

Short notes on:

CONSENSUS IMPROPERLY OBTAINED- CAN AN INNOCENT PARTY BE BOUND TO THE CONTRACT?

Introduction

Many Individuals and Business Entities enter into different Contracts for various reasons such as protecting their businesses against unscrupulous Individuals and Juristic Persons, minimising or solving disputes and/ or to create certainty. A Contract can be entered into orally, in writing, or in any other form should the law not prescribe a mandatory form for the contract to be entered into.

Contract Intended to Create Legally Enforceable Obligation

At the most basic, a Contract can be regarded as an Agreement between two or more Parties, where such Agreement is intended to be legally bounding on both Parties. Therefore, in order to constitute as a Contract, there must be consensus as well as *animus contrahendi* [a serious intention to create legally enforceable obligations]. The Minds of the Parties must meet (or at least appear to meet) on all material aspects of their Agreement.

Improperly Obtained Consensus

Where consensus was obtained as a result of misrepresentation, duress or undue influence, such a Contract will be valid and binding but voidable at the instance of the Innocent Party to the contract who is legitimately exercising a power to avoid the contractual obligations.

Whether the ground for relief is misrepresentation, duress, undue influence, the Innocent Party is faced with an election either to rescind the Contract or to uphold it. His or her decision, once made and communicated to the other Party, is final and irreversible without the other Parties' consent.

Misrepresentation

Misrepresentation is a misstatement regarding a past or present fact made by one Party to another before or at the time of the concluding the Contract concerning some matter or circumstances related to it. Usually the misrepresentations would have induced the Innocent Party to enter into the Contract with the other Party. Misrepresentations can be fraudulent, negligent, or innocent.

Duress

Duress is improper pressure that amounts to intimidation. Although there is consensus, this is inspired by the fear of an illegitimate threat, thus the Contract is valid but voidable at the option of

the Threatened Party. The Threatened Party can thus set aside the Contract and claim restitution or resist the enforcement of the Contract by the other Party.

The Party who alleges duress must establish the following:

- Actual violence or reasonable fear;
- The fear must be caused by the threat of some considerable evil to the Party or his/her family.
- The threat must be imminent or inevitable.
- The threat or intimidation must be *contra bonos mores* (against the good morals of society).
- The corral pressure used must have caused damage.

Undue influence

Similar to duress, undue influence is a form of improper pressure brought to bear upon a person in order to induce him or her to enter into a Contract. However, unlike duress, undue influence is more subtle, involving an erosion of the victim's ability to exercise free will in a matter, usually through abuse of an unequal relationship to influence and undermine the will of the other Party in a certain matter.

Remedy: *restitutio in integrum*

This remedy attempts to, as far as is possible, restore both Parties to the position they were in prior to entering into the Contract and it is in the disposal of the Innocent Party.

The *restitutio in integrum* remedy entitles the Innocent Party to set aside the legal consequences of the Contract (or a previously valid transaction) and the obligation to restore the person from whom they were received any property or benefits given and received in consequence of the original legal relations.

Should the Innocent Party choose to uphold the Contract, he or she is bound by its terms. If he or she elects to rescind the Contract, such a decision must be communicated to the other Party and the Contract terminates upon receipt of such notice. A duty then arises on both Parties to restore and/or return any performance that has been made in terms of the Contract.

Conclusion

In these modern times contracts are concluded daily by individuals and business entities and some even conclude contracts by emails and SMS.¹ The importance of consensus being properly obtained is that it reflects and always gives effect to the Parties' intention and not to simulate intention each, or both of them in concert, may have pretended in their agreement.

The dangers of consensus being improperly obtained is that it legally binds an innocent party to an agreement which if it was not obtained through duress, fraud and undue influence, they would not have been a party to. This is because such an obligation would amount to an innocent party incurring some form of risk or the agreement being highly prejudicial to them.

Protect the future of your assets, business and manage your expectations by contacting SchoemanLaw Inc today for expert advice on all Contractual drafting and related matters.

SCHOEMANLAW INC

Attorneys, Conveyancers and Notaries Public

¹ in *Jafta v Ezemvelo KZN Wildlife* (D204/07) ZALC 84 (1 July 2008)