could be very costly and therefore requires a good sum of money.

Simon, a teacher, who recently got married, has been wanting to purchase a house in Windhoek and start a family. Simon rents a backyard flat in Auasblick, where he lives with his wife Joy. One Saturday morning, Simon goes for a jog and meets Wayne as he is driving out of his yard. Simon compliments Wayne on his beautiful house. Wayne starts telling Simon about how he lost his wife and is therefore selling his house. Seeing that he has caught Simon’s attention and that he is interested in purchasing the house, Wayne starts to provide finer details about the house to Simon, stating that he is selling the house for N\$ 4 million. Furthermore, Wayne informs Simon that the house has eight bedrooms, each with built-in cupboards. Moreover, the house has an inside kitchen and an outdoor

kitchen, good for hosting guests. In addition, he indicates that the house has four garages of which two are underground. The last item he indicates to be on the property is an indoor swimming pool with a heating system, making its use ideal during both summer and winter months. Excited about the finer details regarding the house, Simon offers to purchase the house. This offer is accepted by Wayne. Simon goes back home and tells his wife the good news. Simon thereafter transfers the sum of N\$ 4 million into the bank account of Wayne. Three weeks after paying the purchase price, Simon and Joy decide to move into their new “dream house”. Upon arriving at the property, Simon and Joy realise that the details given by Wayne before the conclusion of the contract do not correlate with the reality. Simon communicates his dismay to Wayne and demands the return of the purchase price.

In the example above, one needs to establish whether or not Wayne’s conduct amounts to misrepresentation and whether such misrepresentation negates consensus. The other issue that needs to be determined is whether Simon could be entitled to any remedies.

Before answering the above questions, it is important to understand what misrepresentation is. Hutchison postulates that a misrepresentation is a form of misstatement. If a statement is incorrect, it is a misrepresentation.²⁰ In the case of *Redelinghuys v Coffee-Lind*,²¹ the court cited with approval the definition provided by AJ Kerr in *The Principles of the Law of Contract* as follows:

“A representation has been judicially defined as a statement made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. It does not become part of the contract.”

Misrepresentation, therefore, refers to a false statement of facts made by one contract party (or his or her agent) to the other contracting party pertaining to the contract. A false representation is not illegal in and of itself. The representation must be material in order to be considered as misrepresentation. The objective test for materiality considers the component of wrongfulness.²² The contracting party to whom the misrepresentation has been made concludes a contract as a result of the misrepresentation. In other words, the question is: if the misrepresentation had not been made, would the contracting party still have concluded the agreement?

4 1 Requirements of misrepresentation

When a party’s choice to enter into a particular contract is affected by a false representation, misrepresentation has taken place.²³ According to our law, parties to a contract are not obliged to disclose to one another any information they may have that could affect the other party’s decision to

²⁰ Hutchison *et al* *The Law of Contract* 121.

²¹ [2018] NAHCMD 368.

²² Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 42.

²³ *George v Fairmead (Pty) Ltd supra*; *Du Toit v Atkinson’s Motors Bpk* 1985 (2) SA 893 (A).

enter into the contract.²⁴ Although parties are not forced to disclose information that relates to the contract, the failure to give correct information will result in misrepresentation. This therefore means that wrong information amounts to misrepresentation, but the withholding of information does not necessarily qualify as misrepresentation. The courts occasionally enforce disclosure obligations, but each case is judged on its unique facts and there is no overarching standard for when someone should be held accountable for failing to disclose information, or when doing so is illegal.²⁵ In the case of *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality*,²⁶ the court held that the obligation to disclose encompasses constructive knowledge, or information that the contracting party would have had access to, and that would have been relevant to the conditions of the agreement at the time of its conclusion.²⁷ The courts have thus not as yet established any specific principles that govern the disclosure of information relating to the conclusion of contracts and that indicate when such non-disclosure could amount to misrepresentation. One could however argue that if the conduct of the party withholding information qualifies as fraudulent or negligent, non-disclosure may amount to misrepresentation.²⁸

Misrepresentation is one of the factors that affects consensus in contractual disputes. On many occasions, the Namibian courts have been called upon to adjudicate on issues pertaining to alleged misrepresentation in contractual disputes. Examples of this can be found in the cases of *Mbekele v Standard Bank Namibia Ltd Vehicle and Asset Finance*,²⁹ *Matheus v Matheus*,³⁰ and *Rivoli Namibia (Pty) Ltd v CMC/Otesa Joint Venture*.³¹ Commercial transactions are part of our daily lives and thus there is a need properly to understand principles relating to misrepresentation negating consensus.

This section sets out the requirements to be proved for a claim based on misrepresentation. In *Trust Bank of Africa Ltd v Frysch*,³² Corbett JA set out the requirements by stating:

“A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that it was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation.”

The Supreme Court of Namibia in the reported case of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC*³³ cited with approval the

²⁴ *Speight v Glass* 1961 (1) SA 778 (D).

²⁵ Cupido *Misrepresentation by Non-Disclosure in South African Law* (LLM thesis, Stellenbosch University) 2013 1.

²⁶ 1985 (1) SA 419 (A) 432 E.

²⁷ *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 432 E.

²⁸ *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 139.

²⁹ [2011] NAHC 18.

³⁰ [2021] NAHCNLD 19.

³¹ [2019] NAHCMD 152.

³² 1977 (3) SA 562 (A).

³³ *Supra*.

elements of contractual misrepresentation as raised in the case of *Sonap v Pappadogianis*:³⁴

“[t]he decisive question in a case like the present is this: 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? ... To answer this question, a three-fold enquiry is usually necessary, namely, firstly was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?”

The South African case of *Novick v Comair Holdings Ltd*³⁵ neatly set out the requirements of misrepresentation. A misrepresentation comprises:

- a false statement of fact,
- made by one party to the contract, to the other,
- before or at the conclusion of the contract,
- on some matter or circumstance relating to it,
- with the intention of inducing the conclusion of the contract, and
- which actually induces the conclusion of the contract.

Applying these requirements of misrepresentation, it is possible to determine the presence or absence of misrepresentation in the above example relating to misrepresentation.

Wayne made a statement to Simon that the house he was selling had eight bedrooms. However, the house only had four bedrooms. Furthermore, the house had an inside kitchen but no outdoor kitchen as claimed. In addition, Wayne expressly indicated that the property in question had four garages of which two were underground, whereas in reality, the house only had two garages. The last representation made by Wayne was that the property had an indoor swimming pool with a heating system, making its use ideal during both summer and winter months, all of which was untrue.

It is evident that Wayne made false representations to Simon as Wayne's statements were totally incorrect when compared to the reality.³⁶ Secondly, the false representations were made by Wayne (one party to the contract) to Simon (the other contracting party). The false representations made by Wayne to Simon were made before the conclusion of the contract. The false representations go to the root of the contract as they relate to some of the essential elements of the contract. In a contract of sale, the *merx* is an essential element and thus, the representations regarding the *merx* (a house in this case) will have a bearing on whether the contract will be voidable or valid. One can argue that Wayne intended to persuade or lure Simon to enter into the contract of sale with him and to do so fraudulently. This reasoning would be inferred from the wording, “*Wayne can no longer stand*

³⁴ *Supra*.

³⁵ 1979 (2) SA 116.

³⁶ In the case of *Redelinghuys v Coffee-Lind supra* the court expressly confirmed that one of the requirements which must be met by a person relying on misrepresentation is that the representation was false in fact.

the thought of living in this big house all by himself and decides to sell the property and move to Swakopmund on the coast to start a new life." This could possibly illustrate that Wayne was desperate and was therefore looking for any possible opportunity to sell the property and move. In addition, the facts from the example that relate to "the costly life at the coast" could be construed to suggest that Wayne was looking for a way in which to make money to guarantee him a good life at the coast and that this was a motivating factor for him to act fraudulently.

Several arguments could be advanced against any possible claims of misrepresentation negating consensus. The first counter-argument could be the negligence on the part of the buyer, being Simon in this case. The question therefore could be whether there was any obligation on Simon to take reasonable steps to establish the true facts regarding the representations made by Wayne. In other words, instead of taking Wayne at his word, should Simon not have verified the true facts relating to the representations, especially where such representations relate to the essential elements such as the *merx* of the sale? Secondly, in wanting to uphold the contract, one could use the reasonable man test. Could any reasonable man in the "shoes" of Simon have believed that the property in question had all the items listed in the representations made by Wayne? It is unclear whether a court would be pleased with the advancement of such an argument from a party to a contract who leaves much to be desired. This is principally because of the doctrine that says "you cannot approach the court with 'dirty hands'" – that is, you cannot intentionally make a fraudulent misrepresentation and thereafter turn to the court to have the contract enforced in your favour.

In adjudicating a particular issue, courts do not merely apply the law, in isolation from the circumstances prevailing at the time that the contract was concluded. Thus, in contractual disputes, the courts will be guided by principles of contract, which includes privity of contract, public policy and reasonableness.

The Supreme Court of Appeal in South Africa in the case of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*³⁷ said the following:

"The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract."

By interpretation, this means that the courts should not interfere with a contract entered into by parties, where they have entered into the contract by exercising their free will. Looking at the example of Wayne and Simon, the question that could be asked is whether Simon entered into the contract freely and voluntarily. At face value, it may seem that Simon entered into the contract freely and voluntarily. This reasoning may be supported by the fact that Simon was not coerced or unduly influenced by Wayne or his agents to

³⁷ [2017] ZASCA 176.

agree to the terms of the contract. This line of reasoning is incorrect. This is because, although there was no undue influence or duress, incorrect information was placed before Simon and he agreed to bind himself to the contract based on this incorrect information. This line of reasoning could entitle him to apply to have the contract set aside on the basis of misrepresentation.

The courts also look at the role played by the contracting parties, or their agents, during the negotiations and subsequent conclusion of the contract. In other words, a court would pay attention to the activities of both parties, namely Wayne and Simon in the above example, so as to guide it on whether to enforce the contract or set it aside with subsequent remedies that may follow.

Applying the requirements for misrepresentation, it is evident that Wayne's conduct clearly fits into what amounts to a misrepresentation. Moreover, Wayne's misrepresentation could amount to a fraudulent misrepresentation. Ordinarily, fraudulent misrepresentations would entitle the aggrieved party (Simon in this case) to *restitutio in integrum* and to damages resulting from the misrepresentation and subsequent conclusion of the contract. However, the actions of Simon show signs of negligence in his dealings in terms of the contract. At no point did Simon take any reasonable steps to verify the correctness of the representations made by Wayne. This could easily have been done through visiting the property. Since this was not done, Simon may not wholly rely on misrepresentation in claiming damages. Having the contract set aside and allowing full damages could adversely affect Wayne, and this is undesirable because of Simon's negligence. On the other hand, allowing the contract to stand without holding Wayne liable for his fraudulent misrepresentation could mean that contracting parties are at liberty to make any false representations and go unpunished. The latter approach is contrary to public policy.

The South African Supreme Court of Appeal held:

"This, without doubt, calls for a balancing and weighing-up of two considerations, namely the principle of *pacta sunt servanda* and the considerations of public policy, including of course constitutional imperatives."³⁸

The best way to deal with Wayne and Simon's contract in terms of the law is to have the contract enforced but allow Simon to claim damages as a result of fraudulent misrepresentation. In this way, the court will uphold the principle of *pacta sunt servanda* on the one hand, while on the other hand also respecting the principles of public policy, which requires one to be truthful and ethical in one's dealings with another.

³⁸ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd supra par 21.*

4 2 Miscommunication versus misinformation and how it applies to contract law

Miscommunication is not the same as “non-communication” or “communication failure”.³⁹ Miscommunication could therefore mean that information or facts were correctly communicated by one contracting party to another, but that the hearer formulated the wrong picture in respect of the facts so communicated. The incorrectness of the facts received stems from the fact that although from the hearer’s end the facts may seem to be correct, they are incorrect from the speaker’s end as they are not what the latter meant or intended to communicate. Patnaik further suggests that miscommunication is different from misinformation – in that the latter is a deliberate act on the part of the speaker.⁴⁰ In other words, with miscommunication, the speaker or person conveying information is not necessarily at fault or being deliberate in their actions in such communication. Nevertheless, owing to one or other mishap, the information conveyed is not correctly understood, causing dissensus. In contrast, with misinformation, there is a deliberate effort on the part of the person conveying information to mislead the other party, with the former desiring to achieve a “wrongful” result. Thus, the focus in understanding miscommunication is on the hearer, whereas with misinformation it is on the speaker.⁴¹ It is therefore safe to suggest that miscommunication occurs as a result of how the information is understood, whereas misinformation occurs as a result of how the information is communicated. One can even go further and suggest that with miscommunication the hearer is at “fault”, whereas in the case of misinformation, the speaker is at “fault”.

From the above analysis, the author concludes that mistake is a result of miscommunication, whereas misinformation leads to misrepresentation. It therefore makes sense to hold the misrepresentor liable for their wrongful conduct, while in the case of mistake, neither party can be held liable for any conduct causing the mistake.

5 DIFFERENCES AND SIMILARITIES

Consensus, one of the requirements of a valid contract, is affected by various factors including both mistake and misrepresentation. Although both mistake and misrepresentation affect consensus, mistake prevents the creation of rights and duties, whereas in the case of misrepresentation, rights and duties are created, but the victim of misrepresentation is entitled to set the contract aside provided that they successfully prove the requirements of misrepresentation as discussed under heading 4 of this article. Generally, a mistake is not actionable; however, where there is malicious intent, this can be actionable. Misrepresentation, on the other hand, is actionable. The similarities and differences between the concepts are presented in a tabular form below to indicate the unique nature of each.

³⁹ Patnaik “Towards an Approach to the Study of Miscommunication” 2012 3(2) *Global Media Journal: Indian Edition* 3.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Owing to similarities between mistake and misrepresentation, one could object to a claim of misrepresentation in terms of scenario 2 above and state rather that Simon was mistaken with regard to the elements of the house. This notion cannot be correct, because one contracting party made a representation to the other, and that representation met the other requirements of misrepresentation. In the case of a misrepresentation, one of the contracting parties or their agents acts in a particular manner, which action results in securing consensus in an improper manner. In other words, the misrepresentation relates to passing over untruthful or incorrect information to another, and the latter in turn acts on the strength of such untruthful or incorrect information. This is different from mistake, where there is no wrongful representation *per se*, but the party simply draws their conclusions, which results in a mistake. One could suggest that the party who makes a misrepresentation is aware of the “wrongful” conduct they are engaging in (although this is not the case for innocent misrepresentation), whereas a mistaken party is unaware that their mistake might cause a problem; a mistake does not involve fault.⁴²

The similarities and differences between mistake and misrepresentation are summarised as follows:

Mistake	Misrepresentation
Mistake is a factor that affects consensus.	Misrepresentation is a factor that affects consensus.
In the case of a mistake, a party does not make any form of wrongful representation of the facts.	In the case of a misrepresentation, a party to the contract makes a wrongful representation intentionally, negligently or innocently.
Mistake is hearer oriented.	Misrepresentation is speaker oriented.
An alleged mistake is made by a contracting party or their agent.	An alleged misrepresentation is made by a contracting party or their agent.
An alleged mistake relates to the material aspects of the contract.	An alleged misrepresentation relates to the material aspects of the contract.
The presence of a mistake prevents the creation of rights and obligations.	Even if misrepresentation is present, rights and obligations are created.
In the wake of a mistake, contracting parties are not required to perform any “obligations” as no obligations have been created in the first place, because of the mistake.	The performance of the obligations in the context of a misrepresentation will depend on the decision of the innocent or misled party.
Mistake does not involve the	Misrepresentation involves the

⁴² In the case of innocent misrepresentation, a party who gives the information or makes a representation, is unaware that the information that he or she is conveying to the other party is false. Such a party has in fact take all responsible steps to verify the correctness of the information. Despite the fact that in the end it results that the information given is untrue.

making of a false statement.	making of a false statement.
There is no deliberate effort to hide the true facts in the making of a mistake.	There is a deliberate effort to hide or withhold the true facts in a misrepresentation (unless innocent).
Correct information or facts are conveyed to the other contracting party but the information is not properly appreciated by the hearer thereof.	Misrepresentation involves the conveying of wrong information to achieve a particular end result (usually the conclusion of a contract based on such incorrect information).
Generally, a mistake is not actionable. However, where there is an error of motive, this can be actionable in terms of the law.	Misrepresentation is actionable. Even innocent misrepresentation entitles a party to claim restitutionary damages as was done in the <i>Phame</i> ⁴³ case. While an aggrieved party can claim compensatory damages as a result of fraudulent misrepresentation, innocent misrepresentation only gives rise to restitutionary damages.
Once established, mistake renders the contract <i>void ab initio</i> .	Once established, misrepresentation renders the contract voidable at the instance of the aggrieved party.

6 LESSONS LEARNED AND THE WAY FORWARD

As is evident in this article, mistake and misrepresentation are two distinct factors affecting consensus in purported contractual agreements. Mistake is a result of miscommunication whereas misrepresentation is caused by misinformation.

This article proposes the following definitions of mistake and misrepresentation.

Mistake in a purported agreement is not simply a misunderstanding of facts; it is a miscommunication of facts. The miscommunication is broad enough to include misunderstanding. The correct view is that because miscommunication occurred, there was a misunderstanding of the facts. This proposed definition in no way suggests that the communicator of the information is at fault or that the receiver or hearer is at fault, as mistake can lie with either of the contracting parties. Instead of casting blame on who caused the mistake, the better view is to establish how the information communicated by one contracting party was understood by the other contracting party. It is important to note that in the process of concluding agreements, the party receiving information (the hearer) has a responsibility to seek clarity on what seems to be unclear or could potentially lead to ambiguity. Both parties have a role to play in the unfortunate road towards dissensus. In the context of a mistake, the concern is not with liability, but simply with proving the existence of a mistake, thus negating consensus. Defining mistake through the lens of miscommunication instead of

⁴³ *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).

misunderstanding places a heavier burden on the party communicating the information to the other contracting party – that is, to ensure that they communicate effectively and properly to avoid being misunderstood.

Misrepresentation, on the other hand, can be described as misinformation conveyed by one contracting party to another. Misinformation can include incorrect or incomplete information. In other words, if a contracting party intentionally or negligently, or in some instances innocently, fails to display certain facts, they may be taken to have misrepresented such information to the other party. Similarly, where a party decides knowingly, or out of carelessness, to provide wrong information to the other contract party with the purpose of creating a contract, such a person may be taken to have made a misrepresentation.

Owing to the concept of material non-disclosure, which is often discussed as part of the principles of misrepresentation, it is important to appreciate the clear distinction between mistake and misrepresentation. Material non-disclosure is not pleaded with misrepresentation owing to the striking similarity between the two, whereas this is not the case with mistake.⁴⁴

Whenever faced with the issue of determining the existence of mistake or misrepresentation that negates consensus, the courts should not look at the form presented by the parties but rather pay attention to the substantive aspects. The courts should move away from simply applying the law as it is and get into the arena of developing the law. Applying the law as it is, without an effort to further develop the law, only benefits the parties to the contractual dispute. However, the court's role in developing the law will benefit members of society who will in future either enter into commercial transactions or be affected by commercial transactions in one way or another. Courts have long been faced with the responsibility of determining whether parties in contractual disputes have reached proper consensus, but do little *mero metu* to provide clarity in grey areas in the law of contract as has been done in this article. In some cases, courts unfortunately still fail to apply themselves properly to the facts and issues before them,⁴⁵ resulting in a wrong application of the law, and ultimately in either orders for the wrong relief or denying a party who could otherwise be entitled to relief. As was stated in the case of *DE v RH*,⁴⁶ the court emphasised that although the legislature is the major engine for law reform, the courts nonetheless bear the obligation to develop the common law in an incremental way. In the case of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC*,⁴⁷ the Supreme Court of Namibia, was puzzled by the High Court stance in overlooking significant developments in the law relating to the interpretation of documents. Courts should therefore heed the sentiments shared in the case of *Carmichele v Minister of Safety and Security*,⁴⁸ in which the court

⁴⁴ See unreported judgment of *Rossouw v Hanekom* [2018] ZASCA 134, wherein one of the contracting parties was found guilty of misrepresentation and material non-disclosure emanating from a contract of sale.

⁴⁵ In the unreported case of *Rossouw v Hanekom supra*, the Supreme Court of Appeal in South Africa stated that "regrettably, the high court failed to properly apply itself to the issues and the evidence".

⁴⁶ 2015 (5) SA 83 (CC).

⁴⁷ NASC 10 (30 April 2015).

⁴⁸ 2001 (4) SA 938 (CC).

cautions courts to remain watchful and not be hesitant in developing the common law. How the concepts of mistake and misrepresentation have been understood and applied in contractual disputes in the past is certainly not the same as it is today; confusion between these two factors affecting consensus will continue unless courts provide proper guidance. Case law is an important source of law in contract law, especially in the Namibian context where the general principles of the law of contract are not derived from statute as in some other jurisdictions – such as Tanzania, Ghana, China and Bulgaria to mention a few. Examples of cases such as *DE v RH* and *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC* indicate that courts are not as vigilant as they should be in developing the common law of contract, hence the need for this article to call upon courts to take seriously their mandate of developing the common law. It is clear that courts in jurisdictions where there is no legislation governing the general principles of contract, including Namibia, must be proactive in developing the law of contract. Parties cannot always wait for matters to be taken on appeal before correct application or for development of the common law to take place for them to be granted their relief. Courts of first instance must play their part in developing the law.

7 CONCLUSION

It is important to uphold the principles of ethics, good morals and truthfulness in all commercial transactions. Any improper conduct during negotiations and at the time of concluding a contract may invite unwanted claims, which may result in the breaching party paying huge sums of money in damages. When courts are called to determine the validity of contracts and to settle disputes relating to improperly obtained consensus, it is important for them to consider not only all the principles of the law of contract, but to go further and develop the law. Important principles for consideration with regard to contractual disputes include the doctrine of *pacta sunt servanda*, public policy and the requirement of reasonableness. Each case should be dealt with on its own merits and thus a one-size-fits-all approach should not be applied. Commercial transactions are part of our everyday life; where such transactions are entered into, care must be taken for the consequences involved. The definitions of mistake and misrepresentation proposed in this article do not in any form detract from the existing common-law definitions of the two concepts. The proposed definitions simply aim to clarify the existing confusion between mistake and misrepresentation.