'Agreements to Agree' – *Pacta de Contrahendo*.

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One of the requirements of a valid contract is Certainty. Certainty requires the terms of a contract to be definite or ascertainable (that is, being capable of being made certain).

For a valid contract to be concluded, the *essentialia* of that type of the contract which the parties wish to conclude must be set out in a certain or ascertainable manner. The *essentialia* of a contract are those terms that identify the type of a contract which the parties are entering into.

For example, the *essentialia* of a contract of sale are; the intention of the parties to purchase and sell, the object to be sold and lastly the agreed purchase price for the object. Whereas, the *essentialia* of a lease agreement are that there must be a thing or property being let for temporary use or enjoyment and a fee as consideration payable by the Lessee. Taking the example of the agreement of lease further, the property to be leased must be sufficiently described and the rent to be paid must be stated and if not, it must be capable of being ascertained by calculating using a given formula or using objective standards agreed to by the parties.

In practice, instead of defining exactly what they want or stating a formula of ascertaining rent, for example, some parties enter into contracts which have provisions stating that certain terms will be agreed upon in the future. These are known as "agreements to agree" or *pacta de contrahendo*. The problem with such clauses is that, at law, they may invalidate the clause in which such a provision appears or even render the entire contract void for vagueness.

The question becomes are agreements to agree enforceable? Before answering this question let us look at this example. A and B agree that they want to enter into a lease agreement. They put the agreement in writing and in the agreement they specify the property that B will lease for his use from A. They also specify that the lease will run for a period of one year. On the issue of the rental amount they agree that the parties will sit together in the future and negotiate in good faith and agree on a rental amount to be payable. The future comes and B refuses to negotiate, but continues to stay in A's property for eight months. Can A go to court and enforce a duty on B to negotiate? Or better yet, can A go to court and sue B for outstanding rental arrears?

The answer to the questions is, as a general rule, no. The courts have held time and again that, as a general rule, agreements to agree are not enforceable. The Supreme Court has had a chance to deal with this issue in the case of ***Hativagone & Another v CAG Farms (Pvt) Ltd &***

Others.[1] Quoting with approval from the case of ***Premier, Free State and Ors v Firedom Free Estate (Pvt) Ltd***, [2] the court held that: *"An agreement that parties will negotiate to conclude another agreement is not enforceable because the absolute discretion is vested in the parties to agree or disagree."*

A court cannot determine what the parties have to agree on.[3] In other words the court cannot enter into an agreement on behalf of the parties. In the *Hativagone case*, the court went on to state that agreements to agree are only enforceable if there is a deadlock breaking mechanism in the agreement.[4] A deadlock breaking mechanism can be in the form of an arbitral clause which provides; for example, that should parties fail to agree on the rental amount, an amount will be determined by the Arbitrator whose decision shall be binding on the parties.[5] If it is a lease agreement the parties can agree, for example, that the rent payable will be the market value of the property as determined by a named real estate company.

Simply put, there is no valid contract where parties agree to leave the essential requirements of the particular contract they are entering into for negotiation at a later stage. This is the same where the parties grant one party an absolute discretion to decide whether or what to perform under a material term.

Drafters of contracts need to be careful and assist the courts in their reluctance to strike down provisions that were intended to have legal effect by trying to put a reasonable degree of certainty in the contracts they prepare.

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[1] (SC 152/14) [2015] ZWSC 42 (15 July 2015).
[2] *Premier, Free State and Ors v Firedom Free Estate (Pvt) Ltd* 2000 (3) SA 413 (SCA).
[3] Joubert v Enslin 1910 AD 6 at 199.
[4] Supra note 1.
[5] Ibid. see also Southernport Development (Pty) Ltd v Transnet Ltd (2) SA 202 (SCA). See also *Southernport Developments (Pty) Ltd v Transnet Ltd* ZASCA 94 2 ALL SA 16 (SCA), and the Australian case of *R & D Construction Group Ltd v Hallam Land Management Ltd,* (2009) CSO H 128.