

**THE PRINCIPLES OF RESCISSION OF CONTRACTS: A COMPARATIVE STUDY
OF ZAMBIA WITH OTHER COMMON LAW COUNTRIES.**

BY

SITALI MASILISO

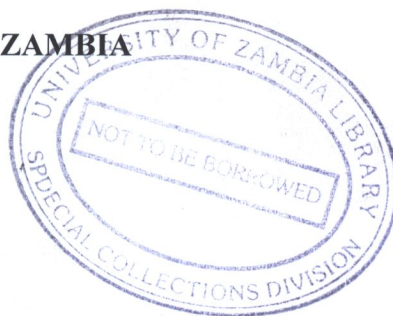


**A DIRECTED RESEARCH SUBMITTED TO THE SCHOOL OF LAW AT THE
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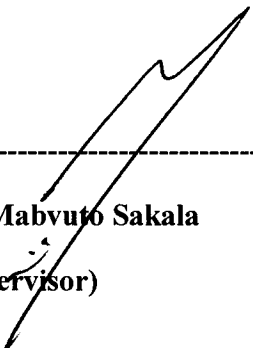
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Mr Mabvuto Sakala
(Supervisor)

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Dedication

I dedicate my research paper, first and foremost to God, to whom without the knowledge and life he has blessed me with, I would not have been able to write.

I further dedicate my research paper to my parents, Mr George Sitali and Mrs Anne Sitali, who have tirelessly and lovingly encouraged and supported me throughout my academic pursuits.

Abstract

Zambia seems not to have sufficient specific laws or guidelines governing the principles of rescission of contracts. This is evidenced by the way this area of the law is often glanced upon by courts. The purpose of this research paper has been to examine whether Zambia has sufficient legal rules and laws governing the principles of rescission of contracts either under statute or through judicial precedent or any other sources of law. The study has utilised a qualitative research paradigm. The study has found that generally Zambian courts rely heavily upon English cases, statutes and textbooks written by English authors and other legal scholars. There is need for Zambia to develop its own case law, statutes and legal textbooks on the subject matter. The writer, therefore, recommends that Zambian legal scholars and lawyers undertake research so as to write material which could serve as a guide as to what the law states. The writer further recommends that Zambia enacts a Contract Act which encompasses the principles of rescission of contracts or a specific statute relating to the various principles of rescission of contracts and that Zambia develops its case law.

Acknowledgments

I am truly indebted and thankful to God who has carried me through my entire research process and who granted me the wisdom that I needed to complete my research.

I owe sincere gratitude to my supervisor, Mr Mabvuto Sakala for the guidance that he gave me throughout my research process. I am sure that this research paper would not have been possible without his help.

I owe sincere and earnest gratitude to my parents, Mr George Sitali and Mrs Anne Sitali, for the support and financial and technical assistance they rendered to me throughout my research writing. I am sure that my research paper would not have been possible without their assistance and support.

I would like to thank Mr Peter Mulenga who offered support and guidance to me and Miss Mukupa Nsenduluka, for taking time from her busy schedule to proof read my work.

It is a great pleasure to thank everyone who helped me write my research paper successfully.

List of Abbreviations

I.C.A. 1872- Indian Contract Act, 1872

M.A. 1967- Misrepresentation Act 1967

M.A. Cap.69- Misrepresentation Act, Chapter 69 of the Laws of Zambia

S.R.A. 1963- Specific Relief Act, 1963

Cases

Alec Lobb (Garages) Limited v. Total Oil Great Britain Limited [1983] 1 WLR 87

Bernard Leigh Gadsden v. Vincent Joseph Chila (1991) SJ (HC)

Charles Rickard LD v. Oppenheim [1950] 1 All ER 420, CA

Clarke v. Dickson [1858] EB & E 148

Crown Cork Company (Zambia) Limited v. Pamela Helen Jackson (Married Woman) (1988-1989) Z.R. 82 (SC)

Great Peace Shipping Limited v. Tsavlis Salvage (International) Limited [2003] QB 679 [CA]

Hassard v. Smith [1872] IR 6 Eq 429

Heilbutt v. Hickson [1872] LR 7 CP. 438

Jaffco Limited v. Northern Motors Limited (1971) Z.R. 75 (CA)

Lloyd v. Nowell [1895] 2Ch 744

Long v. Lloyd [1958] 1 WLR 753

Mwenya and Randee v. Kapinga (1998) SJ 2 (SC)

Newbigging v. Adam [1886] 34 Ch D 582

Redgrave v. Hurd [1881] 20 Ch D 1 [CA]

Southern Africa Trade Limited v. Kitwe Supermarket Limited S.C.Z Judgment No.25 of 2010

Vincent Mijoni v. Zambia Publishing Company Limited (Appeal No. 10/1986)

Woods and Others v. Mackenzie Hill Limited [1975] 2 All ER 170

Statutes

Zambian Statutes

Apprenticeship Act, Chapter 275 of the Laws of Zambia

British Acts Extension Act, Chapter 10 of the Laws of Zambia

English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

Misrepresentation Act, Chapter 69 of the Laws of Zambia

English Statutes

Contracts (Rights of Third Parties) Act 1999, Chapter 31

Misrepresentation Act 1967, Chapter 7

Indian Statutes

Indian Contract Act, 1872, Act No.9 of 1872

Specific Relief Act, 1963, Act No.47 of 1963

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CHAPTER ONE

GENERAL DEFINITIONS

1.0 INTRODUCTION

Rescission is the process by which an existing contract is brought to an end and the effects of its existence are cancelled or terminated. The terminology is somewhat imprecise because the word 'rescission' as commonly used has come to cover a number of different situations, some of which give rise to a right to treat the contract as discharged at common law and some of which lead only to the contract being set aside in equity. The use of the same terminology for different situations should not, however, obscure the differences which exist between the varieties of rescission. It seems that where it is sought on equitable grounds, its effect is to restore the parties to the position they would have been in before the contract was entered into, whereas rescission at common law for breach simply discharges the parties from further obligations to perform the contract.¹

Some of the most important grounds for rescission are fraudulent misrepresentation, innocent misrepresentation, constructive fraud, and contracts *uberrimae fidei*. Under fraudulent misrepresentation, a party may rescind a contract which he has been induced to enter into by fraudulent misrepresentations. A fraudulent misrepresentation is a statement where the party making the statement is aware that it is false or disregards the possibility of it being false, or the party making the statement does so to induce another party to enter into a contract, and the other party enters the contract as a result of the statement and consequently suffers a loss. Under innocent misrepresentation, a party to whom the innocent representations are made may rescind the contract. An innocent misrepresentation will be made where the defendant

¹ Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworth & Co (Publishers) Ltd, 1974), 369.

honestly believes in the truth of his assertion, even if he has no reasonable ground for his belief, or if he once knew the true facts but has forgotten them. Constructive fraud deals with gifts and bargains procured by undue influence. It also covers unconscionable bargains which, together with gifts and bargains procured by undue influence, can be set aside by the victim or injured party. Lastly, under contracts *uberrimae fidei*, certain contracts are such that one party has command of means of knowledge not available to the other, who may therefore rescind the contract if he is not fully informed. Contracts *uberrimae fidei* call for the utmost good faith between contracting parties.²

Rescission as a remedy may only be granted in particular instances such as if the party seeking rescission acts promptly to cancel the agreement after the discovery of the reasons for rescission, if it is possible to restore the parties to their original position and thirdly, if the injured party cannot be reasonably compensated through a monetary damage award.³

It must further be noted that there is a distinction between rescission in equity and rescission at common law. O'Sullivan, Elliot and Zakrzewski write, "The weight of authority supports the conclusion that the principles of rescission at common law and in equity remain distinct and separate doctrines, operating side by side, albeit in a manner that is sometimes overlooked."⁴

As shown above, one distinction is that in equity, rescission seeks to restore the parties to the position in which they would have been had contractual transactions not taken place whereas

² Robert E. Megarry and P.V. Baker, *Snells Principles of Equity*, 27th ed. (London: Sweet and Maxwell, 1973), 670-671.

³ Kushnick and Associates P.C., "Contract Rescission," accessed September 26, 2011, <http://www.nyconstructionlaw.com>.

⁴ Dominic O'Sullivan, Steven Elliot, and Rafal Zakrzewski, *The Law of Rescission* (New York: Oxford University Press Inc, 2008), 247.

at common law, it simply seeks to discharge the parties from further obligations under the contract.⁵

Rescission, as a subject, is complex and challenging. O'Sullivan, Elliot and Zakrzewski in writing their preface to the book, 'The Law of Rescission' state:

Rescission is complex not least because it straddles the jurisdictional divide between the common law and equity and because it can involve both personal and proprietary rights. Some of the most fundamental problems to which these dualities give rise have never been resolved. Parallel and inconsistent lines of authority have been decided in apparent ignorance one of the other, the cases never having been collected together and systematically.⁶

A number of questions have been raised regarding the various principles of the law of rescission which beg for immediate explanation. This principle of the law is one which requires an appropriate analysis by scholars, judges and practitioners alike before it can be applied in various situations. Robert Walker states, "The law as to rescission is bedeviled by terminology that is ambiguous and lacking in uniformity." He quotes Samuel Williston, an American scholar who wrote that:

Words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as rescinded.....when in truth one party to the contract has merely exercised his right to refuse to perform because of the wrongful conduct of the other party.⁷

Thus, there is need to be guided in this jurisprudential jungle either through judicial precedent showing various decisions made under this principle, statute outlining how and when contracts in particular circumstances should be rescinded or any other laws.

⁵ Lord Hailsham, ed., *Halsbury's Laws of England*, 369.

⁶ Dominic O'Sullivan, Steven Elliot and Rafal Zakrzewski, Preface to *The Law of Rescission*, by Dominic O'Sullivan, Steven Elliot and Rafal Zakrzewski (New York: Oxford University Press Inc., 2008), vii.

⁷ Robert Walker, Foreword to *The Law of Rescission*, by Dominic O'Sullivan, Steven Elliot and Rafal Zakrzewski (New York: Oxford University Press Inc., 2008), v.

1.1 STATEMENT OF PROBLEM

The law of rescission is complex and challenging and is often bedevilled with terminology that is ambiguous. The distinction between rescission in equity and rescission at common law has therefore become necessary when handling the law of rescission.

Zambia seems not to have sufficient specific laws or guidelines governing the principles of rescission. This is evidenced by the way this area of the law is often glanced upon in most decided cases. For example, in *Southern Africa Trade Limited v. Kitwe Supermarket Limited*⁸, an appeal was brought on account of the High Court's judgment in favour of the respondent who claimed rescission of the contract between itself and the appellant, damages for negligent misrepresentation and damages for breach of contract and costs. In the High Court, the court dealt mainly with the issue of whether the agreement was a straight sale or market transaction. The High Court held that the fact that the defendant (who was the appellant on appeal) supplied the goods to other businesses, there was a breach of the contract which entitled the plaintiff to rescind the contract. The court did not delve into the actual principles of rescission, to determine when and how rescission takes place and what the guiding factors are in the case of rescission. On appeal to the Supreme Court, the whole issue of rescission was also narrowly dealt with as the court simply stated that there was no evidence to support the trial judge's finding of breach of the contract and therefore, the rescission of the contract could not be supported.

The research, therefore, has sought to discover whether Zambia has sufficient laws to govern this complex and challenging principle. The research has undertaken to do a comparative study as to how Zambia has dealt with this principle in comparison to other jurisdictions. Furthermore, the research has sought to discover how through judicial precedents and various

⁸ SCZ Judgement No. 25 of 2010

laws, common law countries have dealt with the principles of rescission of contracts and what Zambia can borrow, if anything, from these countries to improve its own rules and jurisprudence on the topic under discussion.

1.2 PURPOSE OF THE STUDY

The purpose of the study has been to examine whether Zambia has sufficient legal rules and laws governing the principles of rescission of contracts either under statute or through judicial precedents or any other sources of law. The study has sought to draw comparisons between Zambia and other common law jurisdictions, and to discover, if anything, what Zambia can learn from these countries.

The study has been guided by the following objectives:

- i. The examination of the principles of rescission of contracts;
- ii. An analysis of the law in relation to rescission of contracts in Zambia;
- iii. The examination of the manner in which this principle of rescission of contracts has been dealt with under different jurisdictions.
- iv. A comparative analysis between Zambia and other common law jurisdictions; and
- v. The making of recommendations as to what measures can be taken in Zambia to improve the law of rescission of contracts.

1.3 SIGNIFICANCE OF THE STUDY

The study has attempted to ascertain whether Zambia has sufficient legal rules and laws governing the principles of rescission of contracts. The study has attempted to ascertain whether the various principles of rescission of contracts have been sufficiently adopted under the Zambian legal system either by way of statute, judicial precedents or other sources of law

that can provide guidance in the event that parties to a contract desire to rescind the contract under various circumstances.

1.4 OPERATIONAL DEFINITION OF TERMS

Rescission: The abrogation or revocation of contract.

Common law: The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws.

Contract: An agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration.

Equity: Means fairness and as a legal system, it is a body of law that addresses concerns that fall outside the jurisdiction of common law.

1.5 METHODOLOGY

The study has utilised a qualitative research paradigm. The research has focused on the principles of rescission, a Zambian case study of this subject, considering how other common law jurisdictions have handled this aspect of the law and comparing these jurisdictions with Zambia. Data collection has, therefore, invoked both primary and secondary sources. The study has reviewed pertinent publications of law by the Zambian parliament and court decisions in the area of rescission. Furthermore, the study has considered various authors of text books, journal articles and other relevant documents on the subject. The internet has also provided a useful source of information on the subject matter. Being a comparative study with other common law countries, various laws of parliament and court decisions in the countries under discussion in the study have been considered.

1.6 CONCLUSION

The aim of this research is to ascertain whether Zambia has sufficient specific laws or guidelines governing the principles of rescission. The law of rescission is complex and challenging and as such, there is need to be guided in this jurisprudential jungle either through statute, judicial precedent or any other laws. This chapter, therefore, has included a brief introduction to the topic under discussion in this research, the statement of the problem, the purpose of the study (including the objectives), the significance of the study, important definitions which occur throughout the paper and the methodology utilised to gather the information contained therein. The next chapter will seek to explain the various principles of rescission of contracts such as what grounds would be necessary to obtain a rescission of a contract.

CHAPTER TWO

PRINCIPLES OF RESCISSION

2.0 INTRODUCTION

Macflaire and Willmot remark, “We believe that the circumstances giving rise to the remedy of rescission are still a matter of topical concern and we suggest that the matter is best resolved by statutory reform consistent across Australia”.⁹ The subject of rescission remains a matter of debate in the courts and among legal scholars alike in a number of countries. This chapter, therefore, seeks to provide a brief analysis of the principles of rescission of contracts.

As already defined, rescission is the act of cancelling the contract from the beginning and restoring the parties to the positions they were in as if the contract was never made. It extinguishes a contract *ab initio*, that is, it becomes as if it never existed. It is important to note that unlike most actions in contract that affirm the existence and enforceability of the contract, rescission disaffirms the contract.¹⁰

Rescission is not strictly a judicial remedy but is the act of the party entitled to rescind or the right which the party to a transaction has to set aside the transaction. However, it is best described as a remedy because the court’s assistance is frequently required to determine whether a person is entitled to rescind.¹¹

⁹ Peter MacFarlane and Lindy Willmot, “Rescission of an Executed Contract at Common Law for an innocent Misrepresentation,” accessed December 13, 2011, <http://epublications.bond.edu.au/cgi/viewcontent.cgi>.

¹⁰ John T. Blanchard, “Rescission,” accessed December 13, 2011, <http://www.jtblaw.com/rescission.shtml>.

¹¹ Megarry and Baker, *Snells Principles of Equity*, 27th ed., 669.

2.1 GROUNDS OF RESCISSION

Rescission is an available relief in the following circumstances:

(a) Misrepresentation

A misrepresentation which induces a party to enter into a contract gives that party the right to rescind the contract subject to certain conditions. In order for an action to be classified as a misrepresentation, the statement relied on must be false and the representee or person who is entitled to rescind should have intended to act on the representation.¹² This is in no way exhaustive of the requirements as to what constitutes an effective misrepresentation but merely provides a general summary. Furthermore, there is what is referred to as a fraudulent misrepresentation and innocent misrepresentation. Fraudulent misrepresentation takes place where a party makes a statement that is false or disregards the possibility of it being false, or the party making the statement does so to induce another party to enter into a contract, and the party enters the contract as a result of that statement and consequently suffers loss. Innocent misrepresentation, on the other hand, takes place where the party making the statement honestly believes in the truth of his assertion, even if he has no reasonable grounds for his belief, or where he once knew the true facts and has forgotten them. Both fraudulent and innocent misrepresentations are grounds for rescission.¹³

(b) Mistake

The doctrine of mistake is concerned with the operation of a false but genuine belief held by one, or both, parties to a contract such as to induce its formation under a misapprehension as to its terms and nature. Mistake upholds the classical contractual notion that both parties in a transaction are rational actors capable of acting in furtherance of their own interests. It does

¹² Hugh G. Beale, ed., *Chitty on Contracts: General Principles*, Volume One (London: Thomson Reuters (Legal) Limited, 2008), 503 and 515-519.

¹³ Megarry and Baker, *Snells Principles of Equity*, 27th ed., 669.

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¹² Hugh G. Beale, ed., *Chitty on Contracts: General Principles*, Volume One (London: Thomson Reuters (Legal) Limited, 2008), 503 and 515-519.

¹³ Megarry and Baker, *Snells Principles of Equity*, 27th ed., 669.

so by allowing misinformed parties to escape their obligations without incurring liability to the other.¹⁴ There are two categories of mistakes, namely, common mistake and mistake in communication. In the former, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. In the latter, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement or at least means that there is no agreement on the terms apparently stated.¹⁵

(c) Contracts *Uberrimae Fidei*

There are certain contracts where one party has command of means of knowledge not available to the other and these are known as contracts *uberrimae fidei*. There is normally no duty on one party to a contract to make disclosure to the other but contracts *uberrimae fidei* require full disclosure which if not present entitles the party who is not fully informed to rescind the contract. Contracts *uberrimae fidei* are such that they demand trust between the parties who are contracting.¹⁶ Insurance contracts are the most common type of *uberrimae fidei* contracts because they require the policy holder to act in good faith by fully disclosing all information that affects the insurance company's level of risk.¹⁷

(d) Duress

Duress relates to a situation where a person enters an agreement as a result of threats. Thus, where a party enters a contract because of duress they may have the contract set aside. Originally, the common law only recognised threats of unlawful physical violence, however

¹⁴ "Mistake," accessed December 13, 2011, <http://www.lawteacher.net/PDF/Mistake%20Lecture.pdf>.

¹⁵ Beale, *Chitty on Contracts: General Principles*, 431-432.

¹⁶ Megarry and Baker, *Snells Principles of Equity*, 27th ed., 671.

¹⁷ "Uberrimae Fidei Contract," accessed March 29, 2012, <http://www.investopedia.com/terms/u/uberrimae-fidei-contract.asp#axzz1qWUJOiTw>.

in more recent times the courts also recognise economic duress. The basis of duress as a vitiating factor in contract law is that there is an absence of free consent.¹⁸

(e) Undue Influence

Undue influence arises in a situation where a confidential relationship exists and one party has such influence over the other party that the other party's free will is dominated to the benefit of the influencing party. Because of the possibility that a person in such a confidential relationship may dominate the will of another and take unfair advantage of that person, the law presumes that undue influence has occurred if the dominating party obtains any benefit from a contract made with the person alleged to have been unduly influenced. The contract is then voidable and may be set aside unless it can be proved that no such undue influence took place.¹⁹

(f) Agreement

Where a contract is executory on both sides, that is, neither party has performed the whole of his obligations under the contract; it may be rescinded by mutual agreement, express or implied. A partially executed contract can also be rescinded in this manner provided that there are obligations on both sides which remain unperformed. Additionally, a contract where one party has fully performed the contract can be rescinded on condition that the other party returns the performance which he has received and in turn is released from his own obligation to perform under the contract. The consideration in all three instances being that each party abandons his right to performance or his right to damages.²⁰

¹⁸ "Duress," accessed December 13, 2011, <http://e-lawresources.co.uk/Duress.php>.

¹⁹ "Undue Influence," accessed December 13, 2011, <http://contracts.uslegal.com/fraud/undue-influence>.

²⁰ Beale, *Chitty on Contracts: General Principles*, 1461-1462.

(g) Unconscionable Bargains

This ground of rescission is often associated with the language of ‘constructive fraud’. This is ‘fraud presumed or inferred from the circumstances or conditions of the party’s contracting-weakness on one side, usury on the other, or extortion, or advantage taken of that weakness’. The requirements of this ground of rescission were identified by Lord Millet in *Alec Lobb (Garages) Limited v. Total Oil Great Britain Limited*²¹ as:

- (i) The rescinding party must be at a serious disadvantage relative to the counterparty;
- (ii) The weakness must be exploited in a morally culpable manner; and
- (iii) The resulting transaction must be overreaching and oppressive.

Under the first requirement, sources of sufficiently serious disadvantage have included poverty and ignorance, financial strife, old age, youth and inexperience, lack of education and many others which are often present in combination and are usually coupled with an absence of independent advice. The effect of the serious disadvantage must be such as to give the stronger party dominion over the weaker or, considering the effect from the perspective of the other party that, the weaker party was unable to judge for himself. The second requirement focuses on the stronger party’s conduct and requires that the weakness of the complainant must have been exploited by the counterparty in some morally culpable manner. The third requirement considers the overall effect of the transaction. It has been said that the transaction must be such that it ‘shocks the conscience of the court’; it must call for an explanation.²²

²¹ [1983] 1 WLR 87

²² O’Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 198-211.

(h) Impaired Capacity: Mental Infirmary and Intoxication

A party that is seeking rescission under this ground does not have to show exploitation or other morally culpable conduct, nor does he have to show undervalue. Under mental infirmity, the person seeking rescission must show that when he entered into the transaction he was so affected by mental infirmity that he did not know what he was doing and that the counterparty to the transaction knew of this infirmity. Intoxication, on the other hand, whether induced by narcotics or alcohol, is not a valid ground standing alone. It must also be shown under this ground that the other party knew of such intoxication at the time the agreement was concluded. However, it must be noted that the required intoxication to render a contract voidable must be very serious. That is, the party must be in such a state as to not know what he is doing. The degree of intoxication must be such as to interfere with the person's capacity to understand substantially the nature and effect of the transaction into which he is entering.²³

2.2 PURPOSE OF RESCISSION

The purpose of rescission is what is known as '*restitutio in integrum*'. This means rescission seeks to restore the status quo *ante*. It was said by Bowen L.J. in *Newbigging v. Adam* that "there ought to be a giving back and a taking back on both sides". Furthermore, Crompton J. stated in *Clarke v. Dickson*, "When a party exercises his option to rescind the contract, he must be in a state to rescind; that is he must be in a situation as to be able to put the parties into their original state before the contract." Crompton's statement was the traditional view taken and operated as a bar to rescission.²⁴

²³ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 190-197.

²⁴ Beale, *Chitty on Contracts: General Principles*, 565.

Restoring the parties to their original positions or where rescission occurs in equity, as near to those positions as may be, does not involve restoring them to those positions in all respects, but only as regards the rights and obligations which have been created by the contract. The parties are released from the obligations created by the contract, any advantages transferred under the contract are returned to them and they are indemnified for any detriments incurred pursuant to the contract. This is what is meant by being returned to the *status quo ante*.²⁵

2.3 BARS TO RESCISSION

A claim to rescind will usually fail where *restitution in integrum* is impossible. Thus, it operates as a bar to rescission in that sense. This bar will apply whatever the ground for rescission and whether the ground is one at law or in equity. However, in equity the bar operates less restrictively. Aside from *restitutio in integrum*, other reasons why rescission would be impossible include²⁶:

- (a) Affirmation of the contract- In such an instance, if the representee discovers the misrepresentation and either expressly declares his intention to proceed with the contract or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation.
- (b) Lapse of time- The right to rescind is lost after a lapse of time. If lapse of time amounts to affirmation, there can be no rescission. Delay itself will not be a bar to relief in equity but is relevant to the court's exercise of discretion. Thus, the representee must exercise the right to rescind within a reasonable time. What amounts to a reasonable time is a question of fact.

²⁵ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 307.

²⁶ "Rescission," accessed December 13, 2011, <http://unistudyguides.com/lawnotes//index.php?title=Rescission>.

- (c) Third Parties- In this instance, rescission will be barred where a third party becomes involved and acquires rights under the contract.
- (d) Exclusion/ entire agreement clauses- Non fraudulent misrepresentations will be protected by disclaimers or entire agreement clauses.
- (e) Notification- Rescission will only be effective if it is communicated to the representor. Therefore, the bar to rescission lies in the inability to communicate the rescission.

In the past, rescission of an executed contract for an innocent misrepresentation was not possible. Thus, executed contracts and innocent misrepresentation acted as bars to rescission. However, with the passing of Acts such as the United Kingdom's Misrepresentation Act 1967 and Zambia's Misrepresentation Act (Chapter 69 of the Laws of Zambia), certain bars for innocent misrepresentation have been removed. These two Acts will be discussed in subsequent chapters.

2.4 EFFECT OF RESCISSION

A person who rescinds a contract is entitled to be restored to the position he would have been in had the contract not been made. Thus, property must be returned, possession given up, and accounts taken of profits or deterioration. Damages are not recoverable because the purpose of damages is to place the party in the same position, so far as money can do it, as he would have been, had the contract been carried out.²⁷

The effects of rescission at common law and in equity are different. When rescission occurs at common law, any contract between the parties is extinguished *ab initio* from the moment the rescinding party elects to disaffirm it, whereas in equity the contract is set aside only when the court so orders. With reference to the recovery of property; a party rescinding at

²⁷ Megarry and Baker, *Snells Principles of Equity*, 27th ed., 675.

common law automatically regains legal title to property transferred when he elects to rescind whereas when it occurs in equity, legal title is obtained only pursuant to the court's order. However, in cases of fraud an equitable title may arise when the transaction is disaffirmed. Lastly, under common law a party rescinding is entitled to recover sums paid as a debt imposed by law and this right arises at the moment the transaction is disaffirmed. In equity, the rescinding party has an equitable entitlement to be repaid an equivalent sum. An equitable proprietary claim in respect of money paid arises following rescission for fraud and perhaps other grounds. However, no common law proprietary claim to money has so far been recognised when rescission occurs at common law.²⁸

2.5 RESCISSION AT COMMON LAW AND IN EQUITY

There are differences in rescission at common law and in equity. Rescission at common law remains a much narrower doctrine than rescission in equity. The common law put a strict interpretation on the requirement of restitution and by doing so restricted the field within which rescission could operate. Common law required precise restitution and additionally, there was no machinery for taking accounts or balancing set-offs against each other, or for making allowances. This resulted in the party being left with only the remedy in damages, if any. Equity on the other hand, offered two advantages to the litigant. Equity did not insist that restitution be precise, it was content to do practical justice between the parties. Secondly, equity offered greater flexibility in the machinery at its disposal which enabled it to direct accounts to be taken and balances to be struck and adjustments to be made which were impossible at common law.²⁹

The grounds for rescission at common law and in equity are different. At common law, contracts can be rescinded if induced by fraud or duress; and contracts of insurance for

²⁸ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 256-257.

²⁹ Beale, *Chitty on Contracts: General Principles*, 565.

material non-disclosure and non-fraudulent misrepresentation. A specialized common law right to rescind contracts for mental infirmity and probably also for intoxication exists under common law. Equity, on the other hand, allows rescission for non-fraudulent misrepresentation, actual and presumed undue influence, certain unilateral mistakes and unconscionable conduct. Equity, however, allows rescission for fraud, duress, mental impairment and intoxication also as at common law.³⁰

Both the common law and equity recognise four general bars to rescission namely, *restitutio in integrum* impossible, intervention of third parties, affirmation and delay. However certain bars to rescission are peculiar to the common law and equity. Certain supervening events will bar rescission at common law if they occur before there is an effective election to disaffirm it, but will not prevent rescission in equity. One such supervening event would be an interest in unregistered or registered land being transferred by the party wishing to rescind. Such contract cannot be rescinded because title to the land cannot be regained. Equity is not restricted by the bars to rescission peculiar to the common law. Equity developed its own rules that barred rescission for non-fraudulent misrepresentation in certain cases but all these bars have been abolished in England. However, they remain important in other Commonwealth jurisdictions.³¹

Aside from the above mentioned differences in rescission at common law and in equity, other differences include those mentioned under the effect of rescission above under section 2.4.

³⁰ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 252-253.

³¹ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 255-256.

2.6 CONCLUSION

The principles of rescission are an ocean full which cannot be fully explicated but the above offers a brief summary explaining the grounds, purpose, effect and bars to rescission. The chapter has also provided differences in the manner in which rescission is dealt with at common law and in equity. The next chapter will consider how the law in relation to rescission of contracts has been handled in Zambia.

CHAPTER THREE

ZAMBIAN LEGAL SYSTEM

3.0 INTRODUCTION

Zambia has a mixed legal system of English common law and customary law. The term common law may refer to an historical or geographical concept, that is, to the totality of the law of England and its former colonies. It is sometimes taken simply to mean any of various substantive and procedural rules and concepts. The common law is epitomised by reference to the collective judicial wisdom of the past as the primary source of rules applicable to the problems of the present. No other legal system is like it because emphasis is placed on the opinions of the courts themselves as the major source of the law. In short, customs of the past are carried over from the past cases into the legal rules of the present.³²

Customary law on the other hand is self-explanatory and refers to traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, profession or trade and is treated as a legal requirement.³³

Owing to the above, there are various sources of law in Zambia, firstly, the Constitution which is the supreme law of the land, common law which is the law as developed through the decisions of the judges, statute or legislation and customary law. Therefore, in providing an analysis of the law in relation to rescission of contracts in Zambia, various cases and statutes will be considered.

³² William L. Church, "The Common Law and Zambia," in *Law in Zambia*, ed. Muna Ndulo (Nairobi: East African Publishing House Ltd, 1984), 1-2.

³³ "Customary Law," accessed January 31, 2012, <http://www.businessdictionary.com/definition/customary-law.html>.

3.1 ANALYSIS OF THE APPROACH TAKEN TO ADDRESS THE PRINCIPLES OF RESCISSION OF CONTRACTS IN THE COURTS

In analysing the approach taken to address the principles of rescission of contracts, a number of cases will be considered:

In the case of *Mwenya and Randee v. Kapinga*³⁴, the first appellant agreed to sell her house to the respondent for the sum of K12, 000,000.00. Meanwhile she asked the respondent to pay up K800, 000.00 to enable her redeem the mortgage under which the house was. The respondent paid the said amount and the first appellant redeemed the mortgage accordingly. But when the respondent wanted to pay the rest of the purchase price, the first appellant refused to accept the money saying the respondent had taken too long to find it. She then signed a second contract of sale with the second appellant and the respondent sued. The High Court found in favour of the respondent and ordered specific performance of the contract. The appellant appealed to the Supreme Court.

On appeal it was argued by the appellant, among other things, that the contract was invalid and that in the alternative, if the contract was deemed valid, that the court considers it rescinded because the respondent had breached the contract by delaying to pay the rest of the purchase price. Appellant argued that time was of the essence and as such by delaying; the respondent had breached the contract. Respondent on the other hand argued that time was not of the essence and thus, the respondent had not breached the contract. In passing judgment the court considered whether the letter written by the first appellant to the respondent constituted an offer and arrived at the decision that it did and that acceptance had been given by payment of the K800, 000.00 deposit. Court further considered whether time as shown through the letter was of the essence and concluded that on proper construction of the

³⁴ (1998) S.J. 12 (S.C.)

appellant's letter, a sufficient note or memorandum existed of which time was not of the essence and as such there was no unreasonable delay to warrant the contract being rescinded. Thus, the Supreme Court held that there was no basis of rescission.

In arriving at this decision, Bweupe, DCJ delivering the judgment of the court, quoted *Vincent Mijoni v. Zambia Publishing Company Limited* (Appeal No. 10/1986) which was an unreported case, Cheshire and Fifoots Law of Contract (Ninth Edition) and *Lloyd v. Nowell* (an English case).

A second case in which rescission was considered was *Jaffco Limited v. Northern Motors Limited*³⁵ in which the plaintiff claimed that he was entitled to rescind the contract for the sale of the vehicle and did in fact do so because repairs had not been effected within a reasonable time. The plaintiff claimed that the acceptance of the delivery of the vehicle was on condition that repairs would be done and because they were not done within a reasonable time, he had the right to rescind the contract. The court held in this case that there was a distinction between a buyer's right to reject the goods because they did not comply with the terms of the contract and the buyer's right to rescind. Court showed that there were many instances where the buyer had a right to reject the goods but did not have the right to rescind the contract; and such was the case in this particular instance. The plaintiff had further argued that by accepting delivery of the vehicle conditionally, a new agreement had been constituted and as such the right to reject or rescind survived the new agreement. However, the court held that having agreed to accept the vehicle conditionally, rights did not include the right to either accept or rescind but rather were limited to a right to damages on breach of that agreement. Thus, the right to rescission did not survive but was extinguished.

³⁵ (1971) Z.R. 75 (C.A.)

In arriving at this decision, the court considered cases such as *Long v. Lloyd* and *Heilbutt v. Hickson* both of which are English cases and the Sale of Goods Act 1893 of England.

Additionally, the High Court in *Bernard Leigh Gadsden v. Vincent Joseph Chila*³⁶ while considering the issue of rescission of contract of sale of property focused more on the contract itself in deciding whether a rescission had indeed taken place and whether proper notice of the rescission had been given to the defendant based on evidence tendered into court. In this particular case, the plaintiff applied for possession of the property on the grounds that the defendant was in occupation without license or consent because the contract of sale between them granting occupation had been rescinded by the plaintiff. The plaintiff in this case claimed that notice making time of the essence of the contract had been effected upon the defendant and that upon failure by the defendant to make payment on time; notice of rescission of the contract was effected upon the defendant and thereafter a notice formally demanding delivery of possession of property. The defendant however denied receiving any of the notices.

The court in deciding the case considered when a party to a contract is entitled to give the other notice making time of the essence and quoted *Charles Rickard LD .v. Oppenheim* (an English case) and whether the notice tendered to the defendant needed to be produced in court and if time was of the essence at what point it began to run. The court held upon considering the conditions of the contract that time was of the essence and it began to run after the happening of an event, in this particular case, the issuance of the state's consent to assign and/ or when the fact was brought to the attention of the defendant. The court further considered that in order for it to decide whether the notice given was reasonable, the notice had to be produced in Court and it was the duty of the party relying on it to tender it in evidence. All notices claimed to have been given to the defendant were not produced in court

³⁶ (1991) S.J. (H.C.)

and so the court was unable to make a finding. And as such the court held for the defendant and held that the contract had not been rescinded.

Lastly, in the case of *Crown Cork Company (Zambia) Limited v. Pamela Helen Jackson (Married Woman)*³⁷, the parties entered into a contract relating to land. The respondent (referred to as the defendant) entered into a contract to buy land with the appellant (referred to as the plaintiff). The completion date was to be 1st March, 1980 and pending completion, the defendant was allowed under the terms of the contract to enter into possession. The defendant had paid a substantial amount but still had a balance. The evidence showed that the defendant failed to complete the purchase on 1st March, 1980. A notice to complete was sent by ordinary post to the defendant. The learned trial judge held that notice to complete had not been properly served and the claim for rescission must fail. The appellant appealed to the Supreme Court.

The contract of sale provided for service of a notice to complete and right to rescission in default of completion in accordance with such notice. The court quoted, Halsbury's Laws of England, 3rd edition, which stated, "If a contract contains a condition entitling vendor to rescind on the happening of certain events; the vendor may, if these events arise, rescind. In the absence of such a condition the vendor can only rescind if the conduct of the purchaser is such as to amount to a repudiation of the contract and the parties can be restored to their former position." The court further quoted, Halsbury's Laws of England, 4th edition, relating to repudiation of contracts, "A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time...."

³⁷ (1988-1989) Z.R. 82 (S.C.)

Therefore, the court stated that applying the above two principles it appeared that as the contract contained a special provision for the giving of a notice to complete, the plaintiff would have been entitled to rescind on the defendant's failure to comply with notice. In view of the learned trial judge's finding in this case that the notice to complete was not properly served, the plaintiff had no other right to rescind (in the absence of any other breach or situation referred to in the contract) unless the defendant repudiated the contract. There was no express repudiation in this case and, as time could not have been of the essence of the contract unless a notice to complete had been properly served, the plaintiff could only rely upon implied repudiation. It was the courts view that the onus was on the plaintiff, as the party seeking to rely on implied repudiation, to show that the defendant had so conducted herself as to lead a reasonable man to believe that she would not perform or would be unable to perform the contract. It was further stated that it is accepted that, in cases of purchases of land, delay in completion frequently occurs but does not automatically result in implied repudiation. That in order to consider whether or not repudiation by the purchaser can be implied in this case the whole of the facts needed to be considered. The most salient facts were that out of a purchase price of K17, 000.00 the purchaser had paid K13, 000.00 and had continued to occupy the premises. And that in those circumstances, even when giving the plaintiff the benefit of the doubt that the pleadings indicated that there was a claim of implied repudiation by the defendant, no evidence that existed, was against that implication. Therefore, the court held that there was no other ground upon which the plaintiffs could possibly have succeeded in their action and the appeal was dismissed.

The case referred to in the above case was *Woods and others v. Mackenzie Hill Limited*³⁸ (English case); legislation referred to was the Conveyancing and Law of Property Act,

³⁸ [1975] 2 All ER 170

1881(England) and work referred to was the Halsbury's Laws of England, third and fourth editions.

An analysis of the above cases shows that the courts rely heavily upon English cases, statutes and textbooks written by English authors or legal scholars in order to understand the principles relating to rescission of contracts as well as to serve as guidelines for the law relating to rescission of contracts.

Zambian cases may be referred to as in the case of *Mwenya and Randee v. Kapinga* but this case further illustrates another problem that is faced in Zambia, the fact that not all cases are reported. A large number of cases have been dealt with in the courts but some are not reported thereby creating the problem of discovering what the law states. A lack of reported cases makes it difficult not only for judges and lawyers but also legal scholars who are seeking to understand the law, to access such information.

3.2 STATUTES RELATING TO RESCISSION OF CONTRACTS IN ZAMBIA

(a) Misrepresentation Act

The Misrepresentation Act (M.A. Cap.69) is a major Act as it provides an important aspect of rescission of contracts which is the removal of certain bars to rescission for innocent misrepresentation. In chapter two, it was shown that previously executed contracts and innocent misrepresentation acted as bars to rescission. This has been dealt with by this Act in section 2 which states:

Where a person has entered into a contract after a misrepresentation has been made to him, and-

- (a) The misrepresentation has become a term of the contract,
- or
- (b) The contract has been performed;

Or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b).³⁹

(b) Apprenticeship Act

The Apprenticeship Act provides the manner in which contracts of apprenticeship can be rescinded and how such rescission should take place. This is shown in section 17 of the Act which states:

- (1) A contract of apprenticeship may be rescinded by mutual agreement of the parties thereto or by the Controller at the instance of any party thereto if he is satisfied that it is expedient so to do.
- (2) The employer shall give notice to the Controller of the rescission of any contract by mutual agreement of the parties.
- (3) The Controller shall not rescind any contract of apprenticeship until he has given all parties to the contract an opportunity to be heard by him or to make representations to him in writing.
- (4) The Controller shall endorse on the registered copy of the contract of apprenticeship the fact that the contract has been rescinded.⁴⁰

Under the same Act, section 9(1) of the Apprenticeship Regulations provides:

Where in the opinion of the Controller, an employer has an insufficient number of journeymen or instructors to train his apprentice in any aspect of his trade, he may order-

- (a) That the contract be rescinded and demand from the employer and apprentice their respective copies of the contract and endorse thereupon the fact of such rescission; or
- (b) That the apprentice be transferred to such other employer as may be arranged.

³⁹ Misrepresentation Act, Chapter 69 of the Laws of Zambia, section 2.

⁴⁰ Apprenticeship Act, Chapter 275 of the Laws of Zambia, section 17.

In addition, the Law of England applies in Zambia subject to the English Law (Extent of Application) Act which declares the extent to which the Law of England applies to the republic. Section 2 states:

Subject to the provisions of the Constitution of Zambia and to any other written law-

- (a) The common law; and
- (b) The doctrines of equity; and
- (c) The statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) Any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; and
- (e) The Supreme Court Practice Rules of England in force until 1999;

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes.

Shall be in force in the Republic.⁴¹

The above may be termed the 'reserve' law resorted to fill in the gaps in Zambian legislation and case precedents. In the absence of any legislation in Zambia on any subject, English statutes pass by virtue of the above Act but also the British Acts Extension Act, Chapter 10 of the Laws of Zambia.⁴²

Therefore, the above two Acts as well as English Statutes are referred to when dealing with the principles of rescission of contracts. Additionally, common law and the doctrines of equity will also apply. As was shown under section 3.1, these are referred to when dealing with the principles of rescission of contracts in Zambia.

⁴¹ The English Law (Extent of Applications) Act, Chapter 11 of the Laws of Zambia, section 2.

⁴² Mulela M. Munalula, *Legal Process: Cases Statutes Materials*, (Lusaka: UNZA Press, 2004), 86-87.

3.3 CONCLUSION

Zambia has a mixed legal system of English common law and customary law. The common law is epitomised by reference to the collective judicial wisdom of the past as the primary source of rules applicable to the problems of the present. Customary law, on the other hand, is self-explanatory and refers to traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, profession or trade and is treated as a legal requirement. An analysis of the cases herein under discussion shows that the courts rely heavily upon English cases, statutes and textbooks written by English authors or other legal scholars in order to understand the principles relating to rescission of contracts as well as to serve as guidelines for the law relating to rescission of contracts. Zambian cases are sometimes referred to but Zambia suffers from the problem of case reporting as Zambian cases referred to are sometimes unreported. In relation to statutes that relate to rescission of contracts, Zambia has enacted the Misrepresentation Act and the Apprenticeship Act. Additionally, English statutes, common law and the doctrines of equity apply by virtue of the English Law (Extent of Application) Act. These are used as a reserve in the event that there is a *lacuna* in our own laws. Thus, these are often referred to when dealing with the principles of rescission of contracts. The next chapter will consider how the principles of rescission of contracts have been dealt with in other common law countries and will seek to provide a comparative analysis between Zambia and these common law countries.

CHAPTER FOUR

COMPARATIVE ANALYSIS

4.0 INTRODUCTION

Common law as defined in the previous chapters denotes a system of laws originated and developed in England and based on court decisions. Common law is the basis of a number of legal systems, including, Australia, India, England, Ghana, Malaysia, New Zealand, Bangladesh and Zambia as shown in chapter three. This chapter seeks to focus on the analysis of the principles of rescission of contracts in two common law countries namely, India and England from which a comparative analysis with Zambia will be made.

4.1 RESCISSION OF CONTRACTS IN ENGLAND AND INDIA

An analysis of the law in relation to rescission of contracts with regard to England and India will be made. This section seeks to examine whether there are any laws that have been enacted in these two countries relating to rescission of contracts and how the courts have handled the various principles relating to rescission of contracts.

(a) England

The courts of England have dealt with the principles of rescission of contracts extensively in a number of cases which have been recorded and which form the basis of the English common law on the subject. These cases as shown in chapter three have been of persuasive value to the courts of Zambia. The various cases that have been handled in the courts have established various principles in relation to rescission of contracts that are used in a number of common law countries, including Zambia. For example, core requirements for the grounds

of rescission of contracts have been enumerated by Judges. As Lord Millet stated in *Alec Lobb (Garages) Ltd v. Total Oil Great Britain Ltd*⁴³,

...if the cases are examined, it will be seen that three elements have almost invariably to have been present before the court has interfered. First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken...secondly, this weakness of the one party has been exploited by the other in some morally culpable manner...and thirdly, the resulting transaction has been not merely hard or improvident, but overreaching and oppressive. Where there has been a sale at an undervalue, the undervalue has almost always been substantial, so that it calls for an explanation, and is in itself indicative of the presence of some fraud, undue influence, or other such feature. In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase 'shocks the conscience of the court', and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.

In the above case, Lord Millet established the requirements of one of the grounds of rescission of contracts which is unconscionable bargains as was shown in chapter two. The requirements identified by Lord Millet were that, the rescinding party must be at a serious disadvantage relative to the counterparty, the weakness exploited must be in a morally culpable manner and the resulting transaction must have been overreaching and oppressive.

Other cases which have established principles in relation to rescission of contracts in the courts of England include:

Great Peace Shipping Limited v. Tsavlis Salvage (International) Limited in which it was established that common mistake is no longer a ground for rescission. It was formerly thought to be a ground for rescission of contracts but this case established that there is no such doctrine. The Court of Appeal held in this case that if common mistake operates at all, it

⁴³ [1983] 1 WLR 87, 94-95 (on appeal [1985] 1 WLR 173 [CA] 181-83), in *The Law of Rescission*, O'Sullivan, Elliot, and Zakrezewski, 198-199.

takes effect at common law and renders the contract void. Thus, if the contract is void, there is nothing to rescind at all.⁴⁴

Furthermore, *Redgrave v. Hurd* provides authority to the effect that a contract can be rescinded for innocent misrepresentation and that it may be rescinded by the party to whom the representations were made.⁴⁵ Additionally, the case of *Hassard v. Smith*, explained what should be regarded as knowledge of mental infirmity of the counterparty to the transaction when claiming mental infirmity as a ground for rescission. It was shown in this cases that,

The knowledge of the lunacy or incapacity must be understood to mean not merely actual knowledge, but that which must be presumed, from circumstances known to the other contracting party, sufficient to lead any reasonable person to conclude that, at the time the contract was made, the person with whom he was dealing was of unsound mind.⁴⁶

The above case shows how the courts take time to define various aspects that arise under rescission such as what should be regarded as knowledge of mental infirmity of the counterparty to a transaction.

The courts of England have had occasion to deal with myriads upon myriads of cases (all of which cannot be considered) dealing with rescission of contracts and have come up with various principles as shown above. These cases date as far back as the nineteenth century and they have formed an important source of the law (known as judicial precedent) in England in dealing with the principles of rescission of contracts. An examination of these cases will show how the courts constantly refer to these cases to decide similar ones that arise today. Additionally, the courts of England are also constantly changing the law as it relates to rescission of contracts as was shown by the *Great Peace* case which is a more recent decision

⁴⁴ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 189 ([2003] QB 679 [CA]).

⁴⁵ [1881] 20 ChD 1 [CA]

⁴⁶ O'Sullivan, Elliot, and Zakrzewski, *The Law of Rescission*, 195 ([1872] IR 6Eq 429).

establishing that common mistake can no longer be seen as a ground for rescission of contracts as it renders the contract void.

Secondly, a number of legal scholars have written text books which also serve as a source of law in England and are quoted in *Zambian* cases as authority for certain prepositions in relation to the law of rescission. These books include *Cheshire and Fifoots Law of Contracts*, *Halsbury's Laws of England*, *Snells Principles of Equity* and *The Law of Rescission* by Dominic O'Sullivan and others. These text books have offered a comprehensive guide in relation to the principles of rescission of contracts in England.

In relation to legislation that relates to rescission of contracts, England has the *Misrepresentation Act of 1967* (M.A. 1967) which deals primarily with innocent misrepresentation. The M.A. 1967 amended the law relating to innocent misrepresentation. The M.A. 1967 removes certain bars to rescission for innocent misrepresentation as does the *Zambian Misrepresentation Act* (Chapter 69 of the *Laws of Zambia*) and the two Acts are similar. Section 1 of the *English Misrepresentation Act 1967* provides:

1. Where a person has entered into a contract after a misrepresentation has been made to him, and —
 - (a) the misrepresentation has become a term of the contract; or
 - (b) the contract has been performed,or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.⁴⁷

Furthermore, England has laws such as the *Contracts (Rights of Third Parties) Act 1999* which provides, among other things, that if a third party has a right to enforce a term of the contract as per section 1, the parties to the contract may not, by agreement, rescind the

⁴⁷ "Misrepresentation Act 1967, Chapter 7," accessed February 27, 2012, http://www.bailii.org/uk/legis/num_act/1967/1185735.html.

contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent subject to certain conditions.⁴⁸

In conclusion, England has a number of sources from which the law in relation to rescission of contracts can be derived. It has case law, statute and text books; all of which serve as an important guide in relation to the principles of rescission of contracts.

(b) India

The law of contract in India is contained in the Indian Contract Act, 1872 (I.C.A. 1872) which is based mainly on common law. This Act codifies the manner in which people enter into a contract, execute it and implement provisions of a contract, as well as, the effects of a breach of a contract. As per section 1 of the Act, this Act extends to the whole of India except the state of Jammu and Kashmir.⁴⁹ The preamble of this Act states, “Where as it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows....”⁵⁰

India provides a unique contribution to the law of rescission in the country through the I.C.A. 1872. In chapter two, grounds of rescission of contracts were considered. The I.C.A. 1872 has discussed some of these grounds of rescission such as undue influence and misrepresentation. The I.C.A. 1872 has defined what undue influence and misrepresentation are and when they are said to take place. Section 16, for example, of the I.C.A. 1872 provides a definition of undue influence as: “A contract is said to be induced by undue influence where the relations

⁴⁸ “Chapter 31, Section 2,” accessed February 27, 2012, <http://www.legislation.gov.uk/ukpga/1993/31/introduction>.

⁴⁹ “The Indian Contract Act, 1872,” *India For You Blog*, <http://indiaforyou-13.blogspot.com/2011/06/india-contract-act-1972.html>.

⁵⁰ “Indian Contract Act, 1872, Act No.9 of 1872,” accessed February 27, 2012, <http://districtcourtallahabad.up.nic.in/articles/ICAct.pdf>.

subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.”⁵¹ The rest of the section goes on to explain when a person is deemed to be in a position to dominate the will of another, and that the burden of proof lies upon the person who is deemed to be in a position to dominate the will of another when a contract is entered with that other party to prove that it was not induced by undue influence.

Section 18 of the I.C.A. 1872 defines misrepresentation as meaning and including:

- (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) Any breach, of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
- (3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.⁵²

Section 19 goes on to provide that, “When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.”⁵³

The I.C.A. 1872 also provides for other aspects of rescission of contracts such as when time is of the essence. Section 55 shows that a failure to perform at a fixed time, of a contract in which time is essential, renders the contract voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. The other parts of the I.C.A. 1872 which provide for aspects relating to rescission include sections 62, 66 and 75. Section 62 shows that if a contract is rescinded, the original need not be performed. Section 64 outlines the consequence of rescinding voidable contracts; it provides:

⁵¹ Indian Contract Act, 1872, Section 16 (1)

⁵² Indian Contract Act, 1872

⁵³ Indian Contract Act, 1872

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as maybe, to the person from whom it was received.⁵⁴

And finally, section 75 provides that a party rightfully rescinding a contract is entitled to compensation.

Additionally, the I.C.A 1872 is inherently unique as it gives illustrations to the various sections that are outlined. For example, under section 75, the illustration given is: A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.⁵⁵

These various parts of the I.C.A. 1872 can serve as guidelines for judges, lawyers and legal scholars alike in dealing with the principles of rescission of contracts. The Indian judges and lawyers have a law to which they are able to refer to when dealing with matters that arise in relation to rescission of contracts in the country.

Aside from the I.C.A. 1872, India has enacted other laws that deal with aspects of rescission of contracts. One such Act is the Specific Relief Act, 1963(S.R.A. 1963) which is known as a Bare Act. Under sections 27 to 30 of the S.R.A. 1963, aspects of rescission of contracts are dealt with. Sections 27 and 28 respectively show when rescission of contracts may be adjudged or refused and how rescission can take place in certain circumstances of contracts

⁵⁴ Indian Contract Act, 1872

⁵⁵ Indian Contract Act, 1872

for the sale or lease of immovable property, the specific performance of which has been decreed. For example, Section 27 outlines:

When rescission may be adjudged or refused-

(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:-

- (a) Where the contract is voidable or terminable by the plaintiff;
- (b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.⁵⁶

Section 29 provides that if a plaintiff is suing for specific performance in a contract, he or she can sue in the alternative for rescission and section 30 provides that the court may require rescinding parties to exercise equity.⁵⁷

These sections, in addition to the sections outlined under the I.C.A 1872 show how principles of rescission of contracts will be handled in India. They, further show how Acts such as these serve as important guides in this jurisprudential jungle of rescission of contracts. Lawyers, judges and legal scholars alike in India have laws that they can refer to in order to find what the legal principle is when dealing with cases of rescission.

⁵⁶ "The Specific Relief Act, 1963, Act No.47 of 1963, Chapter IV," accessed February 8, 2012, <http://www.helplinelaw.com/docs/THE%20SPECIFIC%20RELIEF%20ACT,%201963/CHAPTER%20IV%20RESCISSION%20OF%20CONTRACTS>. (Section 27 (2) goes on to provide: "Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract-

(a) Where the plaintiff has expressly or impliedly ratified the contract; or

(b) Where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or

(c) Where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(d) Where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.")

⁵⁷ The Specific Relief Act, 1963.

4.2 COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND ENGLAND

As was shown above, England has dealt with myriads upon myriads of cases dealing with rescission of contracts. The manner in which the courts deal with this area of the law in Zambia leaves a lot to be desired. Unlike Zambia, the English courts have dealt with this area of the law in depth and therefore, legal scholars, lawyers and judges alike have an important source of law. The courts take time to establish principles and make various definitions which are of importance in dealing with the various grounds that are pleaded as reasons for claiming rescission by parties. However in Zambia, as was shown in chapter three, English cases form a huge source of law when dealing with principles in relation to rescission of contract because the courts of Zambia do not take the opportunity to establish principles and define various aspects of rescission of contracts in the Zambian context.

Aside from that factor, in chapter three, one major problem that was identified for the lack of a large number of cases in relation to rescission of contracts in Zambia is the aspect of some cases being unreported which is definitely not a problem in England. Cases are reported in a number of places, be it textbooks, internet, and many other sources. This aspect of unreported cases contributes to the Zambian courts turning to English cases.

Additionally, one contributing factor to the lack of numerous cases dealing with rescission of contracts in Zambia may be poverty. A large number of the Zambian population lives in poverty. It has been recorded that poverty levels declined from 62.8 percent in 2006 to 60.5 percent in 2010.⁵⁸ Thus, it is highly unlikely that if they did engage in contracts (minor as they may be), they would have the resources to engage in litigation for the rescission of such contracts where such rescission is being disputed.

⁵⁸ Sosten Banda, "Poverty: Persistent Reality in rural communities," *The Post Newspaper*, November 29, 2011, accessed February 28, 2012, http://www.postzambia.com/post-print_article.php?articleId=23866.

William A. Markham writing an article on the extraordinary importance of contract law stated as follows: "Contract law lies at the heart of our system of laws and serves as the foundation of our entire society. This is not an exaggeration. It is a simple observation, one that too often goes unobserved"⁶⁰Therefore, if contract law lies at the heart of our system of laws and serves as the foundation of our entire system, the law regarding contracts should be taken seriously as people are engaged in contracts every day. Markham further states,

It is our system of contract law that underpins and makes possible the many private, voluntary agreements by which exchanges of goods and services are accomplished in our society at every level. No exchange is exempt from the contract law, which indeed can be called the cornerstone of marketplace civilisation.⁶¹

It follows necessarily that rescission of contracts is of great importance also. If people are engaged in contracts every day and one party to the contract behaves in such a manner as would cause loss to the other party, such party should be allowed to rescind the contract. Thus, there ought to be laws governing contracts and in particular rescission of contracts. By enacting a Contract Act, India has taken the importance of contracts seriously and in particular, rescission of contracts. This is the reason why such an Act would be of great importance in Zambia; a Contract Act that also contains explanations of the various principles of rescission of contracts.

⁶⁰ William A. Markham, "An Overview of Contract Law by William A. Markham: The extraordinary importance of Contract Law," accessed February 28, 2012, <http://www.maldonadomarkham.com/Contract-lawyer-San-Diego.htm>.

⁶¹ Markham, "An Overview of Contract Law by William A. Markham: The extraordinary importance of Contract Law".

4.4 CONCLUSION

Common law is the basis of a number of legal systems, including, Australia, India, England, Ghana, Malaysia, New Zealand, Bangladesh and Zambia. This chapter has focused on the analysis of the principles of rescission of contracts in two common law countries namely, India and England from which a comparative analysis with Zambia was made. The next chapter will provide a conclusion and recommendations.

CHAPTER FIVE

CONCLUSION

5.0 INTRODUCTION

The authors to the book, 'The Law of Rescission', writing the preface state:

Rescission is complex not least because it straddles the jurisdictional divide between the common law and equity and because it can involve both personal and proprietary rights. Some of the most fundamental problems to which these dualities give rise have never been resolved. Parallel and inconsistent lines of authority have been decided in apparent ignorance one of the other, the cases never having been collected together and analysed systematically.⁶²

Thus, as has been shown in the preceding chapters, it is imperative that there is guidance on the principles of rescission of contracts. This last chapter will review and summarise the research and will seek to provide a discussion of the findings of the research as well as recommendations.

5.1 STATUS OF THE ZAMBIAN POSITION

Zambia does not have sufficient specific laws or guidelines governing the principles of rescission of contracts. This is evidenced by the way this area of the law is often glanced upon in most decided cases by the Zambian courts. The research has, therefore, sought to discover whether Zambia has sufficient laws to govern this complex and challenging subject. In doing so, a comparative study between Zambia and other common law countries has been made.

The study has utilised a qualitative research paradigm in which it focused on the principles of rescission, a Zambian case study of this subject and a comparative analysis between Zambia

⁶² O'Sullivan, Elliot and Zakrzweski, Preface, vii.

and other common law countries. Data collection has invoked both primary and secondary sources.

5.2 RESEARCH FINDINGS

The study has found that generally the courts rely heavily upon English cases, statutes and textbooks written by English authors and other legal scholars in order to understand the principles relating to rescission of contracts. One major finding that was identified for the lack of a large number of Zambian cases on the subject matter is the aspect of unreported cases. It was shown that in some instances, if a Zambian case is referred to, it is unreported. This makes it difficult for judges, lawyers and legal scholars alike to access information on what the case law states.

Furthermore, the research has shown that two Zambian statutes relate directly to rescission of contracts; the M.A. Cap. 69 and the Apprenticeship Act. English Common law, the doctrines of equity and statutes of England were shown to be applicable in Zambia by virtue of the English Law (Extent of Applications) Act. These are used as a reserve in the event that there is a *lacuna* in the Zambian legislation.

A comparative analysis of Zambia with England showed that unlike England, Zambia has not dealt with this area of the law in depth; and has not established principles and provided various definitions which are of importance to the subject matter. England has dealt with myriads upon myriads of cases. One of the problems identified for the lack of a large number of cases was poverty. It was shown that a large number of the Zambian population live in poverty and therefore, even if they did engage in contracts (minor as they maybe), they would not have the resources to engage in litigation for rescission of contracts in the event of a dispute.

Additionally, it was shown that unlike Zambia, in England, legal scholars have taken time to write legal books on the law of rescission as it applies to England. These books even serve as a source of law in Zambia.

The comparative analysis of Zambia with India brought one major aspect into consideration and that was, the importance of a specific law enacted to deal with contracts and particularly, rescission of contracts. As has been shown, Zambia does not have such a law. Zambia has laws that relate to rescission but that deal only with specific aspects and do not provide a comprehensive guide to the principles of rescission of contracts.

Therefore, the conclusions that can be drawn from the research are that Zambia does not have sufficient legal rules and laws governing the principles of rescission of contracts and that the principles have not been sufficiently adopted either by way of statute, judicial precedent or other sources of law that can provide guidance in the event that parties to a contract wish to rescind the contract under various circumstances.

5.3 DISCUSSION OF FINDINGS

As has been shown under section 5.2, owing to the fact that Zambia relies heavily on English cases, statutes and textbooks, there is need for Zambia to develop its own case law, statutes and legal text books on the subject matter.

Firstly, one problem identified was the aspect of unreported cases. To make access to case law better than the situation prevailing, a better, effective and systematic method of case reporting needs to be invoked so that cases are readily available. In an article on 'The Necessity of Case Law', it was highlighted that without written decisions of court cases in the past, there was the problem of inconsistent justice. As written records of cases began, it became easier for those interested in improving the administration of justice to study those

written records and develop better principles of justice and make them consistent and it became harder to conceal injustice. Written records also, became historical memorials which could be studied and utilised by subsequent generations. It was therefore shown in this article that a study of actual cases could not be done if cases are not published and generally made available. Additionally, published cases provide flesh to general statutory provisions, providing meaning to the terms contained within them and demonstrating their application to specific fact situations.⁶³ Thus, case law is an important source of law which needs to be reported or published because by doing so, it is made readily available.

Secondly, the reliance upon English cases would not arise if the Zambian courts could deal with the principles of rescission of contracts in depth; taking time to establish principles and giving various definitions to terms as they apply to the Zambian context. Certain principles only apply and are best understood depending on the situation or facts obtaining. England for example, is definitely more advanced than Zambia. It is a developed country whereas Zambia is a developing country. Therefore, in as much as contract principles are uniform, the manner in which they will be applied is different. Therefore, judges need to take time to apply these principles according to the Zambian context so that they are able to serve as a guide to subsequent cases.

Thirdly, legal scholars in Zambia need to take time to write textbooks on rescission of contracts. Justice Keane making a speech at the launch of the textbook, 'The Law of Rescission' which explains the law of rescission in England and Wales, called it a *magnum opus*. He states that such a book will be of value to judges and lawyers.⁶⁴ Mulela Munalula writing on textbooks as a source of law states that modern textbooks though not having

⁶³"The Necessity of Case Law," *The Dixieland Law Journal*, accessed April 16, 2012, <http://home.hiwaay.net/~becraft/CaseLaw.htm>.

⁶⁴"Launch of The Law of Rescission- Remarks by Keane JA," *Hearsay: The Journal of the Bar Association of Queensland*.

inherent authority of their own, skilfully compiled are of a very persuasive influence on the courts.⁶⁵ Textbooks are important therefore, and it would be of benefit to Zambia, if there could be works explaining the law of rescission in Zambia and applying the various principles of rescission of contracts in the Zambian context. Such works would require skilled lawyers capable of undertaking research and who have a sound knowledge of the law of their countries.⁶⁶

As was discussed in chapter four, contract law is a very important aspect in our society. It lies at the heart of our system of laws and serves as the foundation of our entire society. It is the cornerstone of market civilisation.⁶⁷ Thus, it ordinarily follows, that rescission of contracts is equally important. It would be of great benefit therefore, if an Act relating to the principles of rescission of contracts could be enacted or better still, a Contract Act that would encompass all aspects of contract law including rescission of contracts as has been done in India. This would serve as an important source of law for judges, lawyers and legal scholars alike as statute is over and above all other sources of law.

Lastly, it was suggested that one of the reasons for the lack of a large number of cases on the principles of rescission of contracts is that a large number of the Zambian population live in poverty. If the standards of living were improved, people would have the resources to engage in litigation. Improvement in the standards of living begins with development; economic development. Thus, there is need for Zambia to develop economically so as to raise the standards of living of the people so that they may have the resources to engage in litigation.

⁶⁵ Munalula, *Legal Process: Cases Statutes Materials*, 90.

⁶⁶ Munalula, *Legal Process: Cases Statutes Materials*, 74.

⁶⁷ Markham, "An Overview of Contract Law by William A. Markham: The extraordinary importance of Contract Law".

5.4 RECOMMENDATIONS

In view of the above conclusions, the following are the recommendations of the author of the research paper:

- (a) It is the recommendation of this research paper that legal scholars and lawyers need to undertake research so as to write textbooks on the principles of rescission of contract or contract law in general in Zambia which could serve as a guide to judges, lawyers and legal scholars alike. This is a mammoth task that requires skilled lawyers capable of undertaking research and who have the knowledge of the law in Zambia.
- (b) It is a further recommendation of this paper that judges need to establish principles relating to rescission of contract as well as define various aspects arising under the principles of rescission of contracts. They ought to do so by applying the principles within the Zambian context.
- (c) It is also a recommendation of this paper, that a Contract Act or similar statute is enacted that encompasses the principles of rescission of contracts or a specific statute relating to the various principles of rescission of contracts. There is therefore, need for highly skilled lawyers who are capable of undertaking research and competent legal draftsmen who are able to translate the result of their research into bills that can later be turned to law.
- (d) There is also, definite need for more cases to be published or reported so that they are readily available to judges, lawyers and legal scholars alike. It is the recommendation of this paper that a more effective and better method of ensuring that all cases are reported be put in place so that they are made readily available. This can be done by having a system that ensures that cases are being recorded but not only recorded but a system that ensures that after being recorded, they are published.

(e) Lastly, it is the recommendation of this paper that there be economic development in Zambia so as to raise the standard of living of the people. This can be effected by better policies being put in place by the Government so as to effect economic development. Through economic development, the standards of living of the people will be raised and thus, they will have the resources to engage in litigation.

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