

# **Consequences of Contracts Concluded by Unassisted Minors: a Comparative Evaluation**

by

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## Summary

It is a general principle of the law of South Africa that an unassisted contract of a minor is unenforceable against the minor. Although it binds the other party, the minor is not bound. The minor will only be bound if the contract is enforced by his guardian, or if the contract is ratified by the child after attaining majority. This implies that the other party is in a rather unfortunate position, since the effectiveness of the contract will remain uncertain until the guardian of the minor decides to enforce or repudiate the contract, or until the minor ratifies it after attaining majority. The other party may not resile from the contract during this interim period.

Should it be established that the contract has failed, the question arises to what extent the parties are obliged to return performances made in purported fulfilment of the contract.

In terms of the law of South Africa, the prevailing view is that these claims are based on unjustified enrichment. However, the extent of these claims differs. In principle, both parties' liability will be limited to the amount remaining in its estate, according to the defence of loss of enrichment. But the application of the defence is subject to an exception that does not apply equally to the parties. Had the other party known or should the other party have known that the enrichment was *sine causa*, yet continued to part with it, he will be held liable for the full enrichment. However, this exception does not apply to the enrichment liability of minors. In other words, whether the minor knew or should have known that the enrichment was *sine causa*, he would still be allowed to raise the defence of loss of enrichment. Furthermore, the rules applicable to minors' enrichment liability applies to all minors, and no scope is left to consider the specific circumstances of each minor.

It is accepted that there are two competing principles relating to minors' unassisted contracts. On the one hand, the law must protect the minor from his immaturity and lack of experience. On the other hand, the law must protect the interests of the other party. It will be seen throughout this study that the determination of how to balance these competing principles is not an easy task.

The key aim of this thesis is to investigate the principles governing the unwinding of unassisted minors' contracts in South Africa. A comparison will be made with the

principles applied in other legal systems, in order to identify similarities and differences in the approaches and, to establish what underlies the differences in the various approaches.

Germany, England and Scotland have been chosen for comparison for various reasons. First, they share some historical roots, and they represent three major legal traditions, namely the civil law, common law and mixed legal systems, of which South Africa also forms part. Secondly, both England and Scotland have experienced recent legislative reform in this regard, which implies that their respective legal systems should be in line with modern tendencies, and consequently they may provide a valuable framework for possible reform in South Africa. In Germany, although mainly regulated by rather older legislation, there have been interesting developments in the determination of consequences of failed contracts.

Hellwege has argued that the unwinding of all contracts should be treated similarly, regardless of the unwinding factor. He has also suggested that in order to prevent the accumulation of risk on one party, and to ensure that the risk is placed on the person who is in control of the object, the defence of loss of enrichment should not be available to any party. His reasoning and suggestions is dealt with in more detail in this thesis.

This study argues that the current strict approach applied under South African law regarding minors' unassisted contracts needs to be re-considered. The current approach is dated and is not in line with modern tendencies and legislation. No proper consideration is given to minors' development into adulthood or personal circumstances of the parties. It is submitted that in the process of re-consideration, some form of acknowledgement must be given to minors' development towards mature adults. It is submitted that this would be possible by introducing a more flexible approach to regulate the enforceability and unwinding of minors' unassisted contracts.

## Opsomming

Dit is 'n algemene beginsel van die Suid-Afrikaanse reg dat 'n kontrak aangegaan deur 'n minderjarige sonder die nodige bystand van sy ouer of voog onafdwingbaar is teenoor die minderjarige. Die minderjarige sal slegs gebonde wees indien die kontrak afgedwing word deur sy voog, of indien die minderjarige self die kontrak ratifiseer nadat hy meerderjarig word. Dit impliseer dat die ander party in 'n ongunstige posisie is, aangesien die werking van die kontrak onseker is totdat die voog besluit om die kontrak af te dwing of te repudieer, of totdat die minderjarige dit ratifiseer nadat hy meerderjarig word. Gedurende hierdie interim periode mag die ander party nie terugtree uit hierdie kontrak nie.

Sou dit bepaal word dat die kontrak misluk het, ontstaan die vraag tot watter mate die partye verplig word om prestasies wat reeds gemaak is, terug te gee.

In terme van die Suid-Afrikaanse reg is die meerderheidsopinie dat hierdie eise gebaseer is op onregverdigte verryking, maar die omvang van die partye se eise verskil. In beginsel is beide partye se aanspreeklikheid beperk tot die bedrag wat steeds in sy boedel beskikbaar is, weens die beskikbaarheid van die verweer van verlies van verryking. Maar die toepassing van die verweer is onderworpe aan 'n uitsondering wat nie op beide partye geld nie. Indien die ander party geweet het of moes geweet het dat die verryking *sine causa* was, maar steeds afstand gedoen het van die verryking, sal hy aanspreeklik gehou word vir die volle verryking. Hierdie reël is egter nie van toepassing op die minderjarige se verrykingsaanspreeklikheid nie. Met ander woorde, indien die minderjarige geweet het of moes geweet het dat die verryking *sine causa* was, en steeds afstand gedoen het van die verryking, sal hy steeds die verweer van verlies van verryking kan opper. Bowendien, die reëls van toepassing op minderjariges se verrykingsaanspreeklikheid is van toepassing op alle minderjariges, en geen ruimte word gelaat om die spesifieke omstandighede van elke minderjarige in ag te neem nie.

Wanneer ons kontrakte aangegaan deur minderjariges sonder die nodige bystand, oorweeg, word dit algemeen aanvaar dat daar twee kompeterende beginsels van belang is. Aan die een kant moet die reg die minderjarige beskerm teen sy onvolwassenheid en gebrek aan ondervinding. Aan die ander kant moet die reg ook die belange van die ander party beskerm. Dit sal deurlopend in hierdie studie gesien

word dat die behoorlike balansering van hierdie twee beginsels nie 'n maklike taak is nie.

Die hoofdoel van hierdie tesis is om die beginsels wat die afdwingbaarheid en ontbinding van minderjariges se kontrakte in Suid-Afrika, wat aangegaan is sonder die nodige bystand van 'n voog, te ondersoek. 'n Vergelyking sal getref word met die beginsels wat in ander regstelsels toegepas word, om sodoende die ooreenkomste en verskille te identifiseer, asook om te bepaal wat hierdie verskille onderlê.

Duitsland, Engeland en Skotland is gekies as vergelykende jurisdiksies vir verskeie redes, naamlik hulle historiese gebondenheid en die feit dat hulle drie groot regstradisies (die kontinentale regstelsel, die gemenerereg en die gemengde regstelsel) verteenwoordig. Bowendien het beide Engeland en Skotland onlangse wetgewende hervorming ondergaan in hierdie sfeer van die reg, wat impliseer dat hierdie regstelsels waarskynlik in lyn sal wees met moderne tendense. Gevolglik kan hulle 'n waardevolle raamwerk skep waarbinne moontlike hervorming in Suid-Afrika mag plaasvind. Alhoewel Duitsland grotendeels nog deur ouer wetgewing geregleer word, het dit ook 'n reeks interessante verwickelinge ondergaan in die bepaling van die gevolge van kontrakte wat misluk het.

Hellwege argumenteer dat die ontbinding van alle kontrakte dieselfde hanteer moet word, ongeag die onderliggende ontbindende faktor. Hy stel ook voor dat om te verhoed dat die risiko op slegs een party geplaas word, en om te verseker dat dit eerder gedra word deur daardie party wat beheer het oor die voorwerp, die verweer van verlies van verryking nie vir enige party beskikbaar moet wees nie. Sy redenering en voorstelle word in meer besonderhede in hierdie studie bespreek.

Hierdie studie argumenteer dat die huidige streng benadering wat in Suid-Afrika toegepas word met betrekking tot kontrakte aangegaan deur minderjariges sonder die nodige bystand van 'n voog, heroorweeg moet word. Die huidige benadering is verouderd en is nie lyn met moderne tendense en wetgewing nie. Bowendien word geen behoorlike oorweging gegee aan minderjariges se ontwikkeling tot volwassenheid nie, en die partye se persoonlike omstandighede word ook nie in ag geneem nie. Daar word argumenteer dat in die proses van heroorweging, 'n mate van erkenning gegee moet word aan minderjariges se persoonlike ontwikkeling. Daar word verder argumenteer dat 'n meer buigsame benadering toegepas moet

word ten opsigte van die regulering van die afdwingbaarheid en ontbinding van hierdie kontrakte.

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## Chapter 1: Introduction

It is a general principle of the South African law of contract that a minor has limited legal capacity.<sup>1</sup> This means that a minor, i.e. someone aged between seven and eighteen,<sup>2</sup> is incapable of entering into a contract without the assistance of his guardian. It is accepted that the reason for this incapacity is the inability of the minor to comprehend fully the effects of contracting with other parties.<sup>3</sup> In exceptional cases, a minor may conclude certain contracts without any assistance, for example an agreement in terms of which he only obtains rights and no obligations, or an agreement in terms of which he will receive a gift.<sup>4</sup>

However, unless these exceptions apply, minors who contract without the necessary consent only conclude a “limping contract”: while the other party is bound by the contract, the minor is not bound.<sup>5</sup> The decision to enforce or repudiate the contract resides with the minor’s guardian. If the guardian decides to enforce it, the other party is obliged to perform, and is therefore bound by the contract.<sup>6</sup> The other party may, however, neither enforce nor rescind the “limping” contract.<sup>7</sup>

Should it be established that the contract has failed, the question arises to what extent the parties are obliged to return performances made in purported fulfilment of the contract.

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<sup>1</sup> See J A Robinson *The Law of Children and Young Persons in South Africa* (1997) 22; De Wet & Van Wyk *Kontraktereg en Handelsreg* 59; L Ing. Coertze “Die gebondenheid van ‘n minderjarige uit ‘n kontrak” (1938) 2 *THRHR* 280 284; D S P Cronjé “Persons” in W A Joubert & J A Faris *LAWSA* 20 (2010) 2<sup>nd</sup> ed Par 210.

<sup>2</sup> S 17 Children’s Act 38 of 2005.

<sup>3</sup> Wessels *Contract* 246.

<sup>4</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A). See also Robinson *Children and Young Persons* 23. A marriage concluded by an unassisted minor may also be invalid, but this usually falls under the topic of family law and will thus not be discussed in this study.

<sup>5</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 13. See further Ch 3.

<sup>6</sup> If the guardian decides to enforce the contract, the minor will be obliged to perform as well.

<sup>7</sup> Boberg *Persons* 800.

In South African law it is generally accepted that this liability is based on unjustified enrichment.<sup>8</sup> Both parties may institute an enrichment action to recover their own performance.<sup>9</sup> However, the extent of these enrichment claims are not the same. In principle, both parties' enrichment liability will be limited to the amount remaining in their estates,<sup>10</sup> according to the defence of loss of enrichment. But the application of this defence is subject to an exception that does not apply equally to the parties. The other party will be liable for full enrichment if it can be proved that he knew or should have known that the enrichment was *sine causa* and subsequently parted with it. In other words, if this is proved he will not be able to rely on the defence of loss of enrichment. The same is not true for minors' enrichment liability. As a result, the other party cannot argue that because the minor knew or should have known that the enrichment was *sine causa*, the minor cannot raise loss of enrichment as a defence.<sup>11</sup> Furthermore, the rules regulating the enrichment liability of a minor apply to all minors under the age of eighteen. No scope is left to consider the specific circumstances of the individual minor.

Universally, the law is faced with two competing principles relating to minors' unassisted contracts. The primary aim of the law is to protect the minor from his immaturity and lack of experience; but the law must also protect the interests of the other party. However, the determination of where to draw the line between protecting the minor from his inexperience and compensating the other party for losses is a complex question.

The key aim of this thesis is to investigate the principles that govern the unwinding of minors' contracts in South African law. To analyse the position in the South African law coherently, a comparison will be made with the principles in other legal systems,

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<sup>8</sup> See Ch 4; De Wet & Van Wyk *Kontraktereg en Handelsreg* 60; Visser *Unjustified Enrichment* 547.

<sup>9</sup> Visser *Unjustified Enrichment* 547.

<sup>10</sup> See Ch 4; Visser *Unjustified Enrichment* 547.

<sup>11</sup> De Vos *Verrykingsaanspreeklikheid* 336 fn 40, 337 fn 43; D Visser "Unjustified Enrichment" in F du Bois Wille's *Principles of South African Law* (2007) 9<sup>th</sup> ed 1041 1050 fn 30.

with a view to identifying a range of possible approaches to this question. Germany, England and Scotland have been selected as a basis for comparison. These countries have been chosen for various reasons. First, they share some historical roots, and represent three major legal traditions, namely the civil law, common law and mixed legal systems, of which South Africa also forms part. Secondly, England and Scotland have both experienced recent legislative reforms regarding minors' contractual capacity, which indicates they may provide a valuable framework for possible reform in South Africa. And in German law there have been interesting recent developments in the field of determining the consequences of failed contracts. By using a comparative method, the thesis aims to highlight relevant underlying principles and practices, and to establish the underlying causes of the differences in approach.

The structure of the thesis is as follows. It draws a basic distinction between contracts entered into by non-fraudulent minors and contracts entered into by fraudulent minors, since the rules applicable to these minors differ.<sup>12</sup> Chapter two focuses on the development of the law relating to the requirements for and nature of minors' contractual liability. Because South African law is rooted in Roman and Roman-Dutch law, a brief historical overview of the position in Roman and Roman-Dutch law is provided. Specific attention is paid to the application of the so-called "benefit rule" and the nature of minors contracts, which have given rise to considerable debate amongst academic writers and the judiciary.

Chapter three discusses the enforceability, repudiation and ratification of minors' unassisted contracts. This chapter deals in more detail with the modern South African law governing these possibilities, and compares it with the approach followed in the other jurisdictions under review.

Chapter four aims to assess the restitutionary remedies arising from the failure of a contract entered into by an unassisted minor. The focus of this chapter is on the extent to which the parties are obliged to return performances made in purported

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<sup>12</sup> Chapters 3 and 4 deals exclusively with the position of the non-fraudulent minor, while Ch 5 deals with the position of the fraudulent minor.

fulfilment of the contract. In South Africa, these restitutionary obligations are brought home under the law of unjustified enrichment. Both parties will be allowed to reclaim their performances with an enrichment action.<sup>13</sup> However, the scope of these claims differs. This chapter discusses the respective claims of the parties. The recent suggestion proposed by Hellwege, namely that the unwinding of all contracts should be treated similarly, regardless of the unwinding factor, is also considered in more detail. Ultimately, this chapter engages in a descriptive study regarding the restitutionary claims of the respective parties in the jurisdictions under review. It also highlights the risks carried by each party when entering into a contract with an unassisted minor, and enquires whether South Africa law should embark on a process of reform. In this regard, certain factors worthy of consideration in such a process are considered.

Chapter five deals with the position of the fraudulent minor. Like the other jurisdictions under review, South African law uses a different set of rules in dealing with the fraudulent minor, compared to other minors entering into unassisted contracts. Although they still require protection against their vulnerability and lack of judgement, it is accepted that their fraudulent behaviour cannot be disregarded. As it becomes evident through the discussion, the basis of liability of the fraudulent minor in South Africa is uncertain. This chapter provides an overview of the solutions which have been put forward to date. Arguments for and against these suggestions are examined. Furthermore, the position of the fraudulent minor in the jurisdictions under review is also discussed.

Chapter six contains the conclusions of this study. These conclusions mainly relate to whether the current position in South African law regarding unassisted minors' contracts is acceptable, and especially whether it is in line with modern trends, and the need for the law to acknowledge a minor's development into adulthood. Possible avenues for reform are considered that would properly acknowledge the need to differentiate more clearly between different types of minors when dealing with the validity and restitutionary consequences of these contracts.

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<sup>13</sup> These claims are, however, limited. Refer to Ch 4 in this regard.

## **Chapter 2: The development of the law relating to the requirements for and nature of minors' contractual liability.**

### **2 1 Introduction**

The South African law regarding minors' contractual capacity is rooted in Roman and Roman-Dutch law.<sup>1</sup> For a proper understanding of how our law deals with these contracts, some insight into its historical background is required. The focus will first be on the requirements for the contractual capacity of minors in Roman law, Roman-Dutch law and South African law, and thereafter the controversial issue of the nature of these contracts will be discussed.

### **2 2 The requirements for minors' contractual liability**

#### **2 2 1 Roman Law**

In Roman law the concept of *familia* (ie the household) was of fundamental importance. The *familia* formed a legal unit which was governed by one person, the *paterfamilias*, who was the head of the household.<sup>2</sup> The *paterfamilias* generally had *patria potestas*, legal power, over his wife, his children, his bondsmen and his slaves.<sup>3</sup> He controlled almost every transaction they participated in. This exclusive control over their lives continued irrespective of their age, as they continued to remain under his parental power as long as he lived.<sup>4</sup> Therefore, children reaching the age of majority could not escape the *patria potestas* of the *paterfamilias* solely based on their becoming of age.<sup>5</sup> Family members who lived under the paternal power of the *paterfamilias* could also not

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<sup>1</sup> Boberg *Persons* 756.

<sup>2</sup> D.1.6.4. He was the eldest living male ancestor of a specific family. See A Borkowski & P du Plessis *Textbook on Roman Law* (2004) 3<sup>rd</sup> ed 113.

<sup>3</sup> D.50.16.195.2.

<sup>4</sup> Gaius *Inst* 1.127.

<sup>5</sup> M Kaser *Roman Private Law* (1980) 3<sup>rd</sup> ed 76.

own anything independently of the *paterfamilias*, since all property acquired by them immediately vested in him.<sup>6</sup> Although the “children-in-power”<sup>7</sup> were free to conclude a marriage and could also have legitimate children,<sup>8</sup> they had no proprietary rights and everything they acquired passed to the *paterfamilias*.<sup>9</sup> These children could contract for themselves after they reached puberty. The *paterfamilias* received the benefits flowing from these contracts, yet the liabilities did not pass to him.<sup>10</sup> Contracting with such a child-in-power was not preferable. The reason is that although the minor was bound in theory, the contract was not enforceable against the minor until he or she became *sui iuris*.<sup>11</sup> The *paterfamilias* was also liable for any delicts committed by any of his children-in-power.<sup>12</sup>

Due to the fact that their system was so patriarchal, which is not the case in South African law, it is not necessary to discuss the Roman position in much further detail. However, Roman law is relevant inasmuch as it introduces certain core constructs, such as various categories of capacity and *in integrum restitutio* as restitutionary remedy. These core constructs shall be discussed shortly.

A number of principles which regulate our current position regarding the capacity of minors are derived from Roman law.<sup>13</sup> As early as the Roman times it was accepted that as a general rule, any sane person had the necessary capacity to enter into a binding contract. Incapacity to contract was therefore an exception to the general rule.<sup>14</sup>

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<sup>6</sup> D.41.1.10.1.

<sup>7</sup> D.1.6.4; D.1.7.1.

<sup>8</sup> Kaser *Roman Law* 307.

<sup>9</sup> D.41.1.10.2.

<sup>10</sup> B W Frier & T A J McGinn *A Casebook on Roman Family Law* (2004) 11.

<sup>11</sup> 11.

<sup>12</sup> D.9.4.1; Gai.4.75-79.

<sup>13</sup> Wessels *Contract* 243.

<sup>14</sup> 225.

The party who alleged the incapacity carried the burden of proving it.<sup>15</sup> This is also the position in modern South African law.<sup>16</sup> However, certain persons are generally incapable of contracting. If it is established that a person falls within one of these categories, such a person will be presumed to be incapable of concluding a valid contract.<sup>17</sup>

Roman law also distinguished between the contractual capacity of men and women. However, this distinction is completely irrelevant in modern South Africa, due to the constitutional equal contractual capacity today,<sup>18</sup> and a discussion of this distinction is therefore unnecessary.

During the early Roman law there were no defined stages of life.<sup>19</sup> Children who were too young to speak had no contractual capacity, while children who could speak enjoyed limited contractual capacity, because they required the assistance of their guardian to impose any duties on themselves.<sup>20</sup> As soon as they reached puberty they enjoyed contractual capacity,<sup>21</sup> subject to the authority their *paterfamilias*.<sup>22</sup>

In Justinian's time the law distinguished between three stages of life regarding the contractual capacity of minors. Persons progressed from being *infantes*, to *impuberes infantia maiores* and finally to *minores*. *Infantes* were persons whom were too young to speak. They had no capacity to act. Justinian justified their incapacity based on their insufficient intelligence to understand the consent required by them.<sup>23</sup> It was a

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<sup>15</sup> 225.

<sup>16</sup> *Nel v Divine Hall & Co.* 1890 8 (SC) 16 18.

<sup>17</sup> Wessels *Contract* 235.

<sup>18</sup> S 9 Constitution of the Republic of South Africa 1996.

<sup>19</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 58.

<sup>20</sup> 58.

<sup>21</sup> 58.

<sup>22</sup> Kaser *Roman Law* 74-76. See discussion above.

<sup>23</sup> *Inst* 3.19.10

presumption *juris et de jure* that an *infans* could not consent to a contract nor bind himself otherwise.<sup>24</sup> They were therefore excluded from any kind of juristic act.<sup>25</sup> The child's tutor could act on the infant's behalf, although the tutor must have done the act himself for the infant to acquire any rights.<sup>26</sup>

The second category, namely the *impuberes infantia maiores* (also known as *pupilli*) were persons above the age of seven and below the age of fourteen.<sup>27</sup> The *pupilli* enjoyed a limited capacity to act. This limited capacity related to the fact that their guardian's approval was required for all their legal transactions whereby the minor received not only rights, but also obligations.<sup>28</sup> It was also required for transactions which resulted in the loss of rights of the *pupilli* or the burdening of their rights.<sup>29</sup> If the guardian consented, the child was bound as if they were *sui juris*.<sup>30</sup> If the guardian's consent was absent, the child was not bound, while the other party was bound.<sup>31</sup> However, the child could acquire rights without the aforementioned assistance of the guardian, provided it improved the child's position.<sup>32</sup>

*Minores* were persons above the age of fourteen but were below the age of twenty five years.<sup>33</sup> In the early times of Roman law, a child who had reached puberty enjoyed contractual capacity and could bind himself by way of contract.<sup>34</sup> As time went by the

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<sup>24</sup> Wessels *Contract* 244.

<sup>25</sup> Kaser *Roman Law* 81.

<sup>26</sup> D.26.7.9.

<sup>27</sup> Gaius *Inst* 1.196.

<sup>28</sup> Gaius *Inst* 3.107; 2.83; 2.84.

<sup>29</sup> Kaser *Roman Law* 81.

<sup>30</sup> Wessels *Contract* 244.

<sup>31</sup> D.29.1.13.29.

<sup>32</sup> Gaius *Inst* 2.83.

<sup>33</sup> R Dannenbring "Oor die minderjariges se handelingsbevoegdheid: Romeinsregtelike grondslae" (1977) 40 *THRHR* 315.

<sup>34</sup> Wessels *Contract* 244.

necessity arose to protect these persons, and the *Lex Plaetoria* was introduced in 200 BC.<sup>35</sup> This allowed the minor to appeal to the praetor in cases where he had been ill-treated during transactions they concluded.<sup>36</sup> The aim hereof was to protect these youngsters against such circumvention.<sup>37</sup> The minor could also ask for the appointment of a curator who would assist him in all transactions. Although they had the necessary capacity to act, they still enjoyed a special form of protection offered by *in integrum restitutio*.<sup>38</sup>

When referring to the required consent of the guardian a few questions arise. These include determining when the guardian's consent must be obtained, what form this consent may take, what degree of knowledge the guardian must have about the contract for consent to be sufficient, and whether the guardian can consent to general terms of the contract, or must have specific knowledge of all the terms of the contract.

In Roman law the consent given by the tutor to a contract of a *pupillus* was known as *auctoritas*.<sup>39</sup> At first this was a formal act of the tutor, yet it became more informal as time progressed. *Auctoritas* could only be given had the tutor been present during the transaction from the beginning to the end.<sup>40</sup> Authorisation could not be given in writing, for example by way of letter, nor could it be (later) approve an agreement concluded at an earlier stage.<sup>41</sup>

The second important construct mentioned above is the remedy known as *restitutio in integrum*. It was originally considered and developed by the praetors of the republican

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<sup>35</sup> 244.

<sup>36</sup> D.4.4.1.

<sup>37</sup> D.4.4.1; D.4.4.7.4.

<sup>38</sup> D.4.4.6 and D.4.4.7.3. See discussion to follow on *restitutio in integrum* as a second important construct.

<sup>39</sup> Wessels *Contract* 245.

<sup>40</sup> D.26.8.9.5.

<sup>41</sup> D.26.8.9.5.

Rome.<sup>42</sup> It involved an exercise of the praetor's *imperium*, which was the sovereign power he shared with the consuls.<sup>43</sup> Such an order for restitution is described in the Digest<sup>44</sup> as follows:

“Under this head, the praetor helps men on many occasions who have made a mistake or been cheated, whether they have incurred loss through duress or cunning or their youth or absence.”

With this remedy the minor could claim restitution for almost any transaction he concluded. This would undo any acts which were found to be unfavourable towards the minor.<sup>45</sup> Restitution resulted in the nullification *ab initio* of existing civil rights and duties which otherwise would have been good in law, valid and enforceable.<sup>46</sup> This was clearly a way by which the praetor interfered with legal relationships. However, it was justifiable by limiting it to special circumstances where there were sufficient grounds of equity to justify setting aside an otherwise valid and legal transaction.<sup>47</sup> This remedy was also available to minors, and relieved them from the consequences of contracts concluded on their behalf by their guardians, during minority, as well as contracts concluded by them with the assistance of their guardians.<sup>48</sup> The aim was to restore the *status quo ante* for both parties to the contract.<sup>49</sup> The minor would be allowed to recover what he or she has lost, together with the fruits thereof, but there rested a reciprocal obligation on

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<sup>42</sup> R Zimmermann *The Law Of Obligations* (1990) 656; Lambiris *Specific Performance and Restitutio in Integrum* 183.

<sup>43</sup> 183.

<sup>44</sup> D.4.1.1. tr Watson *The Digest of Justinian* Vol 1 113.

<sup>45</sup> D.4.4.1; D.4.4.6.

<sup>46</sup> Lambiris *Specific Performance and Restitutio in Integrum* 183.

<sup>47</sup> D.4.1.3.

<sup>48</sup> L R Caney “Minors Contracts” (1930) XLVII SALJ 180 183.

<sup>49</sup> D.4.4.24.4.

the minor to restore what he or she received from the contract.<sup>50</sup> Restitutory remedies will be discussed in further detail in Chapter 4.

## **2 2 2 Roman-Dutch Law**

Roman-Dutch law drew many of its general concepts and principles regarding minors from Roman law.<sup>51</sup> However, there was a shift away from the patriarchal position of Roman law, by doing away with most of the harsh family laws. First, there was no distinction between *pupilli* under fourteen and the *minores* under twenty five. Roman-Dutch law only distinguished between two age groups, namely infants and minors. Secondly, in the context of the law of contract, reaching puberty was also without meaning.<sup>52</sup>

*Infantes* were persons under the age of seven while *minores* were persons above the age of seven and under the age of twenty five.<sup>53</sup> Similar to the position in Roman law, *infantes* were completely without capacity to act. Traditionally *minores* had limited capacity to act. They required the assistance of their guardian to bind themselves contractually. However, the general rule that contracts concluded by unassisted minors were void was not applied without exception. A minor had full capacity to enter into an agreement in terms of which he or she acquired only rights and no obligations.<sup>54</sup> An example of this is where the minor receives a gift by way of acceptance.<sup>55</sup> This acceptance by the minor was regarded as sufficient as long as it did not place a burden on the minor.<sup>56</sup>

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<sup>50</sup> D.4.4.24.4.

<sup>51</sup> Donaldson *Minors* 3.

<sup>52</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 59

<sup>53</sup> Voet 4.4.1.

<sup>54</sup> Voet 26.8.2; 26.8.3.

<sup>55</sup> De Groot *Inleidinge* 1.8.5 tr Lee *The Jurisprudence of Holland* Vol 1.

<sup>56</sup> Wessels *Contract* 259.

It has been heavily debated whether there was a second exception to the general rule, namely that minors who enriched themselves at the expense of another were liable to the extent of the enrichment.<sup>57</sup> Grotius said the following regarding enrichment of minors in his *Inleiding tot de Hollandsche Rechts-geleertheyd*:

*“[M]aar zijn handelinghe by den zelve aengegaen, al waren die oock by eede ghesterckt, buiten rechts-dwanck, als verlaten van de burgerlicke wet, uitgenomen dat sy wel iet mogen bedinghen t’haren voordeel, ende oock aengesproocken moghen werden voor zoo veel sy by de handelinghe verrijckt souden mogen zijn.”* (“[A]ny contract entered upon by minors unassisted, even though confirmed by oath, has no binding force as unknown to the civil law; except that they may stipulate for something to their advantage, and may be sued so far as they may have been enriched by the contract.”)<sup>58</sup>

The idea of enrichment liability of minors is repeated by Grotius at a later stage. He says:

*“In alle handelingen heeft de burgher-wet inghevoert, dat een onmondighe iemand die met hem handelt verbind, ende zelf niet en werd verbonden, anders dan als baet-treckinge ofte misdaed daer by komt.”* (“In all contracts, the civil law has introduced the principle that a person of limited capacity binds another who contracts with him, and is himself not bound, except when he has profited by the contract, or in the case of delict.”)<sup>59</sup>

This rule was said to be based on equity:

*“[D]e billickheid laet niet toe...dat iemand hem zal verrijcken over eens anders schade.”*<sup>60</sup>  
 (“Equity does not permit that one man should be enriched at another man’s expense.”)

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<sup>57</sup> Donaldson *Minors* 19.

<sup>58</sup> De Groot *Inleidinge* 1.8.5 tr Lee *The Jurisprudence of Holland* Vol 1 41-43.

<sup>59</sup> De Groot *Inleidinge* 3.6.9 tr Lee *The Jurisprudence of Holland* Vol 1 337.

<sup>60</sup> De Groot *Inleidinge* 3.30.3 tr Lee *The Jurisprudence of Holland* Vol 1 449.

Furthermore, enrichment was also interpreted more strictly when it came to minors. Enrichment was not found to have taken place had the minor lost or spent what he or she received. However, if they spent it through necessity they could be held liable based on enrichment. On the other hand, other persons of full capacity were enriched by anything enjoyed by them.<sup>61</sup>

This doctrine of enrichment was accepted by other important writers such as Voet, who held that minors would be bound (generally) when and so far as they had been enriched at the loss of another.<sup>62</sup>

This led to the debate in modern South African law as to whether the intention of the Roman-Dutch authorities was to bind the unassisted minor to the contract if it was to his benefit, since he otherwise would have been enriched, or whether the unassisted minor was bound to render restitution of what has been performed, for otherwise he would be enriched. The former option would be an exception to the general rule regarding minors' incapacity to contract, while the latter would not, since the minor would only have to render restitution and would not be bound contractually. This will be discussed in the following section.

The required consent of the guardian in Roman-Dutch law differed from Roman law in many aspects. Similar to the position in Roman law, the guardian had to be present with the minor, because authority given by way of letter or messenger was of no effect.<sup>63</sup> But it was not required that the guardian should be present from the beginning of the transaction until the end of it.<sup>64</sup> The guardian was allowed to approve what had already been completed, or even immediately after the conclusion of the transaction, but before any other independent act had been done.<sup>65</sup> Furthermore, the consent had to be

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<sup>61</sup> De Groot *Inleidinge* 3.30. "Enrichment" will be discussed in detail in Ch 4.

<sup>62</sup> Voet 26.8.2.

<sup>63</sup> Voet 26.8.1.

<sup>64</sup> Voet 26.8.1.

<sup>65</sup> Voet 26.8.1.

expressed, either by way of words or by way of acts.<sup>66</sup> It follows that the mere presence of the guardian during a transaction was insufficient.<sup>67</sup> When the alienation of minor's immovable property was at hand, a court order together with the guardian's consent was required.<sup>68</sup>

### **2 2 3 South African Law**

Many of the fundamental principles of South African law that regulate the position regarding minors and their contractual capacity are derived from Roman-Dutch law. Similar to the position in Roman-Dutch law, the law of South Africa only distinguishes between infants and minors. Infants are persons below the age of seven and have no capacity to act. The ground for their incapacity is accepted to be the absence of sufficient intelligence to understand the effects of contracting with another party.<sup>69</sup> It is also accepted that a minor, who is someone aged seven to eighteen,<sup>70</sup> generally has limited capacity to act; he requires the assistance of his guardian to conclude a valid contract.<sup>71</sup>

The strict rules of Roman law regarding the required consent of the minor's guardian have been revised during modern times. Today, the consent of the guardian may take various forms. The guardian may be present prior to, or during the execution of the agreement, or even afterwards, since the contract entered into by the unassisted minor may be ratified.<sup>72</sup> The consent may also be expressed or tacit.<sup>73</sup> There are various

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<sup>66</sup> Voet 26.8.1.

<sup>67</sup> Voet 26.8.1.

<sup>68</sup> Voet 26.8.5.

<sup>69</sup> Wessels *Contract* 246.

<sup>70</sup> S 17 Children's Act 38 of 2005.

<sup>71</sup> Boberg *Persons* 799.

<sup>72</sup> Christie *Contract* 242.

<sup>73</sup> *Ex Parte Bignaut* 1963 4 All SA 210 (O).

approaches<sup>74</sup> regarding the sufficient consent required from a guardian. However, it has been accepted that it is sufficient if the guardian knows the type of contract which the minor is proposing to enter into and the type of contract in respect of which he is giving his assent.<sup>75</sup> It is not necessary for him to know all the specific terms of the contract.<sup>76</sup>

Once the necessary consent of the guardian (or the High Court) has been obtained, the contract at hand will be enforceable by and against the minor. In other words such a contract will then *prima facie* be valid and enforceable. The guardian will not personally acquire any rights or liabilities under the contract.<sup>77</sup> This means that the other party cannot require that the guardian must perform the minor's obligations in terms of a contract he consented to; the guardian cannot be held liable solely because he consented to the minor's contract. A guardian may only be held liable had the minor acted as his agent.<sup>78</sup>

If an unassisted minor has executed a contract with another party, the minor may enforce the contract if he subsequently obtained the assistance of his guardian, he may ratify it after attaining majority, or it may be repudiated. These possibilities will be discussed in the next chapter.

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<sup>74</sup> *Van Dyk v South African Railways and Harbours* 1956 4 All SA 45 (W); *Ex Parte Makkink and Makkink* 1957 3 All SA 232 (N); *Ex Parte Blignaut* 1963 4 All SA 210 (O); *Caney* 1930 SALJ 182.

<sup>75</sup> This view was followed in *Ex parte Makkink and Makkink* 1957 3 All SA 232 (N).

<sup>76</sup> There appears to be a statutory exception to the general rule that reads that if a minor's guardian has consented to his contract, such a contract will be valid and enforceable. According to the Administration of Estates Act 66 of 1965, the consent of a guardian with regard to the alienation of the minor's fixed property or the mortgaging thereof, is by itself insufficient. In such a case the consent of the Court is also required. If the guardian of the minor acts unreasonably providing the required consent, the High Court may be approached in order to obtain the necessary consent, as the High Court is regarded as the upper guardian of all minors. For a detailed discussion in this regard, see Christie *Contract* 243.

<sup>77</sup> Christie *Contract* 242.

<sup>78</sup> *Caney* 1930 SALJ 181.

As explained earlier, during Roman-Dutch law a minor could incur liability if the minor had been enriched by an unassisted contract.<sup>79</sup> However, there appears to be uncertainty whether the references to enrichment indicate that the unassisted contract is enforceable against the minor when he benefits from it, or whether it indicates that such a contract is invalid and warrants restitution. The rule that was originally followed in case law such as *Gantz v Wagenaar*,<sup>80</sup> is that a minor is not bound by a contract if it lacks the required consent of his or her guardian. As time went by the enrichment liability of unassisted minors was interpreted to rather indicate that the contract is enforceable, because the minor would otherwise be enriched. As a result, this interpretation became known as the “benefit theory” in South African law.

In the case of *Nel v Divine Hall & Co*<sup>81</sup> the concept of the benefit theory was introduced.<sup>82</sup> The defendant, while being a minor, bought certain goods from the plaintiff without the necessary assistance from her guardian. These goods mostly consisted of clothing items. At a later stage when she got married, the defendant gave half of the goods to her sister. However, these goods were never paid for. When action was instituted against her in the magistrate’s court for payment for the goods delivered and sold to her, she raised the defence of minority. The plaintiff’s attorney referred to the works of Grotius<sup>83</sup> and other case law<sup>84</sup> to assist him in claiming that when a minor benefits from the contract, liability is attached to the minor, and that in this case the contract did in fact benefit the defendant.

The question that had to be answered was whether a person of full age can raise the defence of minority for goods purchased during his minority, without a guardian’s

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<sup>79</sup> Donaldson *Minors* 19; De Groot *Inleidinge* 3.48.10; Voet 26.8.2.

<sup>80</sup> 1828 1 Menz 92; See also *Riggs v Calff* 1836 3 Mentz 76 and *Groenwald v Rex* 1907 TS 47.

<sup>81</sup> 1890 8 SC 16.

<sup>82</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 61.

<sup>83</sup> De Groot *Inleidinge* 3.1.26 and 3 .6 .9.

<sup>84</sup> *Auret v Hind* 1884 4 GDC 283.

assistance, if the goods are found to be for his benefit. The court referred to the following Rescript of Antonius Pius as possible authority for the proposition that the minor's benefit may impact his contractual liability:

“Since you yourself admit that the contract was entered into with Zenodora before she became of age and it could not be proved to the praetor that she had been enriched by means of that contract, you must understand that she has properly obtained a *restitutio in integrum*.”<sup>85</sup>

De Villiers JA also held that he does not understand the phrase “that she has been enriched” to mean merely that she has had the best of the bargain, but that, *considering the position in life and the circumstances of the case, the contract was for her benefit*.<sup>86</sup> (My emphasis) He added that he believes this is how Voet<sup>87</sup> understood it, too.<sup>88</sup>

This proposed rule can therefore be formulated as follows: minors who enter into a contract without the necessary assistance of their guardian will be bound by the contract if the contract as a whole was to their benefit.<sup>89</sup> The contract would then be valid and enforceable against both parties. The minor could not use his minority as a defence to escape liability.<sup>90</sup> The burden of proving that an obligation incurred by the minor was beneficial to him rested upon the person who sought to enforce the obligation.<sup>91</sup>

For a long time this idea of De Villiers JA was followed in case law such as *Vogel v Greentley*.<sup>92</sup> In this case the respondent, a minor representing to be of age, had

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<sup>85</sup> *Nel v Divine Hall & Co.* 1890 8 (SC) 16 18.

<sup>86</sup> 18.

<sup>87</sup> 4.4.13 and 26.8.2.

<sup>88</sup> *Nel v Divine Hall & Co.* 1890 8 (SC) 16 18.

<sup>89</sup> In other words, there should be no corresponding disadvantage to the minor's side.

<sup>90</sup> *Lee Roman-Dutch Law* 46.

<sup>91</sup> *Nel v Divine Hall & Co.* 1890 8 (SC) 16 18.

<sup>92</sup> 1903 N.L.R. 252.

contracted with a company, Vogel and Co. in England. Included in this contract was a clause forbidding the minor from carrying on, assisting or being directly or indirectly involved in any other business similar to that of the applicant. The contract with the applicant was presumably for his benefit, and he served under it for approximately one year, until he breached the restraint of trade clause. This case was an application for an order interdicting him from carrying on his business as prohibited by the applicable clause. The respondent based his defence on his minority, whilst the applicant claimed the contract was for the benefit of Greentley, and the respondent's minority was accordingly irrelevant. The court finally held the following:

“If a minor enters into a contract which is for his benefit, he is bound by that contract. It is difficult for me to accept the principle that one of the parties may take advantage of the benefits of that document, and yet not be bound by the onerous conditions contained in that contract.”<sup>93</sup>

In *Silberman v Hodkinson*,<sup>94</sup> Krause J also followed *Nel v Divine & Hall Co*<sup>95</sup> and reiterated the general position regarding minors' incapacity to execute a contract without any assistance. Krause J also held that if the contract is for the benefit of the minor the assistance of the guardian is not required.

“A minor may bind himself by contract in all cases in which and to the extent to which he is enriched thereby, at the expense of another.”<sup>96</sup>

He continued by saying that the term “benefit” should not be narrowly interpreted, and followed an even wider test than that of De Villiers J in *Nel v Divine Hall & Co*,<sup>97</sup>

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<sup>93</sup> 254.

<sup>94</sup> 1927 (T.P.D) 562.

<sup>95</sup> 1890 8 (SC) 16.

<sup>96</sup> *Silberman v Hodkinson* 1927 (T.P.D) 570.

<sup>97</sup> 1890 8 (SC) 16.

indicating that the question to be asked is whether the contract as a whole was for the minor's benefit. (My emphasis) The court added:

"It is clear from the decided cases that 'benefit' is not restricted to a material advantage or quid pro quo."<sup>98</sup>

As a result, it was accepted that if an unassisted contract was to the benefit of the minor, the general rule regarding their contractual ability was not applicable, because the minor would be held liable to the contract. The term "benefit" was also interpreted broadly in case law. Furthermore, it was also accepted that if a contract was beneficial towards the minor at the time of its making, it could not later be repudiated due to the fact that it subsequently became disadvantageous to the minor.<sup>99</sup>

The abovementioned benefit rule was eventually rejected in *Tanne v Foggit*.<sup>100</sup> It was decided that a minor is not bound merely because he benefits from the contract. Instead the court held that the minor is only bound to restore the extent of his enrichment.<sup>101</sup> This means that the minor is bound to restore his enrichment rather than to hold him bound by the entire contract, due to the fact that the minor has been enriched. Tindall JP held that according to him, the test to be used is "the extent to which the minor has been benefited."<sup>102</sup> The sole ground for liability was thus held to be benefits actually enjoyed.

This idea was endorsed by Van den Heever JA in *Edelstein v Edelstein*,<sup>103</sup> where the Appellate Division also finally rejected the benefit rule. In this case the appellant, a minor, married Mr Edelstein in 1913 with the necessary consent of her mother and the

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<sup>98</sup> *Silberman v Hodkinson* 1927 (T.P.D) 570.

<sup>99</sup> 570.

<sup>100</sup> 1938 (TPD) 43.

<sup>101</sup> J Skapinker and N M Barling *The law of Persons through the Cases* (1978) 132.

<sup>102</sup> *Tanne v Foggit* 1938 (TPD) 43 49.

<sup>103</sup> NO 1952 3 SA 1 (A).

constructive consent of her father. But when the ante-nuptial contract was executed, only the mother of the guardian assisted her and her father's consent was never obtained. The appellant's husband subsequently passed away, leaving behind quite a large estate. The question arose whether the unassisted minor was bound by the ante-nuptial contract.

It was contended that although the ante-nuptial contract could not *per se* exclude the community of property, the appellant should be bound because it was for her benefit. The court referred to the works of Grotius<sup>104</sup> in this regard. As indicated earlier, Grotius stated that generally a minor cannot assume an obligation, and if he or she does so, such an obligation would be unenforceable. He also mentions two exceptions: first, a minor may validly stipulate for an advantage; secondly, the minor shall be obliged insofar he or she has been enriched.<sup>105</sup> The former refers to cases where the minor contracts to receive a gift or a donation. For these contracts the assistance of the guardian is not required. The latter could suggest that a minor is under an obligation, not to perform, but to make restitution to the other party to the extent that he has been enriched.

The judge held that it appears that it was never the intention that the minor should be bound by the contract whenever it would generally be beneficial for him.<sup>106</sup> The court continued and said that our courts unfortunately followed a misunderstanding of the expression "*quatenus locupletior factus est*".<sup>107</sup> For example in *Nel v Divine & Hall*<sup>108</sup> the court held that this expression should be understood to mean the following:

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<sup>104</sup> De Groot *Inleidinge* 3.1.26; 1.8.5. See 2 2 2 above.

<sup>105</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 12.

<sup>106</sup> 13.

<sup>107</sup> 12.

<sup>108</sup> 1890 (S.C) 16.

“Considering the position in life of the minor and the other circumstances of the case, the contract was for her benefit, and due to this benefit the minor shall be held bound by the contract.”<sup>109</sup>

Van den Heever JA added the following:

“No principle capable of practical and logical application emerges from [these cases]. What standard of measurement is one to adopt in determining whether the contract was for the benefit of the minor?”<sup>110</sup>

The court finally rejected the benefit rule and held it to be “incapable of practical application.”<sup>111</sup> He explained himself as follows:

“The object of the law in regarding the contracts of minors as unenforceable is to protect them against their own immaturity of judgement.”<sup>112</sup>

As a result Van den Heever JA removed the possibility of binding a minor to a beneficial contract entered into without assistance. The question now arises whether this was in fact the correct interpretation of the older authorities, and whether, perhaps, there is possibly a foundation for a benefit rule in South Africa.

The Roman-Dutch texts regarding the enrichment liabilities of minors do seem ambiguous. The confusion appears to be between the inconsistent use of the terms “enrichment”, “benefit” and “profit”. One text that may confuse a reader is by Grotius:<sup>113</sup>

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<sup>109</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 11.

<sup>110</sup> 12.

<sup>111</sup> 12.

<sup>112</sup> 15.

<sup>113</sup> De Groot *Inleidinge* 3.30.3 tr Lee *The Jurisprudence of Holland* Vol 1 449.

“Accordingly minors and others who are not bound by contract, and infants and lunatics who are not bound by delict as such, are none the less bound to make compensation so far as they have been enriched or would have been enriched if restitution were not made.”

This text refers to enrichment liability as understood by Van den Heever.<sup>114</sup> It does not suggest that a minor should be bound to render performance if the contract was beneficial. It only states that the minor may be bound in delict and that they also may be bound to render restitution (compensation) if enrichment has taken place. It does not mention any contractual duty to perform on the minor’s side.

Grotius<sup>115</sup> explains the inability of minors to assume obligations:

“Nevertheless the civil law refuses recognition to obligations of minors, unless based on delict or so far as the minor may have been *profited*.” (My emphasis)

This text refers to obligations in general, and then to the delictual liability of minors. The last few words “or so far as the minor may have been profited” could possibly refer to enrichment liability, but it does not clearly refer to contractual liability, either.

Voet seems to refer to general enrichment liability and does not specifically refer to binding the minor to perform if the contract was a beneficial contract.

“And in general [the minor] can be bound on all causes in so far he has been enriched to the loss of another.”<sup>116</sup>

However, on a comprehensive consideration of the texts dealing with this enrichment liability it becomes clear that other texts in this regard suggest that a minor may be held

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<sup>114</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 25-26.

<sup>115</sup> De Groot *Inleidinge* 3.1.26 tr Lee *The Jurisprudence of Holland* Vol 1 299.

<sup>116</sup> Voet 26.8.2 tr Gane *Commentary on the Pandectas* Vol 4 458.

contractually bound to perform in terms of a beneficial contract. Grotius held the following with regard to contractual liability of the minor in this regard:

“In all contracts the civil law has introduced the principle that a person of limited capacity binds another who contracts with him, and is himself not bound, *except when he has profited by the contract.*”<sup>117</sup> (My emphasis)

This seems to indicate that although the minor is generally not bound by unassisted contracts, if it were beneficial, the minor would be bound by it.

Van Leeuwen’s text also supports this assertion regarding liability:

“But if the wards have *profited* by the transaction *it will hold good...*and indeed be *themselves bound* where it is for their *benefit.*”<sup>118</sup> (My emphasis)

This text refers to binding a minor to perform if the contract was beneficial. The idea of binding the minor to render restitution if enrichment has taken place is not mentioned here.

Therefore, from this discussion it is apparent that the intention of the older authorities regarding the minor’s enrichment liability was not always very clear. As indicated above some texts refer to the minor’s liability to render restitution when enrichment has taken place, while others (such as Van Leeuwen) clearly intended to bind the minor by the contract when the contract was beneficial. Therefore, to hold that there is no ground for such a rule in our law is not exactly true, since there are competing views in this regard. A possible foundation for the benefit rule may be found in Roman-Dutch law, at least by some of the authorities, although the exact extent of the benefit remains uncertain.

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<sup>117</sup> De Groot *Inleidinge* 3.6.9 tr Lee *The Jurisprudence of Holland* Vol 1 337.

<sup>118</sup> Van Leeuwen *RHR* 1.16.8 tr Kotzé *Commentaries on Roman-Dutch Law* Vol 1 135.

It should now be considered whether there is possibly room for such a rule in our law. It must be reiterated that the aim of the law is to protect minors against their immaturity of judgement. However, the law must also protect the interests of the other party. Therefore, a balance must be struck between these competing principles.

Van den Heever JA has identified a problem with the implementation of the benefit rule. He mentions that if the law would apply the benefit rule, it would be difficult to determine the exact scope of the benefit of the minor.<sup>119</sup> He argues that uncertainty will arise regarding the nature of the benefits. Where would the law draw the line? Although this is a valid concern, it is not insurmountable. If proper guidelines are established by which one could measure the benefits received by the minor, such a rule could be implemented. Although this would not be an easy task, it is not an impossible one, either.

Prof Lee<sup>120</sup> suggested a different basis for the liability of a minor with regard to benefits. He recommends that perhaps it should rather be based upon the wider principle that minors may make their condition better without the authority of their tutor, but not worse except with such authority.<sup>121</sup> This is an even stronger basis for allowing such a rule. Although minors' contractual capacity is limited due to their lack of experience and understanding, they are allowed to improve their position without the assistance of their guardian. This is exactly the effect that the benefit rule will have on a minor's position.

It has also been suggested that the English doctrine of necessities whereby a minor may validly contract for necessities, possibly forms part of the South African law of contracts.<sup>122</sup> This suggestion flows from the idea that when someone acquires

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<sup>119</sup> This was also the comment of Van den Heever JA in *Edelstein v Edelstein* NO 1952 3 SA 1 (A). 14.

<sup>120</sup> Roman-Dutch law 414.

<sup>121</sup> See also *Tanne v Foggit* 1938 (TPD) 43.

<sup>122</sup> Boberg *Persons* 780.

necessaries by way of contract, it is also accepted to be beneficial to him or her.<sup>123</sup> But due to the abolition of the benefit rule by De Villiers JA in *Edelstein v Edelstein*,<sup>124</sup> this suggestion, too, is not satisfactory. Spiro stated the position as follows:

“There is no specific liability of a minor for necessaries in South African Law. A minor’s liability for unjustified enrichment extends to whatever, whether necessaries or no necessaries, has been received and is still in existence at the time of the commencement of the proceedings.”<sup>125</sup>

If the benefit rule is endorsed in South Africa, the application of the doctrine of necessaries may be re-considered, too. Effectively, this would contribute to a proper balance in the respective parties’ positions.

It is accepted that by allowing such a benefit rule in South Africa would require careful planning to provide a proper standard of measurement to ensure that it functions properly. However, if proper guidelines are established and some discretion is left to the courts, this rule can be implemented successfully. As indicated earlier, this rule is not without any authority; there are some Roman–Dutch authorities who support it.<sup>126</sup> Reintroducing this rule would also promote fairness towards the other contracting party. As a result, it is submitted that the possibility of the application of this rule should be re-considered.

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<sup>123</sup> 780.

<sup>124</sup> NO 1952 3 SA 1 (A).

<sup>125</sup> E Spiro *The Law of Parent and Child* (1985) 4<sup>th</sup> ed 166.

<sup>126</sup> Van Leeuwen *RHR* 1.16.8.

## 2 3 The nature of unassisted minors' contractual liability

### 2 3 1 Introduction

The nature of the minor's unassisted contract has been a controversial topic for many years. The process of classifying these contracts has not been easy. A void contract has been defined as follows:

"[It is] devoid of any legal effect. It is as though no contract had been made between the parties. Neither party can uphold the contract, and either is free to disregard its existence. It cannot be ratified nor can it become valid by lapse of time."<sup>127</sup>

A voidable contract, on the other hand, is *prima facie* valid.<sup>128</sup>

"It is as good as between the parties to it and as to third persons, but one of the parties may, upon good cause shown, ask the court to declare it void."<sup>129</sup>

The current position in our law regarding contracts concluded by the unassisted minor appears to be as follows: the minor's agreement only creates a natural and unenforceable obligation while the other party's obligation is a civil one.<sup>130</sup> Viewed from the minor's point of view, the contract will be voidable at the guardian's option. From the other party's point of view it can neither be enforced nor be said to be voidable.<sup>131</sup> The other party is bound by the decision of the guardian, whatever this decision may be. Therefore, the classification of contracts concluded by the unassisted minor has always been difficult.

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<sup>127</sup> Wessels *Contract* 209.

<sup>128</sup> 208.

<sup>129</sup> 208.

<sup>130</sup> Voet 26.8.4, 44.7.3 ; Boberg *Persons* 799; Visser *Unjustified Enrichment* 547; Lee *Roman-Dutch Law* 47; *Edelstein v Edelstein* NO 1952 3 All SA 20 (A) 27

<sup>131</sup> J A Robinson *The Law of Children and Young Persons in South Africa* (1997) 34.

### **2 3 2 Roman Law**

In Roman law the distinction between “void” and “voidable” contracts was unknown. As indicated earlier, during early Roman law the minor who had reached puberty could validly conclude a contract. As time progressed the praetor introduced the *Lex Plaetoria* to assist minors in contracts concluded by them. With this remedy the minor could appeal to the praetor had he been deceived during a transaction.<sup>132</sup> If the minor had a curator assigned to him, he could not validly execute a contract without the consent of the curator. However, if no curator was appointed for him a contract concluded by the unassisted minor would be valid, although he was allowed to apply for *restitutio in integrum* if he had been disadvantaged during the transaction.<sup>133</sup> But in none of the texts would these mechanisms regulating the validity and enforceability of contracts be described in terms of making the minor's contract “void” or “voidable”.<sup>134</sup>

### **2 3 3 Roman-Dutch Law**

The Roman-Dutch authorities such as Grotius,<sup>135</sup> Van Leeuwen<sup>136</sup> and Voet<sup>137</sup> have referred to the unassisted minor's contract as being “void” or “invalid”.<sup>138</sup> The classification of these contracts as “void” may possibly be due to the absence of a proper distinction and between “void” and “voidable” during the Roman-Dutch law.<sup>139</sup> However, the classification of these contracts as “void” seems too simplified. For example, where it has been referred to as “void”, it would only have limited application because the minor could incur contractual liability had he or she benefitted from an unassisted contract. The other party would also be bound had the minor decided to enforce the contract with the consent of his or her guardian (or otherwise after attaining majority). As a result, “void” does not describe the nature of these contracts accurately.

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<sup>132</sup> D.4.4.1.

<sup>133</sup> D.4.1.1.

<sup>134</sup> J E Du Plessis *Compulsion and Restitution: A Historical and Comparative Study of the Treatment of Compulsion in Scottish Private Law with particular Emphasis on its relevance to the law of restitution or unjustified enrichment* (Stair Society 2004) 13 fn 67.

“Void” simply means the contract does not bind at all, and clearly that is not the case here, since only the part that imposes possible obligations on the minor may be void.<sup>140</sup> Also, if it is referred to as “invalid”, this would only apply towards the minor, seeing that the other party is in fact liable and cannot escape his or her liability.<sup>141</sup> Grotius<sup>142</sup> states it clearly

“In all contracts, the civil law has introduced the principle that a person of limited capacity binds another who contracts with him, and is himself not bound.”

### **2 3 4 South African Law**

At first the classification of these contracts as “void” was followed by the courts in South Africa. In *De Beer v Estate de Beer*<sup>143</sup> the plaintiff, a minor girl, married with the consent of her father, who was her legal guardian. One day prior to her marriage the plaintiff and her husband executed an ante-nuptial contract without the assistance of the plaintiff’s father. After the plaintiff’s husband passed away, she approached the court for an order declaring the ante-nuptial contract to be null and void, based on the lack of assistance from her guardian.

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<sup>135</sup> De Groot *Inleidinge* 3.48.10 tr Lee *The Jurisprudence of Holland* Vol 1.

<sup>136</sup> Van Leeuwen *CF* 1.4.43.2.

<sup>137</sup> 4.4.47.

<sup>138</sup> Boberg *Persons* 830 Fn 211.

<sup>139</sup> J D Van der Vyfer “Kontrakteregtelike Kompetensie van ‘n Minderjarige” in D J Joubert *Petere Fontes LC-Steyn Gedenkbundel* (1980) 195 217.

<sup>140</sup> Caney 1930 *SALJ* 188.

<sup>141</sup> De Groot *Inleidinge* 1.8.5 and 3.48.10.

<sup>142</sup> De Groot *Inleidinge* 3.48.10 tr Lee *The Jurisprudence of Holland* Vol 1 505.

<sup>143</sup> 1916 C.P.D 125.

The court referred to the works of Grotius<sup>144</sup> and indicated that all obligations entered into by unassisted minors (with the exception insofar they are beneficial), are invalid. Minors need not first seek relief by way of *restitutio in integrum*. As a result, the court concluded that the ante-nuptial contract between the plaintiff and her husband is null and void, and declared their marriage to be in community of property. This classification was continued in future case law such as *Tjollo Ateljees (Eins) Bpk v Small*<sup>145</sup> where the Appellate Division held that a contract entered into by an unassisted minor is “*ipso iure* void”.

Modern writers do not support the classification that unassisted minors' contracts were “void”, for the reasons mentioned above, i.e. that it would only have limited application because the minor could enforce it with the consent of the guardian. The minor was also bound had he benefitted from the contract.<sup>146</sup> Therefore, a second suggestion has been to classify it as “voidable”. Spiro<sup>147</sup> supports this classification:

“Any transaction which is not for the benefit of the minor or which prejudices the minor, is voidable, either at the instance of the parent during the subsistence of the minority, or at the instance of the minor him-or herself, on attaining majority.”

Wessels<sup>148</sup> also classifies these contracts as voidable and says “...contracts both executory and executed are voidable at the instance of the minor.”

This classification has also been supported by case law. In *Du Toit v Lotriet*<sup>149</sup> the plaintiff (a minor at that stage) entered into a lease agreement with the defendant,

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<sup>144</sup> De Groot *Inleidinge* 1.8.5; 3.1.26.

<sup>145</sup> 1949 1 SA 856 A 96.

<sup>146</sup> *Nel v Divine and Hall* 1890 8 (SC) 16; *Vogel v Greentley* 1903 N.L.R. 252.

<sup>147</sup> E Spiro “Minor and the Unborn Fideicommissaries and the Alienation of Fiduciary Property” (1952) 69 SALJ 71 76.

<sup>148</sup> Wessels *Contract* 268.

<sup>149</sup> 1918 OPD 99.

together with an option for the defendant to purchase the farm during the currency of its lease. This agreement was concluded without the necessary consent of the plaintiff's father, and the plaintiff therefore approached the court, requesting that the court declare it null and void with the effect that the defendant be removed from the plaintiff's property where he was currently residing. The question arose whether the lease was *ipso jure* void or only voidable.<sup>150</sup>

The court referred to Thompson's *Institutes of the Laws of Ceylon*, where the author stated the following:

"A minor, having in law no free will, cannot make a contract except for profit alone, so that a contract by a minor to his own prejudice- as for example the sale of his reversion (...) – is void; but the contracts which are necessary, as for his food, etc. are valid. *Contracts which are neither certainly to his prejudice nor necessary for his benefit are neither void nor absolutely valid, but are voidable.*"<sup>151</sup> (My emphasis)

It was held that the correct rule seems to be that contracts executed by the unassisted minor are voidable, unless it can be proved to be beneficial towards the minor.<sup>152</sup>

When referring to a "voidable" contract it implies the contract would be valid and binding until set aside. However, when a party of full age contracts with an unassisted minor, the fully capacitated party is bound by a civil obligation, while the minor is not bound by it at all.<sup>153</sup> Consequently, classifying these contracts as "voidable" does not seem appropriate either, because the other party is bound by the contract and it is not voidable at his option. It must also be remembered that this obligation will validly

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<sup>150</sup> 114.

<sup>151</sup> 115.

<sup>152</sup> 116.

<sup>153</sup> Boberg *Persons* 830 fn 213.

support a novation or a suretyship<sup>154</sup> agreement and it will therefore also not be voidable in this regard.

Another suggestion has been to classify it as “null and void in the one direction, and valid and enforceable in another.” This was suggested in *Edelstein v Edelstein*.<sup>155</sup> The court referred to Voet<sup>156</sup> who held the following:

“From the principles of the law, it is clear that a minor who contracts without the assistance of his guardian, can render others under a obligation to himself, but does not himself become obliged to them... On the minor’s side a contract entered into without the assistance of his or her guardian, is *ipso iure* null and void.”<sup>157</sup>

Unfortunately this, too, is not satisfactory. Turpin<sup>158</sup> adds his opinion in this regard by saying that

“to this extent every contract that is voidable by one of the parties to it is void in one direction of its operation and valid in another.”

The abovementioned classification amounts to being “voidable” as already discussed. Therefore, the same criticism raised with regard to “voidable” may be raised against this suggestion.

Another suggestion regarding the nature of the liability is that a contract of an unassisted minor is “voidable at the minor’s option”.<sup>159</sup> However, this classification does not properly describe these contracts either, since it also refers to the contract being

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<sup>154</sup> Christie *Contract* 245.

<sup>155</sup> NO 1952 3 SA 1 (A) 10.

<sup>156</sup> Voet 27.6.1.

<sup>157</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 11.

<sup>158</sup> C C Turpin “Void and Voidable Acts” (1955) 72 *SALJ* 58 69.

<sup>159</sup> Boberg *Persons* 831.

voidable which is, as already discussed, not the case. For this reason, to suggest that he must perform to escape liability is untrue.

The same can be said about the suggestion by Jenet J, namely that it is the “minor’s special privilege to freely decide not to be bound.”<sup>160</sup> The minor does not have to decide not to be bound, since he is not bound from the start.

“Unilaterally void” has been suggested by Honoré<sup>161</sup> to be the most appropriate classification. Once again, this formulation seems inaccurate. Reinecke<sup>162</sup> explains why this is evidently unacceptable:

*“Die betekenis van hierdie standpunt (‘unilaterally void’) is dat waar daar normaalweg minstens twee verbintenisse uit ‘n meersydige kontrak voortspuit, daar in geval ‘n minderjarige wat nie bygestaan is nie, een van partye tot die kontrak is, slegs een verbintenis voortspuit. Met ander woorde, daar ontstaan geen verbintenis uit die ooreenkoms ingevolge waarvan die minderjarige skuldenaar en die meerderjarige skuldeiser is nie. Hierdie standpunt sou dus ook meebring dat ‘n kontrak ingevolge waarvan ‘n minderjarige net verpligtinge opdoen maar geen regte verkry nie, geheel en al kragteloos is. Ook hierdie benadering is egter nie bevredigend nie, want alhoewel die minderjarige nie vir prestasie aangespreek kan word nie, ontstaan daar tog “iets” wat die grondslag vir ‘n borgkontrak kan bied, wat genoeë kan word, wat sekerlik gesedeer kan word, wat bekragtig kan word en wat boonop nog voldoen kan word.”*

Reinecke finds the answer in merely accepting that the minor’s obligation is a natural obligation,

*“in die sin dat daar wel ‘n skuld bestaan dog geen aanspreeklikheid nie.”<sup>163</sup>*

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<sup>160</sup> *Opperman v Labuschagne* 1954 2 SA 150 E 158A.

<sup>161</sup> A M Honoré “Degrees of Invalidity” (1958) 75 *SALJ* 32 35.

<sup>162</sup> M F B Reinecke “Minderjariges se kontrakte: ‘n Nuwe gesigspunt” (1964) 27-28 *THRHR* 133 136.

<sup>163</sup> 137.

He adds that a natural obligation also forms the basis for a suretyship agreement and a novation.<sup>164</sup> Although this is true, this poses another hurdle for labelling these contracts. An enrichment action is available for the minor who has performed under an unassisted contract, with which the minor may recover performance.<sup>165</sup> Such an action is incompatible with the notion that there is still a legal ground in the form of a natural obligation underlying any transfer made by the minor. Also, the obligation of the other party is a civil obligation, which allows a right to claim performance and may be enforced in court. Therefore, although it is true that a minor's unassisted contract gives rise to a natural obligation, the contract as a whole cannot be labelled as a natural obligation.

Coertze<sup>166</sup> suggests the contract is "valid, though in a rather special sense."<sup>167</sup> He explains himself as follows:

*"As 'n minderjarige 'n kontrak sluit sonder toestemming van sy voog, dan is daar 'n geldige kontrak, maar wat tog mank gaan in die voege dat die minderjarige geen aanspreeklikheid het nie, maar wel skuld."*<sup>168</sup>

Another possible solution suggested by Spiro<sup>169</sup> has been to say that the contract is "inchoate". This classification clearly implies that there is a need for further action in order to create a contract. Spiro<sup>170</sup> explains it by saying the following:

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<sup>164</sup> 137.

<sup>165</sup> G F Lubbe and C M Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1998) 3<sup>rd</sup> ed 9.

<sup>166</sup> L Ing. Coertze "Die gebondenheid van 'n minderjarige uit 'n kontrak" (1938) 2 *THRHR* 280.

<sup>167</sup> Boberg *Persons* 831.

<sup>168</sup> Coertze 1938 *THRHR* 293.

<sup>169</sup> Spiro *Parent and Child* 108.

<sup>170</sup> E Spiro "Antenuptial Contract of Unassisted Minors" (1952) 69 *SALJ* 430 434.

“For the contract, although not yet complete, is ordinarily capable of growing into a legal relationship or into a complete contract, depending on whether the facts fall under any of the instances set out above.”

Boberg justly criticizes this suggestion by explaining that although it is correct to say that “something more” is required to enforce the minor’s obligation, namely ratification, it is not the contract that is inchoate, as suggested by Spiro.<sup>171</sup> He suggests that it is rather the obligation which is inchoate, for the minor’s obligation “has all the attributes of completeness.” It also imposes obligations on both the minor and the other party, though the minor’s obligation is unenforceable.<sup>172</sup>

Kahn, on the other hand, finds the description “unilaterally inchoate” to be more correct.<sup>173</sup> He supports this by reminding us that although the contract is not binding on both parties, it is, in fact, binding on the other party, and that it can still be ratified by the minor (after attaining majority), or during minority but by his guardian.<sup>174</sup> Furthermore, he adds that if his description is accepted, a further classification of such contracts is required, namely that of “bilaterally” or “multilaterally inchoate”<sup>175</sup> and “unilaterally inchoate”.

Boberg finds “enforceable at the minor’s option” to be most suitable.<sup>176</sup> He explains this as follows:

“It is not the case that the contract is not enforceable only against the other party. Although the minor can compel the other party to perform and not *vice versa*, a minor who exercises this power of enforcement makes his or her own obligation enforceable. Both obligations are

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<sup>171</sup> Boberg *Persons* 832 ff 224.

<sup>172</sup> Spiro 1952 *SALJ* 434.

<sup>173</sup> E Kahn “Law of Parent and Child: Book Review” (1959) 76 *SALJ* 343 345.

<sup>174</sup> 345.

<sup>175</sup> For donations between spouses.

<sup>176</sup> Boberg *Persons* 834.

therefore enforceable or unenforceable: the contract stands or falls in its entirety, and the minor has the right to decide which it shall be. It follows that the (whole) contract is enforceable at the minor's option."

But once again it should be reiterated that the minor's obligation still supports an undertaking for surety or a novation. In other words, there is something that arises which is sufficient to support suretyship agreements or a novation. Therefore, this suggestion seems problematic, too.

Van den Heever JA pointed out the danger attached to this kind of classification in *Edelstein v Edelstein*<sup>177</sup> by saying

"It is unsafe to classify transactions into those which are voidable and those which are void, and then to draw conclusions from the classification."

Donaldson therefore suggests we do away with the difficult process of classification, and resolve it by accepting such contracts to be *sui generis*.<sup>178</sup>

There appears to be much merit in the risk discussed by Van den Heever JA, *supra*. Categorising obligations into the most appropriate category is a difficult task. Placing it in the wrong category may lead to unwanted consequences flowing from it, or erroneous conclusions drawn from it. It is clear from the discussion above that the task of categorising the contract of an unassisted minor into its correct category has been a struggle from the very start. None of the suggested categories escaped criticism, either. Roman law is of no help in this regard, because the basic distinction between "void" and "voidable" was unknown in Roman law. Neither does Roman-Dutch law provide any clarity. Modern writers have yet to find a category with which they concur.

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<sup>177</sup> NO 1952 3 SA 1 (A) 15. The contract limps in the sense that it is stronger on the one side than the other.

<sup>178</sup> Donaldson *Minors* 14.

Consequently, it is suggested that based on the various problems and obstacles which constantly arise with regard to the classification of contracts of unassisted minors, and the failure of numerous previous attempts such as the abovementioned suggestions, it is preferable to regard these contracts as being *sui generis*, as suggested by Donaldson.

## 2 4 Conclusion

A number of the basic principles of our law regarding minors' contractual capacity are derived from Roman and Roman-Dutch law. Although Roman law had harsh rules regulating the family, a few constructs are of significant importance for our law. Roman law introduced the concept of capacity, which is of great importance to us today. In the later development of Roman law, three stages of life regarding the contractual capacity of minors were identified.<sup>179</sup> This also formed the basis for Roman-Dutch law (and consequently our law) regarding minors' contractual capacity. Minors required the *auctoritas* of their tutor to validly conclude a contract. For the consent to be sufficient the tutor had to be present during the transaction, from the beginning to the end.

Furthermore, the remedy of *restitutio in integrum* was introduced and developed by the praetor of Roman law.<sup>180</sup> This remedy allowed the minor to recover what they had lost in a contract in which they were deceived. This remedy is still relevant in modern law.

Roman-Dutch law derived many rules from Roman law, but it rejected the strict laws which regulated the family. Furthermore, it only distinguished between two age groups, and puberty was irrelevant with regard to contractual capacity. Minors required the assistance of a guardian to validly conclude a contract. Contrary to Roman law, it was not required that the guardian should be present from the beginning of the transaction until the end of it.<sup>181</sup> However, it was required that it be expressed in some way or

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<sup>179</sup> Wessels *Contract* 243.

<sup>180</sup> Lambiris *Specific Performance and Restitutio in Integrum* 183.

<sup>181</sup> Voet 26.8.1.

another. Furthermore, it was an exception to an unassisted minor's general contractual inability that minors were liable to perform had they been enriched at the expense of another.<sup>182</sup>

The position regarding minors and their contractual liability in modern South African law may be summarised as follows: the general rule, namely that minors cannot incur contractual liability without the necessary assistance of their guardian, still applies. However, under the law of South Africa the assistance of the guardian may take on many forms. These include being present and consenting at the execution of the contract, prior to authorization and also ratification.<sup>183</sup> There are also a few exceptional types of contracts which the minor is fully capacitated to conclude without the assistance of his or her guardian.<sup>184</sup> These include contracts whereby the minor will improve his own position without imposing any duties on themselves.<sup>185</sup> An example of this is when the minor receives a gift. The statutory exceptions to the abovementioned rule also still stand.<sup>186</sup> The benefit rule as discussed above has been done away with, and the idea that unassisted minors may be held liable for general benefits derived from the unassisted contract has been rejected. So, too, has the English doctrine of necessities not been accepted into the law of South Africa. The only available remedy for the other party after contracting with an unassisted minor is to claim restitution on the grounds of unjustified enrichment.<sup>187</sup>

All of the suggestions relating to the classification of the nature of minors' unassisted contracts have suffered criticism and modern writers have not been able to concur regarding the most suitable category in which to classify these contracts. Due to the continuous problems that arise in this process and the risk attached to categorising

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<sup>182</sup> De Groot *Inleidinge* 1.8.5.

<sup>183</sup> Christie *Contract* 242.

<sup>184</sup> Van der Vyfer "Kontrakteregtelike Kompetensies" *Petere Fontes Gedenkbundel* 200.

<sup>185</sup> J Heaton *Die Suid-Afrikaanse Personereg* (2008) 3<sup>rd</sup> ed 101.

<sup>186</sup> For a complete discussion on these exceptions, see Boberg *Persons* 781- 785.

<sup>187</sup> De Groot *Inleidinge* 1.8.5. This remedy will be discussed in detail in Ch 4.

contracts in the wrong category, I have suggested that we accept these contracts for being *sui generis*, as also suggested by Donaldson.

The decision to enforce, repudiate or ratify the unassisted contract rests with the minor.<sup>188</sup> These options will be discussed and compared to other jurisdictions in the following chapter.

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<sup>188</sup> Or his guardian, in the case of enforcing it.

## **Chapter 3: Enforceability, ratification or repudiation of the unassisted contract: a comparative analysis**

### **3 1 Introduction**

Once a minor has entered into an unassisted contract with another party the possibilities arise of enforcing, ratifying or repudiating the unassisted contract. The decision as to which of these possibilities to follow rests solely with the guardian of the minor, while the minor may also ratify the contract after attaining majority.<sup>1</sup>

This chapter will deal in more detail with the modern South African law governing these possibilities, and then compare it with the approach in the jurisdictions under review, namely England, Scotland, and Germany. By using a comparative method I aim to highlight relevant principles and practises, and establish what possibly underlies the differences in approaches.

It will be seen below that minors' contractual capacity is dealt with rather differently in the various jurisdictions. However, despite these differences the common principle emerges that while minors require some form of protection due to their immaturity in judgement, it is also accepted that the interests of the other contracting party warrant protection. Therefore, some form of balance between these two competing principles is required to ensure both parties' interests are protected.

It will be also be observed below that the current position in South Africa rests mainly on the objective that minors require special protection, based on their immaturity of judgement and lack of experience.<sup>2</sup> This includes protection against possible exploitation by the other contracting party, acquiring things that they possibly do not need, vulnerability regarding the exact consequences that will flow from the contract,

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<sup>1</sup> Boberg *Persons* 799.

<sup>2</sup> R A Jordaan & C J Davel *Law of Persons* (2005) 4<sup>th</sup> ed 66.

the risks inherent in a contract, and many other factors.<sup>3</sup> Once the contract has been enforced or ratified, it will be valid and both parties will be obliged to perform.<sup>4</sup> This position cannot be deviated from in specific circumstances, for example if the contract happens to benefit both parties. If the guardian repudiates the contract, the other party will be bound by this decision. This differs from the somewhat flexible position in the jurisdictions mentioned above. This implies that, according to the law of South Africa, the risk when contracting with an unassisted minor lies with the other party. The options available at the instance of the other party are also rather limited.<sup>5</sup>

A comparison will be conducted with the expectation that it may provide insights that could beneficially influence the development of South African law. Factors which possibly contribute to these differences will be highlighted during this comparison, as well as factors worthy of consideration for possible reform. Finally a conclusion will be drawn whereby I intend to emphasise some aspects that deserve further consideration to properly balance the competing principles. But first, a brief overview will be provided of the development of the law regarding the contractual capacity of minors in England, Germany and Scotland to understand the historical context and current positions.<sup>6</sup>

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<sup>3</sup> The Law Reform Commission of Western Australia *Minors' Contracts* Project No 25, Part II (1988) 46 <http://www.lrc.justice.wa.gov.au/2publications/reports/P25-II-R.pdf> (Accessed 1 April 2011).

<sup>4</sup> J Heaton *The South African Law of Persons* (2008) 3<sup>rd</sup> ed 93.

<sup>5</sup> See Par 3 3 1 in this regard.

<sup>6</sup> The previous chapter contains a historical overview of the contractual capacity of minors in South African law.

## 3 2 Historical overview of the law relating to minors' contractual capacity in the jurisdictions under review

### 3 2 1 England

At common law, children below the age of twenty-one years were known as infants.<sup>7</sup> Their contracts were generally treated as voidable at their option. This option was to be exercised before attaining majority, or within a reasonable time thereafter.<sup>8</sup> Strangely, in English common law the concepts of guardianship or tutelage were unheard of.<sup>9</sup> Emancipation was also unknown, and marriage did not affect the infant's status, either.<sup>10</sup> Furthermore, the assistance of the guardian did not affect the validity of the contract of the minor. As pointed out by Hartwig:<sup>11</sup>

"[T]here is no adult who is competent to make contracts on behalf of an infant, nor does the concurrence in or sanction for a contract by a parent or other guardian in any way enhance its validity."

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<sup>7</sup> F Pollock *Principles of Contract* (1921) 9<sup>th</sup> ed 58. This was lowered to eighteen by s 1 of the Family Law Reform Act 1969.

<sup>8</sup> Pollock *Principles of Contract* 58; *Chaplin v Frewin (publishers) Ltd* (1966) Ch 71 8. It must be noted that "voidable" is a confusing term here, as it referred to two different situations. First, certain contracts were voidable as they were binding unless repudiated by the infant before, or within a reasonable time after attaining majority. Secondly, it also refers to another group of contracts which were not binding unless ratified by the minor when reaching the age of twenty-one. See subsequent discussion.

<sup>9</sup> H J Hartwig "Infants' Contracts in English Law: With Commonwealth and European Comparisons" (1966) Vol 15 *ICLQ* 780 786.

<sup>10</sup> 787. See also *Chaplin v Frewin (publishers) Ltd* (1966) Ch 71 10, regarding the presence of a (major) spouse of a minor to a contract: "It is true that Mrs Chaplin was a party to this disposition, but it seems to me that that cannot take away Michael Chaplin's legal right as an infant to avoid it."

<sup>11</sup> Hartwig 1966 *ICLQ* 786-787.

An exception to the general rule regarding minors' contracts was a contract for necessaries, since minority was not a valid defence for these contracts.<sup>12</sup> An infant was bound to pay a reasonable price for necessaries sold and delivered to him.<sup>13</sup> A second exception was that an infant's contract of service could also possibly have been valid had it been beneficial to the infant.<sup>14</sup>

Therefore, infants were not absolutely incapable of binding themselves since their contracts could generally be enforced at their option.<sup>15</sup> The other party, on the other hand, could not enforce it.<sup>16</sup>

Infants' contracts at common law<sup>17</sup> can be divided into positive and negative voidable contracts. The former refers to contracts in which the infant acquires an interest of a permanent or continuous nature.<sup>18</sup> These contracts were valid and binding until the infant renounced it. The latter, on the other hand, were contracts which were not continuous in their nature. These contracts were not binding on the infant, unless he or she ratified the contract within a reasonable time after attaining majority.<sup>19</sup>

This position regarding infants changed with the introduction of the Infants' Relief Act in 1874. In 1870-1980 there was a change of position regarding minors and their contracts, as a continuous decline in the belief in freedom of contract arose.<sup>20</sup> This was

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<sup>12</sup> Beatson *Anson's Contract* 215.

<sup>13</sup> S 2 Sale of Goods Act 1893. See discussion in Hartwig 1966 *ICLQ* 812-816.

<sup>14</sup> See *Maddon v White* (1787) 2 T.R.159, 1 R. R. 453, where it was held that a lease made by a infant which is beneficial to him, the infant cannot avoid liability. See also P S Atiyah *Introduction to the law of Contract* (1961) 80.

<sup>15</sup> Pollock *Principles of Contract* 58; Hartwig 1966 *ICLQ* 784.

<sup>16</sup> Beatson *Anson's Contract* 216.

<sup>17</sup> Prior to the enactment of the Infants Relief Act 1874. A discussion in this regard will follow.

<sup>18</sup> Beatson *Anson's Contract* 220.

<sup>19</sup> 220.

<sup>20</sup> P S Atiyah *Introduction to the Law of Contracts* (1981) 4<sup>th</sup> ed 17

largely due to the belief that the classical law which applied at the time was no longer in accordance with modern times.<sup>21</sup> The belief in freedom of choice was also declining, and some form of protection to some groups of persons was required.

“[T]he weak and the poor, the vulnerable and the exploited, were felt to be in need of protection by the law.”<sup>22</sup>

For this reason, the law had to interfere in these relations to offer some form of protection to those who required it. Although the initial idea was that the Infants’ Relief Act<sup>23</sup> would deal with the sale of goods on credit to minors, it appears that its scope is much wider than initially intended, due to the extent of the wording of the Act.<sup>24</sup> The object of the Act was to amend the law regulating contracts of infants made during their infancy.<sup>25</sup> However, it has been submitted that “[n]o convincing reason has ever been advanced to explain exactly why it was passed.”<sup>26</sup>

This Act stated that certain contracts were void and not merely voidable. Section 1 of this Act declared that three types of contracts entered into by the infant will be absolutely void:

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<sup>21</sup> 17.

<sup>22</sup> 22-23.

<sup>23</sup> 1874.

<sup>24</sup> Hartwig 1966 *ICLQ* 790: See fn 52 as quoted by Hartwig.

<sup>25</sup> See preamble of the Act.

<sup>26</sup> G H Treitel “The Infants’ Relief Act” (1957) 73 *L.Q.R.* 194. This Act was never very popular: See B Downey “Reports of Committees: Report of the Committee on the Age of Majority” (1968) 31 Issue 4 *MLR* 429 435; Atiyah *The law of Contract* (1961) 78 & 83; Hartwig 1966 *ICLQ* 790.

“All contracts entered into by infants...for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void.”<sup>27</sup>

Another significant change is to that of ratification. Section 2 forbade any action to be brought on any promise or ratification of a contract executed during infancy.

Although infants could enforce their contracts, they were not allowed to obtain specific performance of the contract.<sup>28</sup> The justification for this is that the remedy is an equitable one, and since the contract may not be enforced against the minor, the remedy would not be mutual. The reasoning for this has been explained as follows:

“Since the contract could not be enforced against the minor, equity would not allow the minor to obtain specific performance against the other party”.<sup>29</sup>

In 1965 the Latey Committee<sup>30</sup> was appointed to investigate the age of majority in England. In their report presented to Parliament<sup>31</sup> they suggested that the age of majority be lowered to eighteen.<sup>32</sup> This was accepted by Parliament, and as a result the Family Reform Act<sup>33</sup> was introduced which implemented this change. This Act also holds that an infant should now be referred to as a minor.<sup>34</sup> The Latey Committee also made suggestions for changes in the law relating to infants' contracts. However, these suggestions for reform were not enacted.

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<sup>27</sup> For a proper discussion regarding these void contracts, see Atiyah *The law of Contract* (1961) 82-85.

<sup>28</sup> Pollock *Principles of Contract* 64.

<sup>29</sup> Beatson *Anson's Contract* 216.

<sup>30</sup> Committee on Age of majority in England. Report nr Cmnd.3342.

<sup>31</sup> 1967.

<sup>32</sup> Downey 1968 *MLR* 429.

<sup>33</sup> 1969.

<sup>34</sup> S 12 Family Reform Act 1969.

As time went by, it became clear that the law was in need of reform. It was submitted that the law often seemed to over-protect the minor, while in other cases it fell short and did not offer sufficient protection.<sup>35</sup> As a result, the Minors' Contracts Act<sup>36</sup> was introduced which currently, together with the common law,<sup>37</sup> regulates the position regarding minors' contractual capacity. The application of this Act will be discussed below.<sup>38</sup>

### **3 2 2 Germany**

The German family was highly patriarchal. The father's power was described as *mund* or *mundium*.<sup>39</sup> This was similar to the *patria potestas* in Roman times.<sup>40</sup> However, this referred to the rights and duties the father had over his wife and children. It did not only allocate patriarchal power to the father, but placed a duty on him to protect the child.<sup>41</sup>

Early German law only distinguished between those below majority and those who attained it.<sup>42</sup> It denied minors the necessary legal capacity to act, yet it did not entirely deny them capacity as such, since they could incur delictual liability.<sup>43</sup> Since children had little or no contractual capacity to act, their father had an administrative power to deal with their property. However, he was not entitled to deal with the child's immovable

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<sup>35</sup> Atiyah *The law of Contract* (1961) 78.

<sup>36</sup> 1987.

<sup>37</sup> For a comprehensive discussion regarding infants' contracts at common law, see Hartwig 1966 *ICLQ* 780-823.

<sup>38</sup> Par 3 3 2.

<sup>39</sup> S J Stoljar "Children, Parents and Guardians" in A Chloros, M Rheinstein & M A Glendon *International Encyclopedia of Comparative Law* 4 (2004) Ch 7 42.

<sup>40</sup> 42.

<sup>41</sup> 42.

<sup>42</sup> R Huebner *History of Germanic Private Law* (1918, reprint 1968) 54.

<sup>43</sup> Stoljar "Children and Parents" in *International Encyclopedia of International Law* 79.

property without the child's consent, since the child always retained a basic capacity to hold property or acquire it by inheritance or gift.<sup>44</sup> The consent of the child was eventually validated at the attainment of majority, because he could not provide valid consent during minority.<sup>45</sup> In the meantime, it was commonly accepted that the child was not bound by such a disposition. The child had the option to revoke it as long as he acted within a year after becoming of age. If the child did not revoke the disposition after this time period has lapsed, the disposition was regarded as final.<sup>46</sup>

Originally no precise moment was prescribed determining the transition from minority to majority. It took place according to an individual child's physical development.<sup>47</sup> Furthermore, the attainment of majority did not affect the removal of limitations placed upon minors.<sup>48</sup> It specifically did not terminate the paternal power of the father, since this continued until the child left the family house, which was at marriage for daughters, and the establishment of their own households for sons. Similar to the position in Roman law, the law also distinguished between the abilities and capabilities of women and men.<sup>49</sup>

As time went by, fixed ages were adopted for the attainment of majority. Since the law in the territory nowadays known as Germany was not unified, this age differed in the various areas. It was surprisingly young, seeing that in most areas the age of majority was set at twelve.<sup>50</sup> However, often the physical development of the child was still taken into consideration, since the date of birth of the child may have been unknown.<sup>51</sup>

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<sup>44</sup> 50-51. Compare to position in Roman law: See Ch 2 Par 2 2 1.

<sup>45</sup> Stoljar "Children and Parents" in *International Encyclopedia of International Law* 51.

<sup>46</sup> 51.

<sup>47</sup> 79.

<sup>48</sup> Huebner *Germanic Private Law* 54.

<sup>49</sup> A discussion in this regard will not be conducted. See Huebner *Germanic Private Law* 62-69.

<sup>50</sup> Huebner *Germanic Private Law* 55.

<sup>51</sup> Stoljar "Children and Parents" in *International Encyclopedia of International Law* 79.

After the reception of Roman law in Germany<sup>52</sup> a division was drawn between the capacity of children under the age of seven and those above the age of seven but below the age of majority.<sup>53</sup> The former had no capacity to enter into any legal actions, while the latter enjoyed limited legal capacity.<sup>54</sup> Children above the age of seven years but below the age of majority were all treated the same, regardless of whether they had reached puberty or not. Huebner explains their capacity as follows:

“Their juristic acts remained for the time in suspense,- as had formerly those of children under seven years, - and bound only the other party; they were [also] incapable of being parties to an action.”<sup>55</sup>

Finally in 1875 an Imperial statute set the age of majority at twenty-one for the entire country.<sup>56</sup>

Although continuous independent legal development took place in the various areas of Germany, the necessity for a central legal system arose.<sup>57</sup> German law developed to a large extent from an unwritten system to a large unified and codified system of law with the introduction of the *Bürgerliches Gesetzbuch* in 1900.<sup>58</sup> A limited amount of sections

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<sup>52</sup> A discussion regarding the reception of Roman law in Germany is beyond the scope of this thesis. For a discussion in this regard, see N Foster *German Legal System and Laws* (1996) 2<sup>nd</sup> ed 14-18.

<sup>53</sup> The age of majority, as indicated in the preceding paragraph, was not the same in all of Germany, although twenty five years was the most common age for attaining majority, at least after the Reception. See Huebner *Germanic Private Law* 58.

<sup>54</sup> Huebner *Germanic Private Law* 58.

<sup>55</sup> 58.

<sup>56</sup> 58.

<sup>57</sup> Foster *German Legal System* 15.

<sup>58</sup> Hereinafter the “BGB”.

regulate contractual capacity.<sup>59</sup> This code set the age of majority at eighteen years for all persons in Germany.<sup>60</sup>

### **3 2 3 Scotland**

In Scotland the position regarding contractual capacity was originally determined by Roman law.<sup>61</sup> Scots common law distinguished between pupils, minors and persons of full age.<sup>62</sup> Pupillarity started at birth and lasted until puberty, which was twelve years old for girls and fourteen years old for boys.<sup>63</sup> Pupils had no contractual capacity, yet they could enforce a contract which was beneficial towards them.<sup>64</sup> The other party could, however, not enforce it against the pupil.<sup>65</sup> The child's tutor was entitled to perform legal acts on his or her behalf.<sup>66</sup> Such contracts entered into by the tutor could be "reduced" (i.e. terminated) by the pupil within four years after attaining majority if the pupil could prove that he or she suffered "enorm lesion."<sup>67</sup> Although there was no exact definition of what constituted enorm lesion,<sup>68</sup> in essence it referred to a considerable injustice suffered by the pupil.<sup>69</sup> Furthermore, much depended on the nature of the transaction.

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<sup>59</sup> See S 104-113 BGB.

<sup>60</sup> S 2 BGB.

<sup>61</sup> A B Wilkenson & K McK Norrie *Parent and Child* (1993) 52.

<sup>62</sup> 52. A discussion on the position of persons of full age is irrelevant for this study.

<sup>63</sup> W W McBryde *The Law of Contract in Scotland* (2007) 3<sup>rd</sup> ed 33.

<sup>64</sup> W M Gloag *The Law of Contract: A Treatise on the Principles of Contract in the law of Scotland* (1929) (reprint 1985) 2<sup>nd</sup> ed 77.

<sup>65</sup> 77.

<sup>66</sup> K McK Norrie "The Age of Legal Capacity (Scotland) Act 1991" (1991) 36 *J.L.S.S* 434 435.

<sup>67</sup> Wilkenson & Norrie *Parent and Child* 59.

<sup>68</sup> 65.

<sup>69</sup> Scottish Law Commission's *Report on The Legal Capacity and Responsibility of Minors and Pupils*, No 110 (1987) [http://www.scotlawcom.gov.uk/download\\_file/view/439/](http://www.scotlawcom.gov.uk/download_file/view/439/) (Accessed 31 March 2011) Par 2.3.

The following was held regarding the degree of harm that the pupil had to suffer for a reduction:

“[I]f it be inconsiderable, restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions.”<sup>70</sup>

Minors were initially persons above pupillarity up to twenty-one,<sup>71</sup> but minority was lowered to eighteen in 1969.<sup>72</sup> As a general rule, minors were capable of performing legal acts, because incapacity ended with the attainment of puberty.<sup>73</sup> Minors who had no curators had the same contractual capacity as adults, which meant that in principle they had full contractual capacity.<sup>74</sup> Minors who did have a curator enjoyed a limited legal capacity, because they required the consent of their curators when contracting.<sup>75</sup> If they contracted without their curator’s consent, the contract was not void. Although these labels are at times confusing (as we have seen earlier), it could be regarded as avoidable, inasmuch as it could be reduced at any time.<sup>76</sup> The contract was fully binding if the minor had ratified it after attaining majority.<sup>77</sup> A minor was also held liable for necessities supplied to him or her.<sup>78</sup> The right to reduce a contract on the proof of “enorm lesion” was also available to all minors, whether they contracted on their own

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<sup>70</sup> As quoted in Wilkenson & Norrie *Parent and Child* 65. The “doctrine of minority and lesion” was a term which applied to all persons under the age of majority. Wilkenson & Norrie *Parent and Child* 52.

<sup>71</sup> The Age of Majority (Scotland) Act 1969.

<sup>72</sup> S1.

<sup>73</sup> Wilkenson & Norrie *Parent and Child* 58.

<sup>74</sup> A minor, after the death of his father, had no curator, unless he appointed a curator himself, or unless the Court appointed one on petition. See Gloag *The Law of Contract* 82 fn 4.

<sup>75</sup> D M Walker *The Law of Contracts and related Obligations in Scotland* (1995) 3<sup>rd</sup> ed 60.

<sup>76</sup> Gloag *The Law of Contract* 82.

<sup>77</sup> 83.

<sup>78</sup> S 2 Sale of Goods Act 1893.

account without a curator, or with the consent of the curator.<sup>79</sup> This had to be done within the *quadriennium utile*, which is the four year period after the attainment of majority.<sup>80</sup>

Today the position regarding minors' contractual capacity is no longer regulated by common law. On recommendation of the Scottish Law Commission, the common law rules have been statutorily abolished and the position is now dealt with in the Age of Legal Capacity (Scotland) Act 1991.

After conducting a comprehensive research and consultation process, the Scottish Law Commission filed a detailed report in 1987 regarding the legal capacity and responsibility of minors and pupils. This process of the Commission included reviewing the previous position of the law regulating minors and their contractual capacity, considering the position in other countries and finally setting out possibilities for reform.<sup>81</sup> The objectives the Commission identified during their evaluation were the following:

(a) "that the law should protect young people from the consequences of their immaturity without restricting unnecessarily their freedom of action; (b) that the law should not cause unnecessary prejudice to adults who enter into transactions with young people; and (c) that the law should be clear and coherent and should accord with modern social and economic conditions."<sup>82</sup>

The Commission held that the prevailing position could be criticised on all three counts.<sup>83</sup> The law appeared insufficient to meet the needs of both adults and young

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<sup>79</sup> Wilkenson & Norrie *Parent and Child* 58 fn 17.

<sup>80</sup> 63.

<sup>81</sup> Scottish Law Commission *Report on Minors and Pupils* Par 1.2.

<sup>82</sup> Par 2.12.

<sup>83</sup> Par 2.12.

persons. One of the important points of criticism was that the law was “out of touch with contemporary social and economic conditions.”<sup>84</sup>

Consequently, the Commission suggested a complete reform of the law regarding minors, by removing the existing law and replacing it with an (apparently) simpler set of rules, to establish effective operation.<sup>85</sup>

Following this report the law regarding minors and their contractual capacity changed significantly with the coming of the Age of Legal Capacity (Scotland) Act 1991.<sup>86</sup> This act removed many of the fundamental principles underlying minors in Scots Law.<sup>87</sup> It also distinguishes the contractual matters of minors by using a two-tier system, which will be discussed below.

### **3 3 Enforcing, ratifying or repudiating the unassisted contract in modern law**

#### **3 3 1 South Africa**

An unassisted contract of a minor is unenforceable against the minor. Although it binds the other party, the minor is not bound.<sup>88</sup> The minor will only be bound if the contract is enforced by his guardian, or if the contract is ratified by the child after attaining majority.<sup>89</sup> In other words, the question regarding the enforceability of the unassisted contract can only be answered by asking whether the contract was enforced or repudiated by the guardian, or ratified by the minor, after attaining majority.

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<sup>84</sup> Par 2.19.

<sup>85</sup> Par 2.20.

<sup>86</sup> This Act does not affect any transactions which occurred before the commencement of the Act on 25 September 1991: S 1(3) Age of Legal Capacity (Scotland) Act.

<sup>87</sup> Norrie 1991 *J.L.S.S* 434.

<sup>88</sup> L R Caney “Minors Contracts” (1930) *XLVII SALJ* 180 188; Boberg *Persons* 800 fn 130.

<sup>89</sup> Boberg *Persons* 799 & 803.

The unassisted minor is in a better position than the other party, since the decision to enforce or repudiate the contract rests solely in the hands of the guardian (at least until the minor attains majority).<sup>90</sup> The guardian may only choose to enforce the contract if it is in the interests of the minor. This position is based on the fundamental principle regarding minors' contractual capacity, namely the general desire to protect minors against themselves and their inability to make informed decisions.<sup>91</sup> As discussed in the previous chapter,<sup>92</sup> even beneficial contracts do not bind the minor, because the existence of the benefit theory was abolished in *Edelstein v Edelstein*.<sup>93</sup> Therefore, South African law is rather inflexible regarding the enforceability of minors' unassisted contracts; it does not have regard to the specific terms of the contract or the circumstances at hand. An illustration by way of example may be helpful:

A (an unassisted minor) buys a bicycle from B (a person of full age). As promised, B delivers his bicycle to A, but A fails to pay the purchase price. The option(s) available to B may be summarised as follows: he may not claim specific performance from A (in other words claim the purchase price). His only remedy is to reclaim his performance, or the value thereof, but only insofar the minor remains enriched at the time the action is instituted.<sup>94</sup> The specific terms of the contract are ignored, and whether or not the contract was beneficial to the minor is also irrelevant. A's guardian, however, may either enforce it or repudiate it. The minor may also ratify it once he has attained majority. The other party will be bound to whatever decision the guardian takes.

Once the guardian decides to enforce the contract, the contract will be valid and enforceable both by and against the minor.<sup>95</sup> The other party will be bound by the

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<sup>90</sup> 799.

<sup>91</sup> Jordaan & Davel *Persons* 66.

<sup>92</sup> Par 2 2 3.

<sup>93</sup> NO 1952 3 SA 1 (A). See Ch 2 Par 2 2 3 for a comprehensive discussion in this regard.

<sup>94</sup> Boberg *Persons* 812. This claim is rather limited. A discussion in this regard will follow in a subsequent chapter.

<sup>95</sup> J D Van der Vyfer & D J Joubert *Persone- en Familiereg* (1991) 3<sup>rd</sup> ed 157.

contract and he or she may be compelled to render performance under the contract.<sup>96</sup> So, too, will the minor be obliged to perform in terms of the valid contract, since the decision to enforce the contract imposes a counter obligation on the minor to perform.<sup>97</sup> The minor may then also be compelled by a court order to perform, if necessary.<sup>98</sup> This position implies that the contract will be treated as wholly valid and enforceable. It should be reiterated at this stage that it is not the guardian who is liable in terms of the contract, but the minor who will acquire rights and liabilities flowing from the contract.

Once the minor has ratified<sup>99</sup> the contract after attaining majority, the natural obligation of the minor will be transformed into a civil one, which will be enforceable against the minor.<sup>100</sup> This is the case when a minor entered into an agreement with another party, and implements the terms of the agreement after attaining majority.<sup>101</sup> This means that the minor will no longer be able to repudiate the contract or to recover performance of any kind.<sup>102</sup> The contract will then be valid and both parties will be obliged to perform. Ratification works retrospectively, and the contract will consequently bind the minor as if he was of full age at the time that the contract was concluded.

There have been various suggestions relating to the origin of the minor's obligation to counter perform when the unassisted contract becomes valid and enforceable. One of

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<sup>96</sup> Boberg *Persons* 799-800.

<sup>97</sup> Van der Vyfer & Joubert *Persone- en Familiereg* 164.

<sup>98</sup> 157-158. "Necessary" in this regard refers to a situation where the guardian decides to enforce the contract and the minor omits to perform his part of the obligation.

<sup>99</sup> Ratification may be expressed or implied. In *Stuttaford & Co v Oberholzer* 1921 (CPS) 855 the court rejected the previous requirement of an express promise after majority. However, if there is proof of reasonable and excusable ignorance, an inference of ratification shall be denied. See Boberg *Persons* 806.

<sup>100</sup> Boberg *Persons* 803.

<sup>101</sup> Jordaan & Davel *Persons* 80.

<sup>102</sup> 804; Voet 26.8.4.

the suggestions has been that it derives from the *exceptio non adimpleti contractus*,<sup>103</sup> but currently it is accepted that it is rather derived from the fact that ratification of the contract is implicit in the minor's claim for performance.<sup>104</sup> The rationale is evident in the judgment of Van den Heever in *Edelstein v Edelstein*:<sup>105</sup>

“for the minor will sue either assisted by his guardian, or when he has attained majority, either of which will imply a ratification of the contract.”<sup>106</sup>

Caney makes a similar point in his discussion of minors' contracts.<sup>107</sup> He says the following:

“That he cannot rely upon the contract to enforce it without being taken to ratify it, seems commonsense.”

Once it has been established that the unassisted contract is enforceable against the minor<sup>108</sup> the other party may not rely on the minority of the minor to escape his own liability in terms of the contract, since “the privilege is personal to the infant”.<sup>109</sup> Therefore, the other party will be bound by the contract if the guardian decides to enforce it, because the preference of the other party is ignored.

Ratification, on the other hand, may also be unfortunate for the other party, since the situation may arise where he might be bound by a contract in the future which he does not wish to be bound by anymore. A practical example illustrates the problem. A, an

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<sup>103</sup> Boberg *Persons* 807.

<sup>104</sup> 808.

<sup>105</sup> NO1952 3 SA 1 (A).

<sup>106</sup> 13G-H.

<sup>107</sup> Caney 1930 SALJ 180.

<sup>108</sup> This is the position if the guardian has enforced the contract and also if the minor has ratified it at the attainment of majority.

<sup>109</sup> Wessels *Contract* 247.

unassisted minor, contracts with B, a person of full age, for the sale of B's bicycle. At the time the contract was concluded, A was seventeen. Neither party performs. One year later, after attaining majority, A decides to enforce it by way of ratification. B will then be bound by the contract he concluded with A, even though he might now have another potential buyer who is willing to pay much more for it. Once A ratifies the contract, both parties will be obliged to perform.

If the guardian decides to repudiate the unassisted contract, the other party cannot enforce it, either. He will be bound by the decision of the guardian.<sup>110</sup> The other party may also not resile from the contract before the guardian seeks to enforce it.<sup>111</sup> Furthermore, the other party may not sue the minor for specific performance.<sup>112</sup> This is due to the fact that the transaction "limps": the other party has a legal obligation, while the minor's obligation is only a natural one.<sup>113</sup> They may also not sue for damages for any loss suffered due to non-performance by the minor.<sup>114</sup> In other words, there is no contractual remedy available to rely on to enforce the contract against the minor. Once the guardian repudiates the contract, the issue regarding restitutionary remedies arise. This will be discussed in chapter 4.

It is well-established that there are two competing principles which must be balanced when considering minors' unassisted contracts. It is evident from the discussion above that the minor enjoys a preferential position, since the enforceability of the contract rests with the guardian of the minor, and the minor himself may also ratify it after attaining majority. This is due to the fact that the major objective in South African law is to protect the minor against his inability to make informed decisions. The other party is in a much less favourable position than the minor. Such a party has no control over the enforceability of the contract, because the guardian retains the power to enforce or

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<sup>110</sup> Heaton *Law of Persons* 93.

<sup>111</sup> Caney 1930 *SALJ* 188.

<sup>112</sup> Boberg *Persons* 800.

<sup>113</sup> 807.

<sup>114</sup> Christie *Contract* 244.

repudiate the contract at will. The other party can also not avoid liability by resiling from the contract. Ultimately, he is dependant on the decision of the guardian regarding the outcome of the enforceability of the contract. As a result, it is clear from the discussion above that the current position strongly favours the interests of the minor above those of the other party.

The position in South African law as set out above is hardly self-evident when compared to other comparative jurisdictions. This indicates that there may be a need to re-evaluate the South African approach. The position in Scots law, English law and German law will now be examined.

### **3 3 2 England**

In England the position is regulated by common law, as varied by the Minor's Contracts Act.<sup>115</sup> Minors are persons under the age of eighteen years. The scale balancing the competing principles once again favours the minors. This is similar to the position in South Africa.

The general position is similar to that in South Africa, inasmuch as a minor is not bound by his contracts.<sup>116</sup> As a result a contract concluded with a minor is unenforceable against him. These contracts may also not be validated by way of consent from the guardian at a later stage.<sup>117</sup> However, there are exceptions to this rule. Certain contracts with minors will be valid and enforceable against them, while others are voidable in the sense that they bind minors unless they repudiate the contract.<sup>118</sup> Contracts for necessaries are one of the exceptions which are both valid and enforceable against a minor.<sup>119</sup>

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<sup>115</sup> 1987.

<sup>116</sup> Peel *Treitel Contract* 567.

<sup>117</sup> 567.

<sup>118</sup> 567. Repudiation will be discussed in this chapter at a later stage.

<sup>119</sup> E McKendrick *Contract Law: Text, Cases and Materials* (2003) 788.

“Necessaries” is not an easy concept to define. Nevertheless, it has been established that it includes both goods and services.<sup>120</sup> The question whether something may be defined as “necessary” is partly a question of law and partly a factual question. First is the question of law, whereby one needs to determine whether the category of supply is capable of being a necessary. The factual question which follows is two-fold: (i) Was the actual supply of a suitable quality or kind for the particular minor? (ii) Was it necessary for that particular minor or was the minor sufficiently supplied already?<sup>121</sup> When applying this test one needs to regard the status of life of the particular child.<sup>122</sup> Necessary goods are not defined to necessities, as it also includes

“[S]uch articles...fit to maintain the particular person in the state, station and degree in which he is.”<sup>123</sup>

The case of *Nash v Inman*<sup>124</sup> illustrates the application of the concept of necessary goods. In this case the plaintiff, a tailor, sued a minor for the payment for waistcoats delivered to him. At the time of delivery the minor was an undergraduate at university. The plaintiff argued that these coats fall in the category of necessaries, while the defendant pleaded lack of capacity to escape liability. The court held that waistcoats generally are among the things that may be classified as necessaries, since clothing is an item of necessity. However, the waistcoats delivered in this case were not necessary, since the minor already had enough clothing. The plaintiff was unsuccessful in this regard, and could not enforce the unassisted contract.

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<sup>120</sup> Services rendered to a minor include education, medical and legal. Yet if any service rendered to a minor passes the test (to follow) it may be deemed necessary. See Peel *Treitel Contract* 569.

<sup>121</sup> M P Furmston *The Law of Contract* (2003) 2<sup>nd</sup> ed 679.

<sup>122</sup> McKendrick *Contract Law* 789.

<sup>123</sup> *Peters v Fleming* (1840) 6 M & W 42 46.

<sup>124</sup> (1908) 2 KB 1, CA.

The Sale of Goods Act<sup>125</sup> also imposes liability on the minor for necessities. Section 3 states that necessities are

“goods suitable to the condition of life of the minor at the time of delivery.”

Fortunately minors are not unprotected in this regard. Contracts for necessities are only binding and enforceable if it is on the whole for their benefit. They will not be bound if the contract contains “harsh and onerous terms.”<sup>126</sup> Furthermore, minors are only liable to pay a “reasonable price” in this regard.<sup>127</sup> This is not necessarily the contract price.<sup>128</sup>

The minor will also be bound by a beneficial contract of employment. A minor may even be bound by a service contract if it is to his benefit as a whole, even though some of the terms of the contract appear to be disadvantageous.<sup>129</sup>

Although all minors under the age of eighteen are treated similarly, a minor who is incapable to consent due to him being “too young” will not be bound by these

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<sup>125</sup> 1979.

<sup>126</sup> Peel *Treitel Contract* 567. See also *Fawcett v Smethurst* (1914) 84 LJKB 473.

<sup>127</sup> S 3 Sale of Goods Act 1979.

<sup>128</sup> R Stone *The Modern Law of Contract* (2009) 8<sup>th</sup> ed 232.

<sup>129</sup> Peel *Treitel Contract* 571. Yet the minor will not be bound by such a contract if it is on the whole harsh or unfair. The employment of minors in England is largely regulated by Employment Act (1989), Children and Young Persons Act (1933) and Employment of Woman, Young Persons and Children’s Act (1920). The first mentioned Act of 1989 has amended the Act of 1933 and 1920, and therefore these Acts will apply as amended by the Employment Act of 1989. The Employment Act of 1989 removed many of the restrictions which applied to the employment of young persons.

exceptions.<sup>130</sup> As a result, such a contract will be void unless it can be shown that the minor has sufficient understanding of that contract.<sup>131</sup>

There are also certain categories of contracts by which the minor can avoid liability. This may be sub-divided into two categories. The first is those contracts that are binding on the minor unless he repudiates it during minority or within a reasonable time thereafter.<sup>132</sup> As mentioned above, these are often referred to as “positive voidable contracts”.<sup>133</sup> These contracts include contracts concerning the purchasing or letting of land, acquiring shares in a company, partnership agreements and marriage settlements.<sup>134</sup> Once the minor repudiates the contract, the minor will not be bound by the contract any longer and it cannot be enforced against him. The other party cannot enforce it against the minor after the minor has decided to have it set aside.<sup>135</sup>

These voidable contracts must be repudiated during minority or within a reasonable time after attaining majority.<sup>136</sup> This privilege is only available at the instance of the minor, and not the other party. The minor may also change his mind after repudiating the contract. In other words, if the minor has repudiated the contract during minority it may be withdrawn before reaching full age or within a reasonable time after attaining majority.

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<sup>130</sup> Furmston *Contract law* 678.

<sup>131</sup> Hartwig 1966 *ICLQ* 821. Here it is also noted that there is no presumption in favor of the validity of the infants' contract.

<sup>132</sup> Peel *Treitel Contract* 574. “Reasonable Time” was also affirmed in *Edwards v Carter* [1893] AC 360.

<sup>133</sup> Beatson *Anson's Contract* 222.

<sup>134</sup> Pollock *Principles of Contract* 62-63. “And if on becoming of age he does not expressly disaffirm the partnership he is considered to affirm it.” See Pollock *Principles of Contract* 62.

<sup>135</sup> McKendrick *Contract Law* 789.

<sup>136</sup> Furmston *Contract law* 687.

The effects of repudiating such a contract are firstly that the minor will be relieved from liabilities which have yet to accrue from the contract at hand,<sup>137</sup> and secondly, that restitution is not an automatic consequence of repudiation of these contracts. The child must still prove a ground for restitution.<sup>138</sup>

The second group of contracts are those which are not binding on the minor unless he ratifies the contract.<sup>139</sup> These are negative voidable contracts.<sup>140</sup> Once the minor ratifies the contract, the parties will become liable in terms of the contract.<sup>141</sup> Generally this large category of contracts was non-continuous in nature.<sup>142</sup> Similar to the position in South African law, ratification may be express or implied.<sup>143</sup> After a minor ratifies the contract, he will be bound by it.<sup>144</sup> The contract will be fully enforceable on both sides.<sup>145</sup>

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<sup>137</sup> Peel *Treitel Contract* 576. It is still unsure whether liabilities which have already accrued are extinguished by repudiation. Yet a discussion in this regard is beyond the scope of this study.

<sup>138</sup> McKendrick *Contract Law* 791. Restitutionary remedies will be dealt with in the following chapter.

<sup>139</sup> Ratification is regulated by S 1 of the Minors' Contracts Act of 1987. The main effect of this section is to repeal the provisions of the Infants Relief Act. This Act prevented the minor from ratifying an unenforceable contract after attaining majority. The change brought about with the Act confirms that the law recognises that the need to protect minors disappears once the minor attains majority, and that he or she then needs to be treated as a major.

<sup>140</sup> Beatson *Anson's Contract* 220. Until recently, when the Infants Relief Act was repealed, this rule was misplaced by section 2 of this Act, which made it impossible for a major to be sued on a contract which he or she entered into at the time of minority, even though they may have ratified it. With the repeal of this Act the common law position regarding positive and negative voidable contracts has once again become law. See Beatson *Anson's Contract* 221.

<sup>141</sup> Peel *Treitel Contract* 578.

<sup>142</sup> Beatson *Anson's Contract* 220.

<sup>143</sup> Peel *Treitel Contract* 578.

<sup>144</sup> 578.

<sup>145</sup> Stone *Contract* 231.

From the discussion above it is clear that a minor is liable only for contracts that are binding on him or have not been repudiated by him or have been ratified by him. The general position is that a minor is not bound by his contracts, and contract concluded with a minor is generally unenforceable against him. Although there are exceptions, it is rather evident from discussion that minors occupy a more advantageous position in this regard, since the minor's interests are protected above those of the other contracting party. The decision to repudiate the contract is left solely in the hands of the minor. Whatever decision he makes may also be reversed at a later (reasonable) stage. Consequently, the other party is bound by the decision of the minor. Evidently the principle of protection for minors prevail over the competing principle, namely the protection of the interests of the other contracting party. This is similar to the current position in South Africa.

### **3 3 3 Germany**

The position regarding contracts concluded by minors is regulated by German Civil Code or *Bürgerliches Gesetzbuch* (BGB). This code distinguishes between different levels of incapacity.<sup>146</sup> Contractual capacity is acquired at the age of eighteen years.<sup>147</sup>

The provisions addressing the conditions regarding children's contractual capacity are rather limited.<sup>148</sup> A distinction must be drawn between children under seven years of age, children between the ages of seven and eighteen, and persons above the age of eighteen years. Similar to the position in South Africa, children under the age of seven years are deemed to be incapable of concluding contracts.<sup>149</sup> Their contracts are void.<sup>150</sup> Minors who have reached the age of seven years have limited capacity to

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<sup>146</sup> The term used to describe the capacity to execute contractual acts is *Geschäftsfähigkeit*- see Foster *German Legal System* 233.

<sup>147</sup> 234.

<sup>148</sup> S 104-113 BGB.

<sup>149</sup> S 104.

<sup>150</sup> S 105.

contract.<sup>151</sup> The general position is that their contracts are “provisionally invalid” since they require the ratification of their legal representative to be bound.<sup>152</sup> In other words, the “effectiveness of the contract is subject to the ratification of the legal representative.”<sup>153</sup> The contract will not be valid and enforceable without the required ratification.<sup>154</sup>

Ratification by the guardian may take place expressly or by implication, before the contract is made and also afterwards.<sup>155</sup> Until the contract is ratified, the other party is entitled to revoke it.<sup>156</sup> If it is not ratified, the contract will be permanently invalid. If no validation takes place, the other party may also resile. The practical implication is that if the guardian of the minor does not ratify the unassisted contract, neither the minor nor the other party will be bound.<sup>157</sup> This is unique to German law, because in the other countries we have examined the other party would still be bound by the contract, even though the minor is not bound. If the parties have already performed in terms of the invalid contract each party is obliged to return what he received under the contract according to the principles of unjustified enrichment.<sup>158</sup> The relevant principles relating to these duties of restitution will be discussed in a subsequent chapter.

In exceptional cases a minor will be bound by his contract. This will be so when the contract does not entail any legal disadvantage for the minor, such as a promise of gifts for the minor.<sup>159</sup> In such a case the contract will be valid and enforceable. However, the

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<sup>151</sup> S 107.

<sup>152</sup> S 108.

<sup>153</sup> S 108(1).

<sup>154</sup> Ratification is discussed in the paragraph that follows.

<sup>155</sup> Zweigert & Kötz *Comparative Law* 355.

<sup>156</sup> S 109 BGB.

<sup>157</sup> S 109.

<sup>158</sup> Zweigert & Kötz *Comparative Law* 353.

<sup>159</sup> S 7 BGB reads as follows: “For a declaration of intent as a result of which he does not receive only a legal benefit, a minor requires the consent of his legal representative.”

mere fact that a contract of a minor has a beneficial effect on him does not render the contract advantageous; no form of obligation of any kind may be imposed on the minor.<sup>160</sup> As stated by Markesinis:<sup>161</sup>

“[I]f the legal transaction is neither solely legally advantageous nor at least neutral to the position of the minor, section 107 BGB stipulates that the consent of the legal representative is required.”

In other words, contracts entered into by a minor which are neither beneficial nor disadvantageous towards the minor will be valid without the ratification of the legal representative.

German law of contract also has a so-called “pocket-money paragraph” whereby minors may be bound by their unassisted contracts.<sup>162</sup> According to this section a contract entered into by a minor without the required approval of the legal representative is deemed effective if the minor effects performance under the contract with means that were given to him for this purpose or for free disposal by the legal representative.<sup>163</sup> Therefore, money given by parents to their children is considered as a general agreement to purchase items that are

“normal for a child of the age in terms of subject matter and value.”<sup>164</sup>

So, too, will the minor be bound by necessary contracts which arise from a contract of employment.<sup>165</sup> Although the employment of children<sup>166</sup> is generally forbidden,<sup>167</sup>

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<sup>160</sup> Zweigert & Kötz *Comparative Law* 354.

<sup>161</sup> *German Law of Contract* 233.

<sup>162</sup> S 110 BGB.

<sup>163</sup> Or by a third party, with the ratification of the representative.

<sup>164</sup> Foster *German Legal System* 234.

<sup>165</sup> 234.

section 113 BGB reads that if the legal representative has authorised the minor to enter into a service agreement or employment agreement, the minor has unlimited capacity to enter into transactions that relate to either entering or leaving service or employment of the permitted nature, or performing the duties arising from such a relationship.<sup>168</sup>

Minors may also validly execute contracts in pursuit of a business enterprise.<sup>169</sup> Such contracts acquire express approval by the legal guardian of the minor and ratification of the court. In such a case the minor will have unlimited capacity to contract for such transactions as the business operations entail. These contracts will be valid and enforceable against the minor. However, the authorisation of the legal representative may be revoked by him with the ratification of the court.<sup>170</sup>

Furthermore, there is also a list of “neutral transactions” which, if concluded by the minor, are valid.<sup>171</sup> An example of this is that a minor may act as an agent for a principal.<sup>172</sup>

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<sup>166</sup> This refers to children under fifteen and those who are older who is still obliged to attend school: See M Weiss *Labour Law and Industrial Relations in Germany* (1995) 55.

<sup>167</sup> S 5 *Jugendarbeitsschutzgesetz* (1976). This Act has been translated into English as “Young Persons’ Protection in Employment Act”. In exceptional circumstances minors will be allowed to enter into employment contracts, provided the work is also suitable for the child. For detail in this regard, refer to legislation regarding minors’ and employment contracts: *Jugendarbeitsschutzgesetz* (as last amended in 2006) and *Verordnung Über den Kinderarbeitsschutz* (1998).

<sup>168</sup> S 113 BGB. For limitations in this regard refer to S 113.

<sup>169</sup> S 112(1).

<sup>170</sup> S 112(2).

<sup>171</sup> Foster *German Legal System* 231.

<sup>172</sup> S 165 BGB. Such a contract is between the principal and the third party, therefore the minor will not incur any liability in this regard. As this is not particularly relevant to the problem underlying this study, a discussion in this regard will not be conducted. See Markesinis *German Law of Contract* 231.

Therefore, although minors' contracts are provisionally invalid, and the ratification of their contracts by their guardians are required in validating them, there are exceptions by which minors may be bound by their contracts. In other words, these children are at least in some aspects capable of contracting without the assistance of their guardian, although the scope of this group of contracts is limited. It is submitted although the other party is in a fortunate position to resile from the contract, German law may possibly be over-protective with its shield that covers minors and their unassisted contracts.

### **3 3 4 Scotland**

The position regarding minors and the enforceability of their unassisted contracts differs to a large extent from how it is dealt with in South Africa. Scotland works with a two-tier system which distinguishes between persons under the age of sixteen and persons between the age of sixteen and eighteen. The first-mentioned group generally has no legal capacity to enter into contracts.<sup>173</sup> Any legal transaction entered into by a person under the age of sixteen, subject to the list of exceptions in section two, will be void.<sup>174</sup> In other words, contracts entered into by these minors are unenforceable against them. The exceptions in this regard are the following: a person under the age of sixteen years shall have the necessary legal capacity to enter into a transaction of a kind commonly entered into by persons of his age and circumstances, on terms which are not unreasonable.<sup>175</sup> Although "reasonableness" is not defined in the Act, it is a concept the courts are familiar with.<sup>176</sup> "Commonness", on the other hand, is a strange concept. It has been suggested that it should refer to acts which are not unusual, rather than referring to numerical frequency.<sup>177</sup>

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<sup>173</sup> S 1(1)(a) Age of Legal Capacity (Scotland) Act.

<sup>174</sup> S 2(5).

<sup>175</sup> S 2(1). The aim hereof was to include a flexible provision in order to meet the diverse circumstances which often arise. E E Sutherland *Child and Family Law* (1999) 100.

<sup>176</sup> Norrie 1991 *J.L.S.S* 434.

<sup>177</sup> 435.

The second exception is that a person aged twelve years or older shall have testamentary capacity.<sup>178</sup> Such a person shall also have legal capacity to consent to the making of an adoption order in relation to him.<sup>179</sup> A person under the age of sixteen years shall have legal capacity to consent to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.<sup>180</sup> The test is whether the child understands the nature of the situation.<sup>181</sup> Lastly, a child below the age of sixteen may instruct a solicitor in connection with civil proceedings, provided he has a general understanding of what it means to do this.<sup>182</sup>

Therefore, contracts concluded by children under the age of sixteen are generally void and unenforceable against them, due to their incapacity to contract. At the same time, if such a child concludes one of the abovementioned exceptional contracts, it may be valid and enforceable against them.

Children aged between sixteen and eighteen are treated differently. They are regarded as more mature and intelligent.<sup>183</sup> The Act grants them legal capacity to enter into transactions. As a general rule they can act on their own behalf, since they have the necessary legal capacity to enter into legal transactions without parental consent.<sup>184</sup> These contracts will be regarded as valid and enforceable against the child. However,

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<sup>178</sup> S 2(2) Age of Legal Capacity (Scotland) Act.

<sup>179</sup> S 2(3).

<sup>180</sup> S 2(4).

<sup>181</sup> A question that arises in this regard is whether a parent or guardian can veto the decision of the child with regards to consenting to medical treatment. However, a discussion in this regard is beyond the scope of this study, and a short discussion in this regard may be found in Norrie 1991 *J.L.S.S* 436-437.

<sup>182</sup> S 2(4A) Age of Legal Capacity (Scotland) Act. There is a presumption that a child of twelve years has sufficient understanding.

<sup>183</sup> Scottish Law Commission *Report on Minors and Pupils* 10.

<sup>184</sup> S 1(1) Age of Legal Capacity (Scotland) Act; McBryde *Contracts* 37.

they are not unprotected. If the child entered into a “prejudicial transaction” due to their inexperience, he may challenge the validity thereof to have the transaction<sup>185</sup> set aside.<sup>186</sup> This application cannot be brought by the other party, since it is only available for the minor.<sup>187</sup>

“Prejudicial Transaction” has been defined as follows:

“A transaction which (a) an adult, exercising reasonable prudence, would not have entered into in the circumstances of the applicant at the time of entering into the transaction, and (b) has caused or is likely to cause substantial prejudice to the applicant.”<sup>188</sup>

The application to set aside such a transaction has two prerequisites: First, it is only available if the transaction was entered into by the child while he was between the ages of sixteen and eighteen years.<sup>189</sup> Second, the application must be made before the child reaches the age of twenty one. The test for a “prejudicial transaction” is two-fold. It is not enough that a minor suffers prejudice as a result of the contract concluded by them; the prejudice must also be substantial.<sup>190</sup> In other words, the contract will not be set

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<sup>185</sup> “Transaction” has been defined to include any transaction having legal effect, which covers, most importantly, contracts, and it also includes unilateral transactions such as promises, the giving of any consent having legal effect, the bringing or defending of civil proceedings, acting as arbiter or trustee, or as an instrumentary witness. See J A Huntley, J Blackie and C Cathcart *Contract Cases and Materials* (2003) 2<sup>nd</sup> ed 4.

<sup>186</sup> S Woolman & J Lake *Contract* (2001) 3<sup>rd</sup> ed 54. This is similar to the reduction of a minor’s contract for “enorm lesion” which was the position in common law. It has been suggested that the courts will look at cases under the old law in this regard in order to guide them on what can reasonably be held to be a “prejudicial transaction”. See Walker *Contracts* 63.

<sup>187</sup> Walker *Contracts* 62.

<sup>188</sup> S 3(2) Age of Legal Capacity (Scotland) Act.

<sup>189</sup> S 3(1).

<sup>190</sup> S 3(2)(a)–(b). Note that the section states that the test is that of a reasonable adult, and not a reasonable minor. If the transaction is set aside, it will be treated as void.

aside solely because it is disadvantageous towards the minor.<sup>191</sup> If a transaction is found to be prejudicial it will be set aside and it will not bind the minor any longer. There are also a series of transactions which cannot be challenged under these rules, such as the involvement in civil proceedings.<sup>192</sup>

An example in this regard may provide a useful illustration. A contract between a fifteen year old child and an adult for the purchase of the adult's motorbike will be void and unenforceable against the child. However, if it can be proved that this is a transaction commonly entered into by a child of this age, and on reasonable terms, it may be valid, since this is one of the exceptions listed in the Act.<sup>193</sup> If the child was seventeen years old, this contract would have been valid and enforceable against both parties. If the child decides this transaction appears to be prejudicial, he may challenge the validity thereof as an attempt to have it set aside.<sup>194</sup>

Contracts concluded by these minors (aged sixteen to eighteen) are therefore valid and enforceable as a general rule, although the validity thereof may be challenged by the minor. This evidently differs from the position in South Africa.

The minor may also ratify the transaction himself after reaching the age of eighteen years. Although there are no statutory provisions in the Act dealing specifically with the child's individual right to ratify a transaction after attaining majority,<sup>195</sup> it surely exists since this right is mentioned in the passing in section 3(3)(h) of the Act. It reads that before the child's right to have a transaction set aside is excluded, he must have borne knowledge of his right to do so.<sup>196</sup>

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<sup>191</sup> Walker *Contracts* 62.

<sup>192</sup> McBryde *Contracts* 38.

<sup>193</sup> S 2(1) Age of Legal Capacity (Scotland) Act.

<sup>194</sup> This application has to be made before the child turns twenty one.

<sup>195</sup> W M Gloag & R C Henderson *The Law of Contract* (2007) 12<sup>th</sup> ed 991.

<sup>196</sup> 991.

Another possibility is that of judicial ratification. It may happen that a party will be reluctant to enter into a contract with a young person aged between sixteen and eighteen, due to the abovementioned possibility that their agreement may be set aside.<sup>197</sup> In such a case judicial ratification is useful. The court may, on a joint application of the contracting parties, ratify a proposed transaction between a young person (aged between sixteen and eighteen) and another party.<sup>198</sup> Such an order may not be granted if it appears that an adult exercising reasonable prudence in the same circumstances as the young person would not have entered into such a transaction.<sup>199</sup> If the order by the court is granted it will be final and such a transaction, if completed, will be unchallengeable.<sup>200</sup> In other words, such a transaction cannot be set aside on application of the minor at a later stage.<sup>201</sup> Judicial ratification requires a joint application, and therefore if one of the parties refuses to concur with the application for ratification, it will not be granted.<sup>202</sup>

In essence, it is clear from the discussion above that Scotland acknowledges the vast difference between the level of intellect of very young children and those of older children (or perhaps rather young adults). The law protects younger persons (those under sixteen) from their own immaturity and possible lack of judgement, yet they allow for some form of contractual capacity by way of a few exceptions. Older children, however, are treated as adults, since they have full capacity to enter into contracts by themselves. No assistance from a guardian is required to validate their contracts. However, they are not unprotected, because the law allows them to apply to have a prejudicial transaction set aside. This also indirectly protects the other party, since it is

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<sup>197</sup> Woolman & Lake *Contract* 54.

<sup>198</sup> S 4(1) Age of Legal Capacity (Scotland) Act.

<sup>199</sup> S 4(2).

<sup>200</sup> Walker *Contracts* 63.

<sup>201</sup> S 3(3)(j) Age of Legal Capacity (Scotland) Act.

<sup>202</sup> Walker *Contracts* 63. Uncertainty arises with regards to when such a transaction would be judicially ratified, as no examples have been suggested by the Scottish Law Commission. See Norrie 1991 *J.L.S.S* 435.

not an easy test to pass to have such a transaction set aside. Scotland is more flexible than South Africa in this regard since different age groups are established in order to acknowledge the difference in the levels of intelligence between these groups. This differentiation also recognizes the development of the child into mature human being. It seems to present a more equitable approach than the one applied in South Africa.

### **3 4 Summary: a comparative analysis: balancing the competing principles**

The discussion above illustrates that despite the apparent differences in the various countries regarding the enforceability, ratification and repudiation of these contracts, the common principle emerges that while minors require some form of protection due to their immaturity in judgement, it is also accepted that some form of protection is required for the interests of the other contracting party. This implies that these two competing principles need to be balanced in an equitable manner. All of the abovementioned countries contemplated this balance when considering what arrangement should be made, and yet all of them reached a different conclusion as to what may be the best possible way to deal with such contracts.

It is clear that the aim of the law in South Africa in this regard is to protect minors against their own immaturity, and that this aim prevails over the principle of respecting the interests of the other party. The other party's options are limited. He cannot enforce the contract or escape liability in terms of the contract. However, he does have a claim for enrichment against the minor if the minor's estate has been enriched at the expense of his estate.<sup>203</sup>

Similar to the position in South Africa, English law appears to favour the minor above the other party in this regard, since minors are generally not bound by their contracts unless ratified after attaining majority.<sup>204</sup> However, unlike the law in South Africa, the minor's guardian cannot validate the unassisted contract by way of consent. For this

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<sup>203</sup> This claim for enrichment is a limited one, and will be discussed in a subsequent chapter.

<sup>204</sup> Peel *Treitel Contract* 578.

reason it appears that the law regulating minors' unassisted contracts often operate harshly against the other contracting party.<sup>205</sup> The (possibly) *bona fide* adult who contracts with a minor may find the contract between them to be unenforceable.<sup>206</sup> Even if the contract seems to benefit the minor, it will not bind the minor, because there is no general provision by which a minor will be held liable based on mere beneficial contracts. The so-called benefit rule, as we know it, is restricted to service contracts (or similar contracts).<sup>207</sup> Although minors are bound by contracts for necessities, such contracts are only binding and enforceable if they are beneficial as a whole.<sup>208</sup> This is not the case in South African law, since the so-called doctrine of necessities has been rejected by the courts.<sup>209</sup>

The possibility of repudiation of certain contracts which allows minors to avoid liability in some instances also favours the minor above the other party. Strangely, this repudiation may also be withdrawn, in which case the contract will be binding and enforceable again. Since the option of repudiation is only available at the instance of the minor, it is correct to say that this option, too, supports the submission that the scale of justice favours the minor to a large extent.

Although English law does not offer much protection to the other party, it remains more flexible than South African law regarding the minors' unassisted contracts. This is apparent in various areas of the applicable law. The law takes into account the possibility of certain beneficial contracts. It also binds the minor to contracts entered into for necessities and takes into account whether the applicable articles are fit to maintain the particular child in the state, station and degree in which he is.<sup>210</sup> This is evidently different from how it is dealt with in South African law. However, both legal systems

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<sup>205</sup> Stone *Contract* 227.

<sup>206</sup> 227.

<sup>207</sup> Peel *Treitel Contract* 573.

<sup>208</sup> 567.

<sup>209</sup> See discussion in Par 2 2 3.

<sup>210</sup> See discussion in Par 3 3 2.

favour the protection of the minor, often at the cost of the other party. The single age restriction of minors to eighteen in both South Africa and England consequently leads one to submit that little (or no) regard is given to the child's development into adulthood.

The position regarding minors in Germany also presents some interesting perspective. Germany is the only country which allows the other party to resile from a contract entered into with a minor if it has not been ratified.<sup>211</sup> This means the other party may escape liability should the guardian of the minor not ratify. This clearly differs from the limping transaction which is concluded in South African law, since this title implies the other party is still bound by the contract and cannot escape liability, even though the minor is not bound by the contract.

As illustrated in the preceding sections, minors generally need to ratify contracts to validate them, although certain contracts are valid if the minor does not suffer any legal disadvantage in the process. However, the abovementioned term "legal disadvantage" is not free from difficulties, and has given rise to many controversies in German law. It seems to be specifically difficult once it becomes necessary to distinguish between "immediate legal disadvantages" and "more remote disadvantages."<sup>212</sup> Markesinis provides us with a useful example: the making of a gift is legally beneficial towards the minor. In other words, minors may validly enter into such a contract (to receive a gift) without any assistance from his guardian. However, if the gift consists of immovable property such as a piece of land, uncertainty arises with regard to its mere advantage. This is because such a gift may place a list of duties on the minor, such as paying tax. In such a case German law holds that as long as it does not pose an immediate duty on the minor, it may well be commercially disadvantageous and still be valid under the *BGB*.<sup>213</sup>

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<sup>211</sup> Zweigert & Kötz *Comparative Law* 355.

<sup>212</sup> Markesinis *German law of Contract* 231.

<sup>213</sup> 231.

It has been submitted that the German law restricts the independence of minors perhaps more than is required for protection.<sup>214</sup> As Zweigert & Kötz rightly points out:<sup>215</sup>

“[I]t fails to respect the interests of decent third parties who confer benefits on young people under contracts on whose validity they were entitled to rely.”

Although it is accepted that the law should protect the minor against his immaturity, it should also promote empowering minors to develop their abilities as they mature. The German law in this regard is partially flexible, yet it has been suggested to still operate too strict regarding the development of minors' abilities in this regard. Furthermore, some form of fairness should be maintained towards the other contracting party.<sup>216</sup> Allowing the other party to rescind before the legal guardian of the minor ratifies the contract is indicative of partial fairness to the other party.

To conclude: a party who contracts with a minor without the consent of his legal guardian carries a large risk that the contract may be invalid, and consequently no damages can be claimed.<sup>217</sup> The minor is protected since they are only bound to legally advantageous contracts. This excludes generally beneficial contracts. Any other contracts executed by the unassisted minor require ratification by the minor in order to be validated. As stated by Peer Zumbansen<sup>218</sup> in this regard:

“[T]he scarcity of provisions [in this regard] ...is telling of a legal regime that facilitates the participation of minors in contractual exchanges while placing the risk of their involvement on the shoulders of their adult contract parties.”

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<sup>214</sup> Zweigert & Kötz *Comparative Law* 355.

<sup>215</sup> 355.

<sup>216</sup> Zweigert & Kötz *Comparative Law* 355.

<sup>217</sup> 231.

<sup>218</sup> “The Law of Contracts” in J Zekoll & M Reimann *Introduction to German Law* (2005) 2<sup>nd</sup> ed 179.

Since the law in South Africa law also places the risk on the other party while allowing minors to participate to some extent (with assistance) in contracting with others, this quote may very well be used as a form of criticism of the position in South Africa. The risk that the other party carries is also larger in South Africa, since the other party may not resile from a contract entered into with a minor, as allowed in German law.

It is evident from the preceding discussions that the position in Scotland is very different from the position in any of the other jurisdictions under review. As indicated earlier, their two-tier system distinguishes between the capacity of children under sixteen and that of children aged between sixteen and eighteen. Since South African law does not differentiate between minors of different age groups, there is little opportunity for older children, for example sixteen and seventeen year old children, to develop their abilities in this regard. Scotland, on the other hand, provides this opportunity to minors.

Another distinctive alternative in Scots law is that of judicial ratification, which allows a reluctant contractual party some form of security. If an order for judicial ratification is granted by the court it will be final and such a transaction, if completed, will be unchallengeable. This provision both protects the other party and safeguards the interests of the minor, since judicial ratification will not be granted if it appears an adult exercising reasonable prudence in the same circumstances as the young person would not have entered into such a transaction.<sup>219</sup> This provides the other party with peace of mind and allows them to rely on the enforceability of the contract. This unique provision in Scots law contributes to its flexibility and balanced approach.

Furthermore, in Scotland the other party seems to enjoy the normal rights that a party may acquire when contracting with someone with full contractual capacity, when he contracts with a child aged sixteen to eighteen. This is not the case in South African law. In Scotland, when contracting with children younger than sixteen, the scale seems to weigh in favour of the minor, since they generally require more protection than the older young persons. The Age of Legal Capacity (Scotland) Act undoubtedly tries to

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<sup>219</sup> S 4(1)-(2) Age of Legal Capacity (Scotland) Act.

balance fairness to adults against the necessity to protect younger persons. The simplicity of this Act makes it easier to understand the risks attached to contracting with minors. Children in Scotland are (in many aspects) much freer.<sup>220</sup> The Act acknowledges the reality that sixteen and seventeen-year old children are (and can be) economically active.<sup>221</sup> It appears that the placement of risks and availability of remedies is based on the general principle of balance, which safeguards the interests of enforcing agreements, while not overemphasising the protection of minors.<sup>222</sup> It seems to strike a good balance between the two competing principles, and makes the placement of the risk seem fair in this regard.

### **3 5 Factors that contributed to different approaches in the jurisdictions under review**

The preceding comparative overview reveals a remarkable divergence of approaches. This section briefly considers some factors that may explain this divergence. These factors mainly relate to the pace of law reform. The next section then considers further factors that are relevant in pursuing such reform in South Africa.

One important ground for differentiation between the various approaches relates to the historical development of the law regarding the contractual capacity of minors. Germany private law was codified more than a century ago in the 1900's. Although the code was welcomed by many due to its organised and formal structure, a continuing criticism has been that many of its provisions did not reflect the social and economic concerns of the

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<sup>220</sup> Norrie 1991 *J.L.S.S* 438.

<sup>221</sup> Scottish Law Commission *Report on Minors and Pupils* Par 3.5.

<sup>222</sup> To state that the current position is free from difficulties is incorrect. But to do a comprehensive comparative study between the old and new regulatory position is also beyond the scope of this study. However, the position in Scotland might offer interesting ideas which could possibly be of assistance in South African law regarding minors' contractual capacity. For a comparative discussion between the common law position and the current regulatory position, see Norrie 1991 *J.L.S.S* 434-438.

day.<sup>223</sup> It also ignored the subsequent changes in this regard.<sup>224</sup> The section that deals with minors' capacity is rather limited.<sup>225</sup> German law has also been influenced by canon law,<sup>226</sup> which may indicate a more conservative outlook towards dealing with minors.

In contrast, England and Scotland have more recent legislation dealing specifically with minors' contracts. This provided them with the opportunity to re-evaluate their previous positions. In England the position is regulated by the common law as modified by the Minors' Contract Act.<sup>227</sup> This short piece of legislation states that in general minors should not be bound. Scotland changed its position significantly with the introduction of the Age of Legal Capacity (Scotland) Act,<sup>228</sup> which, as already discussed, distinguishes between two groups of minors and lays down different laws to regulate minors' contracts. This is indicative that the law recognizes that there is a difference between the abilities and maturity of seventeen year old minors and that of a seven year old child.

Unlike England and Scotland, South Africa does not have legislation dealing specifically with minors' unassisted contracts. This position is still regulated by common law.<sup>229</sup> Therefore, the point of departure in South African law, namely that minors are generally not bound by their unassisted contracts, is possibly a dated concept. One of the most significant changes in the minors' position is the abolition of the benefit theory in *Edelstein v Edelstein*.<sup>230</sup> Today minors are not bound by unassisted contracts even if

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<sup>223</sup> Foster *German Legal System* 22.

<sup>224</sup> 22.

<sup>225</sup> S 104-113 BGB.

<sup>226</sup> Foster *German Legal System* 6.

<sup>227</sup> 1987.

<sup>228</sup> 1969.

<sup>229</sup> Although the Children's Act was introduced in 2005, this Act does not deal specifically with the contractual capacities of minors.

<sup>230</sup> NO 1952 3 SA 1 (A). See discussion in previous chapter.

the contract appears to be beneficial.<sup>231</sup> This differs from English law, where minors are bound by contracts for necessities and beneficial contracts of employment.

Another factor worth considering is the comprehensive research and consultation process undertaken by the Scottish Law Commission in this regard.<sup>232</sup> The report provided by the Commission follows a consultation memorandum which was published in 1985. The process of consultation involved distributing questionnaires to the public, explaining the issues under enquiry and obtaining comments from the public.<sup>233</sup> Meetings were also held to discuss the issues and members of the public were invited to attend these meetings and discuss their views. Furthermore, they were also assisted by research conducted by System Three Scotland, which gather adult opinions on the reform ideas presented to them. The Central Research Unit, on the other hand, obtained the opinions of pupils and schools leavers regarding their involvement in common legal transactions and their views regarding reform suggestions.<sup>234</sup> Although the opinions of the public were not all in support of the two-tier system, the Commission still preferred their suggestion regarding the two-tier system. They justified their approach to reform on their own consultation, suggesting that they were in possession of much more information regarding the expected effect of the reform, and also the consequences if such a reform was not introduced.<sup>235</sup>

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<sup>231</sup> See discussion in previous chapter with regard to beneficial contracts.

<sup>232</sup> Although the position regarding minors' contracts in England was also re-considered, the Scottish report and the changes implemented thereafter are much more comprehensive and is therefore discussed in more detail, possibly as an example for reform in South Africa.

<sup>233</sup> Scottish Law Commission *Report on Minors and Pupils* Par 1.2.

<sup>234</sup> Par 1.3.

<sup>235</sup> Par 3.15. The Commission also argued that as the public did not participate in any detailed evaluations of the previous laws, and they also did not understand the implications of the proposed changes, their opinions should not be accepted "without some qualification". Scottish Law Commission *Report on Minors and Pupils* Par 3.15.

The detailed enquiry conducted by the Commission regarding minors' contractual abilities and the encompassing report filed based on this issue, forced the Commission to re-evaluate the previous position of minors in Scotland. It provided them with the opportunity to consider the position in other countries and set new objectives. It also presented the Commission with the chance to criticize the previous position and to make suggestions for reform.

As already mentioned, the Report of the Commission finally resulted in the introduction of the Age of Legal Capacity (Scotland) Act.<sup>236</sup> Since the position in South Africa is still regulated by common law, such an extensive research process is absent in South Africa. Therefore, South Africa still has to avail itself of the opportunity to re-consider the position regarding minors' contractual liability.

### **3 6 Factors relevant in considering legal reform in South Africa**

Recent legislation in South Africa ensures that children are protected in many issues that involve them. The Children's Act<sup>237</sup> requires that the best interest of the child must be the standard of measurement in every issue that involves a minor.<sup>238</sup> This is not only a guideline, but a strict standard of measurement that must be applied in all actions concerning the child. However, one of the general focal points of the Act is the development, protection and basic well-being of children.<sup>239</sup> It does not suggest that minors must completely lack capacity; in fact, it is the opposite that must not be ignored, namely that their development into maturity must be kept in mind. However, it must be remembered that this Act does not deal with minors' contracts, but rather with minors' general well-being.

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<sup>236</sup> 1969.

<sup>237</sup> 38 of 2005.

<sup>238</sup> S 2(b)(iv) and S 9.

<sup>239</sup> S 2(i).

A second relevant factor is the Consumer Protection Act.<sup>240</sup> It specifically deals with the position relating to minors' contracts had the minor been the consumer in a contract. Section 39(1) reads as follows:

“An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer- (b) is voidable at the option of the consumer, if—(i) at the time the agreement was made the consumer was an unemancipated minor; (ii) the agreement was made without the consent of an adult responsible for that minor; and (iii) the agreement has not been ratified by either—(aa) an adult responsible for that minor; or (bb) the consumer after being emancipated or becoming an adult.”

It must be noted that this section is only applicable to transactions which falls into the category of transactions covered by this Act, and will therefore not be applicable to all transactions entered into by minors.<sup>241</sup> Section 39(2) states that this section will not apply to fraudulent minor who is a consumer in terms of the Act. The implications of these provisions will be considered later on.<sup>242</sup>

A third factor to consider that it can be difficult to determine the correct age(s) to allow or disallow young persons from contracting without assistance. This is often not an easy task, since minors do not all possess over the same abilities and level of intellect.

The fourth and possibly most important factor is the interests of the parties at hand. As indicated, the primary focus of the law is the protection of the minor, although recent legislation<sup>243</sup> requires that the development of minors into adulthood is also an important balancing consideration. Scotland's two-tier system provides a valuable example indicating a way to consider both interests. Furthermore, the other party must also be protected. Since the risk in South Africa falls on the other party and their availability of

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<sup>240</sup> 68 of 2008.

<sup>241</sup> For a definition of who is a consumer in this regard, see S 1 Consumer Protection Act 68 of 2008.

<sup>242</sup> Chapter 4 Par 4 2 2.

<sup>243</sup> Children's Act 38 of 2005.

options are rather limited, the imbalance calls for re-consideration. Binding minors to beneficial contracts, as the law in England partially does, may be re-considered in the process of re-evaluation, as this may introduce some margin of flexibility which is required when reconsidering the current somewhat disproportional placement of risk. In the previous chapter<sup>244</sup> it was also shown that there exists some authority in support of such a rule.

In the light of the above, it can be concluded that the position regarding the enforceability, repudiation and ratification of minors' contracts in South Africa seems unbalanced. Although we accept that minors require protection, it is clear that this is not the only factor to consider in this regard. In the process of re-consideration, some form of acknowledgement of their maturity as human beings with developing abilities is necessary. In this regard the two-tier system of Scotland serves as a good illustration, since this is a first-hand example of the acknowledgement that the abilities of these different age groups differ. Furthermore, another factor which contributes to the unsatisfactory position of the other party is the fact that he has to rely on the decision of the minor's guardian to enforce or repudiate the unassisted contract. In this regard, German law provides a possible solution, namely to allow the other party to revoke the contract as long as it has not yet been ratified by the legal representative of the minor.<sup>245</sup> It is submitted that during the process of re-consideration, the introduction of a similar concept, which would allow the other party to resile from the contract, should be considered. This would improve the position of the other party and ultimately provide a more balanced approach.

### **3 7 Conclusion**

From the discussion above it is evident that the enforceability, ratification and repudiation of minors' unassisted contracts in South Africa differ from the position in the other jurisdictions under review. South Africa, as a developing country with a young

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<sup>244</sup> Ch 2 Par 2 2 3.

<sup>245</sup> S 109 BGB.

democracy, has previously identified the need for new legislation in various fields regarding minors and their rights.<sup>246</sup> Other countries have been of great assistance in contributing experience and knowledge by way of comparative studies.<sup>247</sup> While the current view is that minors' unassisted contracts are unenforceable, the interests of the other party have been marginalised.

It has also been shown that the position in South Africa seems rather inflexible when compared to the jurisdictions under review. England binds minors to contracts for necessities and beneficial employment contracts. Germany also allows for at least some form of flexibility regarding minors' unassisted contracts, since minors' contracts are "provisionally invalid", although there are some instances where minors possibly be bound.<sup>248</sup> The two-tier system applied in Scotland allows the law to differentiate between the enforceability of contracts entered into by younger children and older children.

It is trite law that children are particularly vulnerable and we recognise their special need for protection. As mentioned above,<sup>249</sup> this protection, when considering possible contractual obligations, is far-reaching.<sup>250</sup> Consequently, the major objective regarding minors' contracts in South African law is their protection. This results in the fact that adults are discouraged from contracting with minors, since these contracts would be unenforceable according under South African law. As indicated earlier, the restitutionary remedies available at the instance of the other party are also limited.<sup>251</sup> This could also

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<sup>246</sup> K Johansson & T Palm "Children in trouble with the law: Child Justice in Sweden and South Africa" (2003) 17 *International Journal of Law, Policy and the Family* 308 – 337 309 <<http://lawfam.oxfordjournals.org/content/17/3/308.full.pdf> > (accessed 28/03/ 2011).

<sup>247</sup> 309.

<sup>248</sup> See discussion earlier.

<sup>249</sup> See introductory paragraph.

<sup>250</sup> See Introductory paragraph.

<sup>251</sup> See Ch 4.

contribute to adults refraining from contracting with minors, since they carry the risk in such a case. Therefore, as has been pointed out before:

“Adults are thus discouraged from, and minors to that extent are deprived of, the opportunity of making all other contracts, notwithstanding that some or perhaps many of those contracts might be perfectly proper and beneficial to both parties.”<sup>252</sup>

It is submitted that should the law re-consider the approach applicable to minors' unassisted contracts, more consideration must be given to the interests of the other party. This could be done by providing him with a right to elect to resile from the contract at any stage before the minor's guardian decides to enforce the contract.

Furthermore, it is submitted that a more flexible approach should be introduced. A two-tier system, similar to the one in Scotland, may be of assistance in this regard. In this way, the law can acknowledge the differences in the abilities of younger and older minors. It is not suggested that the law should bind older minors to their unassisted contracts. Although this is the point of departure in Scotland regarding older minors' contractual abilities, this would be against the basic principle in our law. However, within the ambit of a two-tier system, the re-introduction of the benefit rule could possibly be re-considered. This would contribute to the idea of establishing a system that also safeguards the interests of the other party to a larger extent.

Although there is room for the argument that no "ultimately" correct age distinction could be established in order to ensure all children are correctly treated regarding their unassisted contracts, the practical and proper functioning of the law of contract regarding minors requires that some age group be determined and prescribed. However, a margin of flexibility must be introduced to ensure that minors are protected, while supporting the development of the child and his abilities.

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<sup>252</sup> Western Australia Report on Minors' Contracts 42.

## **Chapter 4: Restitutionary remedies arising from the failure of a contract concluded with an unassisted minor**

### **4 1 Introduction**

If a contract fails because it has been concluded by an unassisted minor, the question arises to what extent the parties are obliged to return performances made in purported fulfilment of the contract. In South African law, the dominant position is that these duties are not contractual in nature,<sup>1</sup> but are rather based on unjustified enrichment.<sup>2</sup> In principle, both parties' claims for restitution are limited to the extent of the recipient's enrichment at the time the action is instituted.<sup>3</sup> The risk of loss of enrichment is therefore on the transferor, not the recipient. As will be indicated below, the nature and extent of these enrichment claims are problematical. This chapter sets out and evaluates the respective positions regarding restitutionary remedies in South Africa, England, Germany and Scotland and identifies the restitutionary risks carried by each of the parties when contracting with a minor.

### **4 2 Actions available at the instance of the parties: South Africa**

#### **4 2 1 Introduction**

An unassisted minor's contract is referred to as a limping transaction, because it binds the other party, but not the minor.<sup>4</sup> However, as soon it has been established that the contract has failed, the performances of both parties can be reclaimed. The parties' respective actions and the scope thereof will now be discussed.

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<sup>1</sup> Boberg *Persons* 810; J D Van der Vyfer & D J Joubert *Persone- en Familiereg* (1991) 3<sup>rd</sup> ed 165. If a contract validly concluded on behalf of the minor is prejudicial to the minor, the duties of restitution are contractual in nature: J D Van der Vyfer "Kontrakteregtelike Kompetensies van 'n Minderjarige" in D J Joubert *Petere Fontes LC-Steyn Gedenkbundel* (1980) 195 214.

<sup>2</sup> Visser *Unjustified Enrichment* 547.

<sup>3</sup> Boberg *Persons* 812. There are exceptions in this regard, which will be discussed at Par 4 2 3 below.

<sup>4</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A). This was also discussed in Ch 3 Par 3 3 1.

#### **4 2 2 The action(s) available to the minor**

There exists some controversy regarding the correct action available to the unassisted minor for reclaiming property or money transferred to another party. The suggestions include *restitutio in integrum*, the *rei vindicatio*, as well as a claim based on unjustified enrichment.

##### **(a) The contractual remedy of *restitutio in integrum***

With this remedy the minor claims restoration of the *status quo ante*.<sup>5</sup> In other words, the parties' respective positions are restored to that what they would have been had the contract not been concluded. As a result, both parties must return what they have received in terms of the contract.<sup>6</sup> Furthermore, they also compensate each other for any losses suffered by the other party which the other party would not have suffered had they not entered into the contract.<sup>7</sup>

The remedy of *restitutio in integrum*, which, as indicated earlier,<sup>8</sup> originates in Roman law, has been proposed to be the correct remedy in the case of *Louw v MJ & H Trust (Pty) Ltd*.<sup>9</sup> This case dealt with a fraudulent minor who induced a party to

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<sup>5</sup> H Scott *Unjust Enrichment by transfer in South African law: unjust factors or absence of legal ground?* Doctoral Thesis Oxford (2005)189.

<sup>6</sup> 189.

<sup>7</sup> Van der Vyfer "Kontrakteregtelike Kompetensies" *Petere Fontes Gedenkbundel* 216. The essential elements required to support a claim for an order of *restitutio in integrum* are the following: (a) Allege and prove an *iusta causa* which will justify setting aside a transaction or legal effect of an event; (b) Allege and prove that you (as the claimant) have suffered or may suffer material damage to your proprietary interests due to the fact that you have entered into the transaction or allowed some event to happen; (c) Claimant must be willing and able to restore the benefits which he has received under the contract, because *restitutio in integrum* may require a mutual restoration of the benefits of the parties: See Lambiris *Specific Performance and Restitutio in Integrum* 182.

<sup>8</sup> Ch 2 Par 2 2 1.

<sup>9</sup> 1975 4 SA 268 (T). See also *Fouche v Battenhausen & Co* 1939 CPD 228 233, where it was held that a minor claiming repayment was in fact seeking *restitutio in integrum*.

believe that he was emancipated. Eloff J held that although the contract was invalid, the minor's fraud had deprived him of the right to claim *restitutio in integrum*.<sup>10</sup> It has been argued that this judgment implies that if the minor had not acted fraudulently by misrepresenting his age, he would have a right to claim *restitutio in integrum*. According to Scott:<sup>11</sup>

“[I]n denying the appellant's restitutionary claim on the basis of his fraudulent misrepresentation, Eloff J affirmed that *restitutio in integrum* is indeed the appropriate mechanism to effect the restitution of minors' payments.”<sup>12</sup>

Scott also adds that the application of *restitutio in integrum* as the correct remedy has been confirmed in recent case law.<sup>13</sup> In *Watson v Koen*<sup>14</sup> the court referred to this remedy once again. Although this case dealt with tacit emancipation, the court referred to the case of *Grand Prix Motors v Swart*,<sup>15</sup> and held the following:

“Daar moet ook in gedagte gehou word dat waar die minderjarige *restitutio in integrum* eis (soos in die *Grand Prix Motors*-beslissing *supra*), dit 'n verweer sal wees dat die minderjarige voorgegee het, hetsy uitdruklik of stilswyend, dat hy 'n meerderjarige persoon is.”<sup>16</sup>

She adds that as a result, the court in the *Watson*-case<sup>17</sup> upheld the rule stated in *Louw v MJ & H Trust (Pty) Ltd*,<sup>18</sup> namely that a minor's fraud will deprive him of the right to claim *restitutio in integrum*.<sup>19</sup>

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<sup>10</sup> My Emphasis.

<sup>11</sup> Scott *Unjust Enrichment by Transfer* 190-196.

<sup>12</sup> 195-196.

<sup>13</sup> 196.

<sup>14</sup> 1994 2 SA 489 (O).

<sup>15</sup> 1976 3 SA 221 (C). This case also dealt with tacit emancipation of a minor. The court found that the other party was unjustly enriched and the minor was allowed to recover performance. However, Scott points out that there was no discussion regarding the nature of the minor's claim: Scott *Unjust Enrichment by Transfer* 194.

<sup>16</sup> *Watson v Koen* 1994 2 SA 489 (O) 493.

<sup>17</sup> 1994 2 SA 489 (O) 493.

Another related case which Scott refers to is *Breytenbach v Frankel*.<sup>20</sup> In this case De Villiers C J indicated that although a claim for *restitutio in integrum* is not necessarily required by law, the general practice during Roman-Dutch law was for minors who repudiated their unassisted contracts to bring a claim for *restitutio in integrum* after attaining majority.<sup>21</sup>

Scott touches on another important issue. She says that although *restitutio in integrum* is said to not apply in cases concerning land, the minor's remedy is not as far removed from *restitutio in integrum* as one might think it to be:

“*Breytenbach v Frankel*<sup>22</sup> shows, at least where a system of land-registration is in place, the vindication of immovable property amounts to the rectification of the title-deed, and thus the minor's remedy closely resembles *restitutio in integrum*.”<sup>23</sup>

Visser supports Scott's submission and mentions that one should also not forget the similarity between the winding-up process of a minor's unassisted contract, and that of a contract rescinded due to the distortion of the will of the parties.<sup>24</sup> The points of departure with regard to the enforceability of these contracts are indeed different, since the former is unenforceable against the minor unless it ratified, whereas the latter is enforceable against the one party, unless rescinded. However, he points out that the winding-up of such contracts is very alike.<sup>25</sup> Once the minor's guardian decides to repudiate the contract, both parties may claim restitution, as far as possible, of what has been performed in terms of the contract. Likewise, once the wronged party rescinds the voidable contract, both parties must return, as far as possible, whatever they received in terms of the contract. Neither contract is void:

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<sup>18</sup> 1975 4 SA 268 (T).

<sup>19</sup> Scott *Unjust Enrichment by Transfer* 196.

<sup>20</sup> 1913 AD 390 398.

<sup>21</sup> 398.

<sup>22</sup> 1913 AD 390.

<sup>23</sup> Scott *Unjust Enrichment by Transfer* 192.

<sup>24</sup> Visser *Unjustified Enrichment* 549.

<sup>25</sup> 549.

the minor's contract may be enforced by the guardian of the minor, while in the case of improperly obtained consent the contract is voidable.<sup>26</sup> If the winding-up of the contract which is rescinded by the wronged party is effected by *restitutio in integrum*, it is only fair to ask whether the similarities between the two cases do not warrant treating the winding-up of an unassisted minor's contract in a similar manner?

Not everyone supports *restitutio in integrum* as the correct remedy. Boberg summarises the problem as follows:

“[T]he unassisted contract of a minor is simply not enforceable against the minor as a *matter of law*, irrespective of whether it benefits or prejudices him or her, and there is no need for the court to declare it so. Whatever the true nature of the minor's action for recovery of performance may be, one thing is clear: it is not a claim for *restitutio in integrum*.”<sup>27</sup>

On this approach, the decision in *Louw v MJ & H Trust (Pty) Ltd*<sup>28</sup> is regarded as incorrect. A major criticism raised against this remedy is the fact that the minor does not require *restitutio in integrum* to be relieved of an unassisted contract. In short, it is regarded as unnecessary.<sup>29</sup> Boberg submits that the argument of Eloff J presupposes that *restitutio in integrum* is the only way the minor may be released from the contract, and rejects this view.<sup>30</sup> He adds that the unassisted minor incurs no contractual liability at all, and consequently *restitutio in integrum* was unnecessary to relieve an unassisted minor.<sup>31</sup> Caney, too, adds that the older authorities (relied upon in *Breytenbach v Franke*<sup>32</sup>) affirmed that *restitutio in integrum* is “out of place, unnecessary.”<sup>33</sup> Donaldson also comments on this so-

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<sup>26</sup> 503 & 546. See par 2 3 above on how minors' unassisted contracts should be typified.

<sup>27</sup> Boberg *Persons* 802 & 801 fn 132. My emphasis. Also see Lambiris *Specific Performance and Restitutio in Integrum* 221.

<sup>28</sup> 1975 4 SA 268 (T).

<sup>29</sup> Boberg *Persons* 802 fn 132; Lee *Roman-Dutch Law* 45, 418.

<sup>30</sup> Boberg *Persons* 820-821.

<sup>31</sup> 821.

<sup>32</sup> 1913 AD 390.

<sup>33</sup> L R Caney “Minors Contracts” (1930) XLVII SALJ 180 188.

called practice in Roman-Dutch law and states that it is not required that the minor seeks *restitutio in integrum* to be relieved from his consequences.

“It accordingly became the practice even in actions where the contract was void to bring a petition for *restitutio in integrum* at the same time. This was merely an extra precaution lest it should turn out that for some reason, e.g., that consent had in fact been given, the contract had some existence. But this extra caution on the side of the practitioners, whether in the law of Holland or in the modern law, does not alter the fundamental character of the minor’s unassisted contract.”<sup>34</sup>

Another difficulty with the application of this remedy is the fact that for a minor to claim *restitutio in integrum*, the minor must prove his minority as well as the fact that the contract was prejudicial towards him at the time of its execution.<sup>35</sup> In *Breytenbach v Franke*<sup>36</sup> the court held that

[I]f the action is one for *restitutio in integrum*, the *onus* lies on the minor to *prove damages*.<sup>37</sup>

However, not all contracts entered into by minors are necessarily to their detriment. Consequently, the aforementioned remedy will only be available in specific circumstances. This would be contrary to the minor’s right to reclaim performance, since authorities<sup>38</sup> clearly indicate that any performances made by an unassisted minor in purported fulfilment of a contract will be recoverable, due to the minor’s incapacity to enter into a valid contract.<sup>39</sup>

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<sup>34</sup> Donaldson *Minors* 13-14,59.

<sup>35</sup> Van der Vyfer “Kontrakteregtelike Kompetensies” *Petere Fontes Gedenkbundel* 216; In *Wood v Davies* 1934 CPD 250 258 Sutton J refers to old authorities to support his submission that prejudice is required;

<sup>36</sup> 1913 AD 390.

<sup>37</sup> 400. My emphasis.

<sup>38</sup> Voet 4.4.21 and 26.8.4

<sup>39</sup> Boberg *Persons* 801 fn 132.

It is clear from the preceding discussion that the authorities are inconclusive in this regard. If the choice was merely one of attaching a label to the claim for restitution it would not matter much, but that the choice actually has an impact on the measure of liability, since *restitutio in integrum* is not measured in the same way as enrichment claims. I will return to this issue once again after discussing the measure of liability of enrichment claims, and the position in various other jurisdictions.<sup>40</sup>

(b) The *rei vindicatio* provided by property law

The *rei vindicatio* is a remedy available to an owner who wants to recover an existing and identifiable object from someone who is exercising unlawful physical control over it.<sup>41</sup> Although the minor may own property, he is incapable of acquiring or alienating it.<sup>42</sup> This is because the transfer of ownership is a legal transaction, which requires that the parties must enjoy the necessary capacity to act before the law will attach certain consequences to the transaction.<sup>43</sup> Due to the minor's minority he does not enjoy full capacity to act and consequently cannot alienate property without the assistance of his guardian.<sup>44</sup> The ownership of property purportedly transferred by the unassisted minor consequently remains vested in the minor,<sup>45</sup> and the property can be reclaimed with the *rei vindicatio*.<sup>46</sup>

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<sup>40</sup> Par 4 7 2 1.

<sup>41</sup> A J van der Walt & G J Pienaar *Introduction to the Law of Property* (2009) 6<sup>th</sup> ed 145.

<sup>42</sup> Lambiris *Specific Performance and Restitutio in Integrum* 219.

<sup>43</sup> J C Sonnekus & J L Neels *Sakereg Vonnisbundel* (1994) 2<sup>nd</sup> ed 390.

<sup>44</sup> Eiselen & Pienaar *Unjustified Enrichment* 172. Certain contracts also require the approval of the court, together with the guardian's approval. An example of this is the alienation of immovable property of the minor: See Wessels *Contract* 250 and *Breytenbach v Frankel* 1913 AD 390 398.

<sup>45</sup> Eiselen & Pienaar *Unjustified Enrichment* 172; *Breytenbach v Frankel* 1913 AD 390 400.

<sup>46</sup> Eiselen & Pienaar *Unjustified Enrichment* 172; *Breytenbach v Frankel* 1913 AD 390 398. In this case four brothers owned an undivided share in a farm. In August 1911 the three elder brothers, who have already attained majority, and their father, acting on behalf of the fourth brother, a minor, entered into a long term lease agreement with the defendant in terms of which they leased a certain portion of the farm to the defendant. However, this lease was concluded without the approval of the Supreme Court. After attaining majority, Jacob

However, the *rei vindicatio* only offers limited assistance to the minor. It is only available if the object is still in the possession of the other party. Also, money cannot be reclaimed with *rei vindicatio* since the other party becomes owner by way of *commixtio*.<sup>47</sup> Consequently, this remedy does not offer an encompassing remedy which may assist the minor when he has already performed in terms of an unassisted contract.

(c) A claim based on unjustified enrichment

Enrichment liability arises if one person's estate is increased at the expense of another person, without any legal cause (*sine causa*).<sup>48</sup> Lotz & Brand describe the obligation that arises in such a case as follows:

“From the fact of such increase an obligation arises in certain circumstances in terms of which the person whose estate has been increased has a duty to restore the increase to the person at whose expense the increase has taken place.”<sup>49</sup>

Even though a minor cannot transfer ownership through delivery, it is possible for the other party to obtain ownership of property in any event.<sup>50</sup> As indicated in the previous section, this can arise by virtue of the rule regarding the original acquisition of ownership, such as the mixing of money or accession of movables. The other party could further be enriched by services performed by the minor. As a result, an enrichment action may be of assistance to the minor to reclaim his performances.

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repudiated the lease contract and subsequently sold his share in the farm to the plaintiff. The plaintiff sought to remove the defendants from the property, claiming the lease was invalid as it had not been registered, or at least it was invalid with regard to the portion leased by the minor. The Appellate Division was of the view that unassisted minors' transfers were without any effect, and indicated that the appropriate action was a vindicatory action.

<sup>47</sup> Eiselen & Pienaar *Unjustified Enrichment* 172; Scott *Unjust Enrichment by Transfer* 192.

<sup>48</sup> J G Lotz & F D J Brand “Enrichment” in W A Joubert (ed) *LAWSA* 9 (2005) 2<sup>nd</sup> ed Par 207.

<sup>49</sup> Par 207.

<sup>50</sup> Lambiris *Specific Performance and Restitutio in Integrum* 219 fn 19.

Certain general requirements have to be met to succeed with a claim for restitution based on unjustified enrichment.<sup>51</sup> First, the defendant must be enriched. Secondly, the plaintiff must have been impoverished. Thirdly, there must be a causal link: the enrichment of the defendant must have taken place at the expense of the plaintiff. Lastly, the enrichment must be without legal ground or *sine causa*. Meeting the first three requirements does not require further consideration, since the question when value leaves a minor's estate and enters the estate of the other party has already been dealt with above, in the context of the discussion of proprietary remedies. The focus here will be on the absence of a legal ground for the enrichment. This at least means that there should be no valid contract which supports retention of the enrichment.<sup>52</sup> By definition, the unassisted contract which has not been ratified cannot provide such a basis for retention. But it could also mean that the minor has met the requirements for an appropriate enrichment action which could be used to obtain restitution of these benefits.<sup>53</sup> Identifying such an action has been highly problematic, and requires further consideration.<sup>54</sup>

One of the suggestions has been that the minor relies on the *condictio indebiti*.<sup>55</sup> With such a *condictio* a party claims restitution of an undue transfer. In other words, the transfer of money or property must have taken place *indebite*, which means that there must have been no legal or natural obligation in terms of which this transfer was made.<sup>56</sup> Furthermore, one also needs to prove that the mistake was

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<sup>51</sup> J du Plessis *The South African Law of Unjustified Enrichment* (2012) 79.

<sup>52</sup> J du Plessis "Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from two mixed jurisdictions" (2005) 122 *SALJ* 142 148-152.

<sup>53</sup> Visser *Unjustified Enrichment* 547.

<sup>54</sup> For various possibilities see Visser *Unjustified Enrichment* 547-549.

<sup>55</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 60.

<sup>56</sup> Lotz & Brand "Enrichment" in *LAWSA* 9 Par 212(d). Here it is suggested that an unassisted contract of a minor is exceptional in this regard, since a minor will be allowed to reclaim his performance even though such a contract created a natural obligation on the minor's side.

excusable.<sup>57</sup> When one examines the contract of an unassisted minor, it is clear that although we are dealing with an obligation which may be unenforceable, the obligation is not void either.<sup>58</sup> A transfer made in fulfilment of such an obligation could therefore not be regarded as an *indebitum*.<sup>59</sup> The failure to meet this key requirement suggests that the *condictio indebiti* is not an appropriate remedy.<sup>60</sup>

An alternative suggestion by Eiselen & Pienaar is that the action available in such a situation is the *condictio sine causa specialis*,<sup>61</sup> or more specifically, the *condictio ob causum finitam*. This action is available in circumstances where performance has taken place which, at the time, was due, but where the *causa* for the performance subsequently falls away.<sup>62</sup> Therefore, if the benefit was obtained in terms of a valid *causa* which only later disappeared, a party could reclaim his performance with this action. As stated in *Hughes v Levy*:<sup>63</sup>

“By the *condictio sine causa*, money or any other thing parted with in respect of a certain *causa* could be reclaimed if that *causa* ceased to exist.”

Eiselen & Pienaar argue that due to the fact that at the time the performance was made by the minor it was due (although unenforceable), and the *causa* later falls away, the minor’s performance may be reclaimed with the *condictio sine causa specialis*.<sup>64</sup> This view is also supported by De Vos.<sup>65</sup>

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<sup>57</sup> *Willis Faber Enthoven v Receiver of Revenue (Pty) Ltd* 1992 4 SA 202 (A); Visser *Unjustified Enrichment* 301

<sup>58</sup> Du Plessis *Unjustified Enrichment* 80.

<sup>59</sup> M F B Reinecke “Minderjariges se kontrakte: ‘n Nuwe gesigspunt” (1964) 27-28 *THRHR* 133 137-138.

<sup>60</sup> Reinecke 1964 *THRHR* 138 fn 38.

<sup>61</sup> Eiselen & Pienaar *Unjustified Enrichment* 172

<sup>62</sup> 153.

<sup>63</sup> 1907 TS 276 280.

<sup>64</sup> Eiselen & Pienaar *Unjustified Enrichment* 172; Du Plessis *Unjustified Enrichment* 80.

<sup>65</sup> *Verrykingsaanspreeklikheid* 95.

An important implication of regarding the minor's claim for restitution as a *condictio*, is that the other party's liability will in principle be limited to his actual enrichment.<sup>66</sup> The general rule is that the enrichment liability of a party is reduced or extinguished if the object in question was damaged or destroyed while it was in his possession, regardless of whether this was done due to the fault of the enriched party.<sup>67</sup> However, if the other party knew or should have known that the enrichment was *sine causa* and subsequently parted with it, he will not be able to claim loss of enrichment.<sup>68</sup> He will be held liable for the full amount of the enrichment, as determined at the time he knew or should have known that the enrichment was *sine causa*.<sup>69</sup>

#### (d) The Consumer Protection Act

Finally, it is worth referring briefly to the impact of the Consumer Protection Act<sup>70</sup> on minors' unassisted contracts. Section 39 states that agreements entered into by unassisted minors for the supply of any goods or services to the minor (the consumer) will be voidable at the option of the minor.<sup>71</sup> In other words, these agreements will be valid and enforceable until they are set aside.<sup>72</sup> The minor will

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<sup>66</sup> Boberg *Persons* 802.

<sup>67</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>68</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 3 SA 699 (A) 711; De Vos *Verrykingsaanspreeklikheid* 336.

<sup>69</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>70</sup> 68 of 2008.

<sup>71</sup> S 39(1) reads as follows: "An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer- (b) is voidable at the option of the consumer, if—(i) at the time the agreement was made the consumer was an unemancipated minor; (ii) the agreement was made without the consent of an adult responsible for that minor; and (iii) the agreement has not been ratified by either—(aa) an adult responsible for that minor; or (bb) the consumer after being emancipated or becoming an adult."

<sup>72</sup> Lambiris *Specific Performance and Restitutio in Integrum* 198.

have the right to choose unilaterally to abide by the contract or to render it void.<sup>73</sup> If the minor decides to rescind the contract, any obligations under the contract will be extinguished and restitution of performances will be possible.<sup>74</sup> This differs from the consequences of other contracts entered into by unassisted minors, since these contracts are neither void nor voidable, but rather *sui generis*.<sup>75</sup>

#### **4 2 3 The action(s) available to the other party**

Once it has been established that the contract entered into with the unassisted minor has failed, the other party will also have a claim for restitution against the minor. This claim is traditionally regarded as based on unjustified enrichment.<sup>76</sup> The minor's enrichment liability is determined at the time the other party institutes a claim against the minor.<sup>77</sup>

Although it has been submitted that the other party's remedy is a *condictio*,<sup>78</sup> it is uncertain which one of the enrichment actions is the correct one, since no specific action has been indicated in Roman-Dutch law or South African law.<sup>79</sup>

In the case of *Edelstein v Edelstein*<sup>80</sup> Van den Heever JA referred to the works of Grotius and Van der Keesel who stated that as a general rule a minor cannot assume an obligation, with the exception of two situations. First, a minor may

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<sup>73</sup> The minor requires the assistance of his guardian to make the election to rescind or uphold the contract.

<sup>74</sup> S Van der Merwe, L F Van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* (2007) 3<sup>rd</sup> ed 137.

<sup>75</sup> See Ch 2 Par 2 3 4 in this regard.

<sup>76</sup> Eiselen & Pienaar *Unjustified Enrichment* 167; De Wet & Van Wyk *Kontraktereg en Handelsreg* 60-61; Boberg *Persons* 801-802. Support for this statement may also be found in case law which will be discussed below.

<sup>77</sup> Boberg *Persons* 811 fn 159.

<sup>78</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 12.

<sup>79</sup> Eiselen & Pienaar *Unjustified Enrichment* 172; De Vos *Verrykingsaanspreeklikheid* 47.

<sup>80</sup> NO 1952 3 SA 1 (A).

stipulate for an advantage. Secondly, minors are obliged insofar as they have been enriched.<sup>81</sup> The judge also referred to Van der Keessel to explain what Grotius meant by the abovementioned exceptions. He notes that according to Van der Keessel the obligation of the minor arises *ex lege*, and that the minor is therefore obliged by law to make restitution insofar as he has been enriched. The minor would not have to restore whatever he has received pursuant to the contract, but is only obliged to return so much as still remains in his possession at the time of the action.<sup>82</sup>

As indicated above,<sup>83</sup> the general rule states that if the enriched party knew or should have known that he was enriched *sine causa* and subsequently parted with the object, he will be held liable for the amount by which he was enriched at the moment he became aware or should have been aware that the enrichment was unjustified.<sup>84</sup> This rule, however, does not apply to minors' enrichment liability.<sup>85</sup> In other words, the other party cannot argue that because the minor knew or should have known that the enrichment was *sine causa*, the minor cannot raise loss of enrichment as a defence. The minor will be allowed to raise this defence regardless of whether he knew or should have known that he was enriched *sine causa*. Eiselen & Pienaar explains the minor's exceptional liability as follows:

"The enrichment liability of the minor thus forms an exception to the general rule that the enriched party's enrichment becomes fixed at the time that he comes to know or suspect

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<sup>81</sup> 12. See the discussion at Par 2 2 2 above.

<sup>82</sup> 12. This would include surrogates obtained as a result of the other party's performance in the minor's possession at the time of the performance.

<sup>83</sup> Par 4 2 2.

<sup>84</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>85</sup> *Edelstein v Edelstein* indicates by implication that the minor will always be allowed to raise loss of enrichment as a defence, and as a result the so-called knowledge rule will not apply to their enrichment liability: *Edelstein v Edelstein* NO 1952 3 SA 1 (A) 12. See also D Visser "Unjustified Enrichment" in F du Bois Wille's *Principles of South African Law* (2007) 9<sup>th</sup> ed 1041 1050 fn 30; Lotz & Brand "Enrichment" in *LAWSA* 9 Par 209(a) read with Par 226 fn 2.

that he has been enriched. The minor is at all times *liable only for the actual enrichment at the time that action is instituted.*<sup>86</sup>

In other words, money or property transferred to the minor in terms of an unassisted contract will be recoverable, but only insofar as the minor remains enriched. This would also include surrogates obtained as a result of the other party's performance in the minor's possession at the time of the performance.<sup>87</sup> However, if there is no surrogate to substitute the property or money received in terms of the unassisted contract, and the minor has spent or lost whatever he has received in terms of the contract, the minor is not liable whatsoever.<sup>88</sup> The reasoning behind this statement is that if the minor has spent or lost the money or property, he is no longer enriched.<sup>89</sup> The minor is also not liable for depreciation.<sup>90</sup> It may be mentioned in the passing that the basis for the liability of the minor is, as confirmed by Van den Heever JA,<sup>91</sup> not contractual. De Wet explains it as follows:

*“Die aanspreeklikheid van ’n minderjarige op grond van verryking is nie ’n kontraktuele aanspreeklikheid nie, maar ’n aanspreeklikheid wat ontstaan enkel op grond daarvan dat die minderjarige ten koste van ’n ander verryk is.”<sup>92</sup>*

There is one exception to the general principle that a minor will no longer be liable had he spent or lost the item(s) received under the contract. If the minor has spent it

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<sup>86</sup> Eiselen & Pienaar *Unjustified Enrichment* 173. My emphasis.

<sup>87</sup> Boberg *Persons* 812.

<sup>88</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 61.

<sup>89</sup> Christie *Contract* 248.

<sup>90</sup> Van der Vyfer & Joubert *Persone-en Familiereg* 166; Boberg *Persons* 812 fn 160. Depreciation does not necessarily enrich the minor. In *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 3 SA 221 (C) the minor was allowed to reclaim the full purchase amount paid by her for a motor vehicle, although she used it for three months. Enrichment needs to be proved, i.e. that the minor saved money which he otherwise would have spent in any event.

<sup>91</sup> *Edelstein v Edelstein* NO 1952 3 SA 1 (A).

<sup>92</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 60.

on necessaries, such as food or rent,<sup>93</sup> which would have to have been provided to the minor in any event, the minor would be deemed to have been enriched.<sup>94</sup> In such a case the minor will be have to make restitution to the other party as far as he has been enriched. Support for this submission may also be found in case law. In *Edelstein v Edelstein*<sup>95</sup> the court held the following:

“However with regard to minors, enrichment is construed more strictly than in other cases. For in their case enrichment is not held to have taken place if the minor has lost what he received or spent it in some unusual way; but the case is different if a minor has spent it through necessity or if it would in any event have had to come out of his estate.”<sup>96</sup>

De Vos also explains this exception clearly:

*“Mens het hier te doen met die begrip van verryking deur bespaarde uitgawes, dit wil sê nie-vermindering van die vermoë. Omdat die goedere as noodsaaklik beskou is, sou die minderjarige hulle in ieder geval aangeskaf het....Deurdad die eiser nou die goedere voorsien het, is hy verarm deur hul waarde, en die minderjarige is verryk deur sy bespaarde uitgawe, al is die goedere daarna vernietig. Dus is die minderjarige tog aanspreeklik.”<sup>97</sup>*

In any event, the question that arises in this regard is who has actually been enriched?<sup>98</sup> If the minor is self-supporting, it would be the minor who is saving expenditures in such an event, and the minor would therefore be enriched.

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<sup>93</sup> Visser *Unjustified Enrichment* 557; Du Plessis *Unjustified Enrichment* 81.

<sup>94</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 61. It must be reiterated at this stage that the liability for necessaries in this regard is not the same as the doctrine of necessaries which binds the minor in English law. As mentioned in Ch 2 Par 2 2 3, we have rejected this doctrine in our law. It also proceeds on different principles than the enrichment liability of minors.

<sup>95</sup> NO 1952 3 SA 1 (A).

<sup>96</sup> 12.

<sup>97</sup> De Vos *Verrykingsaanspreeklikheid* 47.

<sup>98</sup> Boberg *Persons* 813.

Consequently, the enrichment liability would be that of the minor.<sup>99</sup> However, if the parent would have paid for the necessaries, it is the parent who has saved money and who has been enriched at the expense of the other party. In such a case the parent may be held liable based on enrichment or *negotiorum gestio*.<sup>100</sup> If the performance of the other party consisted of an act or rendering a service, the enrichment that may be claimed in such a case will be the recovery of “the reasonable value of the act or service”.<sup>101</sup> This, too, is only available if the other party’s estate has been impoverished whilst the minor’s estate has been enriched.<sup>102</sup>

Christie<sup>103</sup> suggests that the proper way to apply the enrichment principles in this regard is as follows:

“[I]nquire whether the use of the property has saved the minor expenditure that he would otherwise inevitably have had to make... or whether it merely provided him with amenity he would not otherwise have enjoyed.”

An example will be used to illustrate the other party’s poor position: A, a minor, contracts with B, a person of full capacity, for the sale of B’s bicycle to A. After transfer and payment has taken place, A’s guardian repudiates the unassisted contract and claims repayment of the purchase price. B may reclaim the bicycle from the minor. If the minor has lost or no longer possesses the bicycle, the other party may claim any available surrogates the minor may have in his possession. If no surrogates exist and the bicycle is no longer in the possession of the minor, the other party may be left without a remedy. The reason is that a bicycle is (normally) not included in the category of necessaries, in which case the other party’s claim will fail. Whether the minor knew or should have known that the enrichment was *sine causa* is also irrelevant. No consideration is given to factors such as the minor’s reason for disposing the object. Furthermore, the circumstances of the particular case are also

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<sup>99</sup> 813.

<sup>100</sup> 813.

<sup>101</sup> 814.

<sup>102</sup> 814.

<sup>103</sup> *Contract* 248.

ignored. Minors, regardless of their age and level of maturity, enjoy this protection offered by the law. In other words, whether the minor is ten years old or seventeen years old, the result will inevitably be the same, namely that the other party carries the risk while the minor enjoys significant protection. It is submitted that this inflexible approach must be re-considered. Other factors such as the possible *bona fides* of the other party and the minor's personal experience and understanding with regard to the contract deserve consideration in determining whether the minor should escape liability in such a case or not. This will be discussed in more detail at a later stage.<sup>104</sup>

The other party may not claim specific performance or damages due to non-performance by the minor. Enforcing the contract is not an option, since this decision rests exclusively with the guardian of the minor.<sup>105</sup> The other party may also not rely on the minor's minority as a defence, because this defence is only available at the instance of the minor. From this it is clear that the other party is left in an unfavourable position. Although the other party has a claim for unjustified enrichment, this action offers limited assistance, since the minor is not liable for any money spent or property lost before the action was instituted, except if it was spent on necessities of life.<sup>106</sup> The so-called "knowledge rule" discussed above, which deprives a party of his right to raise loss of enrichment as a defence, does also not apply to minors' enrichment liability.

Finally, it has to be considered whether the other party may possibly enjoy a remedy in delict. If the damage or loss arising from the contract concluded with the unassisted minor can be ascribed to the negligence of the minor, the other party might be able to sue the minor for compensation, because minority is not *per se* a defence in such a case.<sup>107</sup> Boberg makes it clear that the possibility of a delictual claim will only arise where the loss involved was caused by an act outside the ambit

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<sup>104</sup> See Par 4 7 below.

<sup>105</sup> Van der Vyfer & Joubert *Persone- en Familiereg* 165; Visser *Unjustified Enrichment* 547.

<sup>106</sup> Eiselen & Pienaar *Unjustified Enrichment* 173.

<sup>107</sup> Boberg *Persons* 815.

of the contract.<sup>108</sup> If not, it would amount to circumvention of the unenforceability of the contract, and consequently it would not be allowed.<sup>109</sup> In the case of *Lillicrap, Wassenaar & Partners v Pilkington Brothers (Pty) Ltd*<sup>110</sup> the then Appellate Division refused to recognise an action in delict where pure economical loss was claimed, because a contractual relationship already existed. Grosskopf AJA explained that such an “unwanted liability” could provide a “trap for the unwary”,<sup>111</sup> and that it may lead to a circumvention of some contractual terms. As a result, this remedy offered by the law of delict would only be available in certain circumstances, and does not offer an encompassing solution for the other party.

From the overview above, it appears that the South African law relating to the restitutionary consequences of minors’ unassisted contracts may be in need of reform, and that a more nuanced approach, which properly balances the interests of the parties, may be advisable.<sup>112</sup> To assist in determining possible solutions, the experiences of other jurisdictions in regard to determining the consequences of these contracts will now be considered.

### **4 3 Actions available at the instance of the parties: England**

#### **4 3 1 Introduction**

The point of departure in English law is that minors are not bound by their contracts.<sup>113</sup> However, as discussed in Chapter three,<sup>114</sup> certain contracts are valid, while others bind the minor unless he repudiates them.<sup>115</sup> If the minor is not bound, he may be held liable for restitution. It is nowadays argued that these duties of

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<sup>108</sup> 815. My emphasis.

<sup>109</sup> This is similar to the position in England. See Par 4 3 3 in this regard.

<sup>110</sup> 1985 1 All SA (A).

<sup>111</sup> 367.

<sup>112</sup> See Par 4 7 in this regard.

<sup>113</sup> Peel *Treitel Contract* 567.

<sup>114</sup> Par 3 3 2.

<sup>115</sup> Peel *Treitel Contract* 567.

restitution are based on unjust enrichment. Once it has been established that the contract is not binding on the minor, the minor no longer needs to perform in terms of future obligations,<sup>116</sup> and the minor may not claim specific performance.<sup>117</sup> Furthermore, once a minor has performed in terms of such a contract, he cannot claim the money or property transferred merely because of his minority. For the minor to reclaim money paid in terms of a contract which is not binding on him, a valid ground for restitution must be proved.<sup>118</sup> The other party may also reclaim his performance, unless it amounts to an indirect enforcement of the contract, in which case it will not be allowed.<sup>119</sup> The respective parties' claim for restitution will now be considered.

#### **4 3 2 The action(s) available to the minor**

First it is important to establish what it means when we say that the minor must prove an independent ground to reclaim his performance. One such ground, which is relevant in the present context, is a "total failure of consideration".<sup>120</sup> "Failure of consideration" refers to a case where one party did not enjoy the benefit of any part of what he bargained for.<sup>121</sup> If this can be proved, it will be a ground by which the minor may reclaim money or property transferred. "Partial failure" is generally insufficient; the requirement is to show that "no part of the performance for which he has bargained has been rendered."<sup>122</sup> In other words, minors can only reclaim money or property transferred if they did not receive anything in exchange. An

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<sup>116</sup> M P Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (2007) 15<sup>th</sup> ed 556. Liabilities that have already accrued will be discussed at a later stage.

<sup>117</sup> Peel *Treitel Contract* 577.

<sup>118</sup> Beatson *Anson's Contract* 229.

<sup>119</sup> See Par 4 3 3 in this regard.

<sup>120</sup> *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452. In the Court of Appeal Lord Sterndale MR held that "[A]lthough the contract may be rescinded the money paid cannot be recovered back unless there has been an entire failure of the consideration for which the money has been paid." (See page 458 of the judgment.) See also Beatson *Anson's Contract* 229. Note that the requirement of *totality* is currently being re-considered.

<sup>121</sup> Beatson *Anson's Contract* 644.

<sup>122</sup> Peel *Treitel Contract* 1134.

example of the requirement of totality may be found in *Hunt v Silk*.<sup>123</sup> In this case the plaintiff and the defendant entered into an agreement in terms of which the defendant agreed to let a house to the plaintiff. The defendant also agreed to do some alterations and repairs (at his own expense) to the house within ten days after the agreement was entered into. In terms of the agreement the plaintiff was to have immediate possession and execute a counterpart and pay the rent. Although the plaintiff acquired possession of the premises, the defendant failed to adhere to the rest of his promise, namely to do the necessary alterations and repairs. The plaintiff soon left the premises and sued the defendant to recover the rent he paid up front. He was unsuccessful due to the fact that the contract was partially performed, and therefore there was no total failure of consideration.

However, it is clear from case law that the strict application of the requirement of a total failure of consideration is under re-consideration.<sup>124</sup> It has been argued that the law ought to move to a test of partial failure of consideration.<sup>125</sup> The House of Lords<sup>126</sup> (now the UK Supreme Court) has also shown its support for reformulation of the total failure of consideration rule. Unfortunately there is much uncertainty as to whether, and when, the requirement of totality will be eliminated. It has been suggested that restitution should be available in all cases where the minor can return whatever benefits he received in terms of the contract (or compensate for it), as long as it does not amount to indirect enforcement of the contract.<sup>127</sup>

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<sup>123</sup> (1804) 5 East 449.

<sup>124</sup> See *Valentini v Canali* (1889) 24 Q.B.D. 166, where the judge seems to indicate that a restitutionary remedy might have been successful had the minor been able to restore the *status quo ante*.

<sup>125</sup> A Burrows *The Law of Restitution* (2011) 3<sup>rd</sup> ed 333; R Goff & G Jones *The Law of Restitution* (2007) 7<sup>th</sup> ed 640. For a comprehensive discussion in this regard, see Burrows *Restitution* 330-334.

<sup>126</sup> *Westdeutsche Landesbank Girozentrale v Islington L.B.C* [1996] A.C. 669 682-683.

<sup>127</sup> For a more comprehensive discussion in this regard, refer to Beatson *Anson's Contract* 229 & 643-645; Hellwege "Unwinding mutual contracts" in Johnston & Zimmerman *Unjustified Enrichment* 277-278; G Virgo "Failure of Consideration: myth and meaning in the English law of restitution" in D Johnston & R Zimmerman *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 103 115.

In summary: The position regarding minors' restitutionary remedies is found in common law, since there is no legislation which regulates the availability of minors' actions.<sup>128</sup> In terms of common law, minors cannot claim restitution unless they can show that there is an independent ground in the form of total failure of consideration.<sup>129</sup> The recovery of the property may also not amount to indirect enforcement of the contract.<sup>130</sup> The recovery of goods which have passed in terms of a contract which does not bind the minor is not easy, because restoring the *status quo ante* is not an automatic consequence of minority.

#### **4 3 3 The action(s) available to the other party**

Where a minor has obtained property under a contract and the contract is unenforceable against him, the other party may suffer prejudice, because property which passes to a minor under a contract which does not bind him will pass to the minor by way of delivery of the property.<sup>131</sup> With the introduction of The Minors' Contract Act,<sup>132</sup> changes were brought about for the English law to provide some form of assistance to the other party. According to section 3(1) of this Act, the minor

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<sup>128</sup> Although there is legislation dealing with minors' contracts, it does not govern claims made *by* a minor.<sup>128</sup> It only regulates claims instituted *against* a minor. For this reason the option(s) available for the minor remain regulated by common law: Goff & Jones *Restitution* 639.

<sup>129</sup> Beatson *Anson's Contract* 229.

<sup>130</sup> 225.

<sup>131</sup> Peel *Treitel Contract* 578. This rule also protects a third party who (possibly) buys the property from the minor at a later stage. It is uncertain whether property may pass to the minor without delivery. However, it has been correctly said that this is of small practical interest, as the other party will have no interest in instituting a claim as the property will still be in his possession. For support in case law, see *Stocks v Wilson* [1913] 2 K.B 235 246. It has also been established that property may also pass from the minor to the other party by way of delivery, although the contract does not bind the minor. See *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Cp.71 in this regard.

<sup>132</sup> 1987.

may be liable for enrichment. This enrichment liability is, however, not definite, but at the discretion of the court.<sup>133</sup>

Section 3(1) states that where a contract is unenforceable against a defendant or if he repudiates it (because he is a minor at the time the contract was concluded), the court can, where it is “just and equitable to do so,”<sup>134</sup> order the defendant to return the property received under the contract (or any property representing it) to the plaintiff. The practical implication of this section is that non-necessary goods can no longer be retained, and the minor can no longer be unjustly enriched by retaining property.<sup>135</sup> However, this section only empowers the court to make an order for the return of either property or money acquired under the contract. The court may not, in terms of this section, order the minor to pay the value or reasonable value of what he has received under the contract.<sup>136</sup> In such a case the minor can possibly rely on loss of enrichment, if he does not have the object or property (or money representing it).<sup>137</sup>

Some uncertainty surrounds the interpretation of section 3(1). There appears to be doubt as to the exact scope of the words “any property” or “any proceeds representing it”. Whether “property” also refers to “money” has been uncertain for a while. However, there is authority to suggest that it should, in fact, also include money.<sup>138</sup> It is uncertain whether the minor would be liable for restitution if, in the meantime, he disposed of whatever was received under the contract.<sup>139</sup> In other words, interpreting the words “property representing it” may be problematic, because it may be difficult to determine whether the substitute which the minor acquired

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<sup>133</sup> The discretion conferred on the court is a wide one. The court will look at whether it is “just and equitable” to grant the claim.

<sup>134</sup> S 3(1)(b) Minors’ Contracts Act 1987.

<sup>135</sup> This is an important change, keeping in mind that prior to Act, the person entering into a contract with a minor for non-necessities ran a great risk; if it was supplied on credit, the supplier could recover nothing, unless the minor fraudulently induced the contract.

<sup>136</sup> Peel *Treitel Contract* 581.

<sup>137</sup> Visser *Unjustified Enrichment* 551 fn 412.

<sup>138</sup> Peel *Treitel Contract* 582.

<sup>139</sup> Goff & Jones *Restitution* 639.

represents the property he received under the contract.<sup>140</sup> Fortunately, section 3(2) provides that other remedies shall not be prejudiced by the availability of the statutory remedies.<sup>141</sup> Therefore, in cases which fall outside the ambit of section 3(1), or where the court does not want to exercise its discretion, it remains open for the other party to seek relief by way of the common law principles.<sup>142</sup>

In terms of common law, minors are also liable to pay a reasonable price for necessities supplied in terms of a contract.<sup>143</sup> This is not necessarily the same as the agreed purchase price.<sup>144</sup> Therefore, if it can be proved that the concerned benefit falls within the meaning of necessities, the defence of minority will no longer be available to the minor.<sup>145</sup> Although it is easier to prove that a specific item falls within the category of necessities, money, too, may fall within the category of necessities. If the minor has received money in terms of a contract, and the money received can be traced to necessities acquired, the minor would also be liable for enrichment.<sup>146</sup>

Similar to the position of the minor, the other party may also reclaim money paid or property delivered to the minor in terms of common law by proving “total failure of consideration”.<sup>147</sup> If this is proved, the other party will be able to reclaim property delivered to the minor, due to the fact that property which passes to a minor under a contract which does not bind him will pass to the minor by way of delivery of the property.<sup>148</sup>

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<sup>140</sup> Peel *Treitel Contract* 571.

<sup>141</sup> Goff & Jones *Restitution* 639

<sup>142</sup> Peel *Treitel Contract* 580.

<sup>143</sup> Beatson *Anson's Contract* 216.

<sup>144</sup> Peel *Treitel Contract* 1148.

<sup>145</sup> P Birks *An Introduction to the Law of Restitution* (1985) 433.

<sup>146</sup> 435.

<sup>147</sup> For a discussion of applicable case law in this regard, refer to Furmston *Contract* 557-560.

<sup>148</sup> Peel *Treitel Contract* 578

The other party will not be allowed to reclaim performance if it amounts to an indirect enforcement of the contract.<sup>149</sup> Consequently, when performance is reclaimed from a minor, it must also be shown that, if recovery in restitution takes place, it will not amount to indirectly enforcing the contract. The following example may provide a useful illustration: Let us suppose an unassisted minor, A, has entered into an agreement to rent a house from B. After discovering that A was a minor, B institutes action to cancel the lease agreement. B claims that A must give up possession of the property and pay the outstanding rent. This might be problematic. Assuming the claim for restitution is the same amount as the outstanding rent, how will the minor be ordered to pay the rent which is in arrears, without it amounting to an indirect enforcement of the contract?<sup>150</sup> The minor has enjoyed the use and occupation of the property; if the minor is ordered to repay the outstanding rent, it may amount to indirect enforcement of the lease agreement. It is exactly this that the courts are preventing by adding this prerequisite for reclaiming performances.

A minor will not be liable to refund money that was lent to him in terms of a loan agreement, since the recovery of such money would amount to an indirect enforcement of a contract that is not binding on him.<sup>151</sup> This possibly includes the recovery in restitution relating to non-necessary goods or services supplied to a minor, who refuses to pay the agreed contractual price.<sup>152</sup>

Conflicting opinions arise regarding the effect of repudiation on liabilities that have already accrued,<sup>153</sup> or put differently, whether the other party would be able to hold a minor to liabilities that accrued before the minor repudiated the contract. There appear to be opposing two views in this regard. The first view is that the effect is the same as rescission. As explained by Salmond & Williams:

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<sup>149</sup> Beatson *Anson's Contract* 225.

<sup>150</sup> *Lempriere v Lange* 1879 L.R. 12 Ch. D 675.

<sup>151</sup> S Hedley & M Halliwell *The Law of Restitution* (2002) 343; *R Leslie v Sheill* [1914] 3 KB 607.

<sup>152</sup> Goff & Jones *Restitution* 644.

<sup>153</sup> Furmston *Contract* 556.

“A valid repudiation discharges the infant not merely of future liabilities, but also of those which have already accrued due, such as arrears of rent under a lease or calls already made payable in respect of shares.”<sup>154</sup>

This means that the operation of the repudiation by the minor is retrospective. The contract is ended and the parties' *status quo ante* is restored.<sup>155</sup> In other words, liabilities that may have accrued before the minor repudiated the contract will be cancelled and the other party will not be able to claim from the minor in this regard. However, there is also support for the opposite view, namely that repudiation will have no effect on liabilities that have already accrued.<sup>156</sup> In the Irish case of *Blake v Concannon*<sup>157</sup> an infant occupied premises as a tenant for nearly one year. The infant ultimately gave up possession of the property and, after attaining majority, repudiated the occupancy. The judge held him liable for the first six months' rent, since this accrued while he was still occupying the land. This judgment was relied upon in the English case of *Re Jones, ex parte Jones*.<sup>158</sup> The judge, however, hesitated to accept this as correct. Jessel MR responded as follows:

“That is founded on an implied contract. How can a court imply a contract as against a person who is incapable of contracting?”<sup>159</sup>

Although authorities have not reached a unanimous conclusion in this regard, it has been suggested that the former view is preferable.<sup>160</sup> In other words, had the minor attracted any liability in terms of the contract before repudiation, this liability will terminate after repudiation of the contract.

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<sup>154</sup> Sir J Salmond & J M Williams *Principles of the Law of Contracts* (1945) 300.

<sup>155</sup> Furmston *Contract* 556. This view is supported in *North Western Rly Co v McMichael* (1850) 5 Exch 114.

<sup>156</sup> Peel *Treitel Contract* 576.

<sup>157</sup> (1870) IR.4 CL. 323.

<sup>158</sup> (1881) 18 ChD 109.

<sup>159</sup> 118.

<sup>160</sup> Furmston *Contract* 557.

Furthermore, similar to the position in South Africa, the other party will not be able to hold the minor liable for a tort if it is directly related to a contract under which no action lies against the minor.<sup>161</sup> In other words, although minors are generally liable for conduct which amounts to a tort, the other party will not be able to rely on a claim in tort if this would have the effect of indirectly enforcing the contract against the minor.<sup>162</sup>

From the discussion above it is clear that the minor is protected by the law due to his immaturity in judgment. First, the other party cannot enforce the contract against the minor. Secondly, to reclaim his performance from the minor he needs to prove that there has been a total failure of consideration<sup>163</sup> or he must claim in terms of the statutory remedy, in terms of which the court has a discretion.<sup>164</sup> Thirdly, the other party cannot circumvent the action by holding the minor liable for a tort, and by this way indirectly enforce the contract.<sup>165</sup> The minor's position, on the other hand, seems to be more protected since he will only be liable if the court finds it just and equitable to impose liability.<sup>166</sup> Furthermore, the minor may be freed from this liability if he is no longer in possession of the object or property.<sup>167</sup> This position supports the protective attitude the law has towards minors. However, at the same time, it is not easy for the minor to reclaim performance either, since he is also required to prove an independent ground for restitution for him to reclaim anything that has passed to the other party.

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<sup>161</sup> 561.

<sup>162</sup> 561. For an example in this regard, see *R Leslie Ltd v Sheill* [1914] 3 KB 604.

<sup>163</sup> This is the common law claim. See Par 4 3 3.

<sup>164</sup> See Par 4 3 3.

<sup>165</sup> Beatson *Anson's Contract* 225.

<sup>166</sup> S 3(1) Minors' Contracts Act 1987.

<sup>167</sup> Visser *Unjustified Enrichment* 551 fn 412.

## 4 4 Actions available at the instance of the parties: Germany

### 4 4 1 Introduction

In German law a contract entered into by a minor without his legal representative is “provisionally invalid”, since the validity of the contract depends on the consent of the guardian.<sup>168</sup> Section 108(1) of the BGB reads as follows:

“If the minor enters into a contract without the necessary consent of the legal representative, *the effectiveness of the contract is subject to the ratification of the legal representative.*”<sup>169</sup>

If this required ratification does not occur, the provisional invalidity of the contract will become a permanent invalidity.<sup>170</sup> If an unassisted minor has entered into a contract and performance has taken place, the performances will be reversed according to the rules of unjustified enrichment.<sup>171</sup> The enrichment liability of the minor is subject to the defence of loss of enrichment, found in section 818 of the BGB.<sup>172</sup> It will be seen below that the enrichment liability of the minor is rather uncertain, which leaves the other party in an unsatisfactory position.

### 4 4 2 The action(s) available to the minor

Provided that the minor has acted *bona fide*, the minor may claim restitution of his performance with a claim for unjustified enrichment arising from the general enrichment action contained in section 812 of the BGB.<sup>173</sup> This claim will be limited to the extent to which the other party remains enriched.<sup>174</sup>

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<sup>168</sup> Zweigert & Kötz *Comparative Law* 353; See Ch 3 Par 3 3 3.

<sup>169</sup> My emphasis.

<sup>170</sup> Zweigert & Kötz *Comparative Law* 353.

<sup>171</sup> C von Bar & E Clive *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference 4* (2009) 3932.

<sup>172</sup> T Krebs *Restitution at the crossroads: a comparative study* (2001) 181-182.

<sup>173</sup> Zweigert & Kötz *Comparative Law* 353.

<sup>174</sup> S 818(3) BGB. See Par 4 3 3 for a discussion of the defence of loss of enrichment.

#### **4 4 3 The action(s) available to the other party**

One of the options available to the other party is to resile from the contract.<sup>175</sup> This option is only available before the contract is ratified.<sup>176</sup>

Although the other party may also claim restitution with the general enrichment action, it has been submitted that the BGB lacks proper rules regarding unjustified enrichment relating specifically to minors.<sup>177</sup> It is uncertain exactly what the enrichment of minors would be in all instances, for example how to determine the enrichment of a minor where the object received cannot be returned, such as returning an amount for the value of service that a minor received under a (subsequently) invalid contract.<sup>178</sup>

There are two doctrines in German law which are of importance when dealing with enrichment liability of parties, namely the *Zweikonditionenlehre* and the *Saldotheorie*. The *Zweikonditionenlehre* allows both parties to claim back their performances with separate enrichment claims.<sup>179</sup> The claims of the parties are treated independently of each other. Consequently, if one party is no longer enriched because the object that he received has been destroyed, he will still be allowed to institute a claim for enrichment against the other party, even though the latter will not be able to claim from him.<sup>180</sup> In most cases it is the seller who is prejudiced in such circumstances, since he carries the risk of (possible) destruction.<sup>181</sup> Once the contract turns out to be void, the purchaser may reclaim the purchase price he paid in terms of the contract, even though he is (possibly) no longer in possession of the

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<sup>175</sup> S 109.

<sup>176</sup> S 109 (1).

<sup>177</sup> Markesinis *German Law of Contract* 235-236.

<sup>178</sup> 236.

<sup>179</sup> Hellwege "Unwinding mutual contracts" in Johnston & Zimmermann *Unjustified Enrichment* 243 258.

<sup>180</sup> R Zimmerman & J E du Plessis "Basic Features of the German law of Unjustified Enrichment" (1994) 2 *RLR* 14 41.

<sup>181</sup> 41.

object bought in terms of the contract.<sup>182</sup> Although this theory was originally applied, the courts soon realised the unsatisfactory results flowing from it and began applying the *Saldotheorie*.<sup>183</sup>

The *Saldotheorie* can be divided into two parts.<sup>184</sup> First, the enrichment debtor<sup>185</sup> may reduce his own enrichment liability by subtracting any benefits connected to the enrichment which may have fallen away.<sup>186</sup> The second part of the theory refers to transfers made under invalid reciprocal agreements.<sup>187</sup> It requires that the enrichment debtor must subtract from his counterclaim the value of that which he cannot return.<sup>188</sup> In other words, in essence the defence of loss of enrichment is generally not allowed.<sup>189</sup> Visser explains, referring to reciprocal agreements:

“[T]his principle is heavily qualified by the mutuality inherent in the contractual performance, that is to say, performance and counter-performance form an economic unit, a unitary phenomenon, and this must be taken account of in the winding up process.”<sup>190</sup>

Therefore, by way of example the following may be stated: in terms of this theory, if an object bought in terms of a void agreement was destroyed, the purchaser would first have to subtract the value of whatever he received from his counterclaim for repayment of the purchase price, as opposed to the *Zweikonditionenlehre*, where

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<sup>182</sup> Hellwege “Unwinding mutual contracts” in Johnston & Zimmermann *Unjustified Enrichment* 258.

<sup>183</sup> 258; Zimmerman & du Plessis 1994 *RLR* 41.

<sup>184</sup> Zimmerman & du Plessis 1994 *RLR* 41.

<sup>185</sup> This refers to the person who, in terms of the BGB, has “acquired something”: See Zimmerman & du Plessis 1994 *RLR* 39.

<sup>186</sup> 41.

<sup>187</sup> 41.

<sup>188</sup> 41.

<sup>189</sup> There exist some exceptions in this regard, which will be discussed subsequently.

<sup>190</sup> Visser *Unjustified Enrichment* 523.

the purchaser would be able to claim repayment of the entire purchase price, despite being unable to return the object he received.<sup>191</sup>

The *Saldotheorie* has been criticised for undermining the required protection of minors.<sup>192</sup> The BGB states that minors should not be exposed to risks which the representative of the minor would not consent to.<sup>193</sup> An example presented by Zimmerman & du Plessis<sup>194</sup> may assist in this regard: if a minor bought something from an adult without the required consent of his guardian, and the item is subsequently destroyed in the minor's hands, the minor would effectively be bound by the agreement if the seller were to be allowed to subtract the value of the object that has been destroyed from the minor's claim for repayment of the purchase price. The end result may then be that the seller retains the full purchase price, and that the minor is left with the (destroyed) object. In such an event, it appears that the minors' protection is watered down.

However, certain exceptions exist in specific circumstances where the defence of loss of enrichment is allowed. One of these is the case of minors, where minors may plead the defence of loss of enrichment.<sup>195</sup> Minors are also protected against accidental losses.<sup>196</sup> Effectively this means that when a minor enters into a contract with a person of full capacity his interests are protected more strongly than that of the other party. The example of Hellwege illustrates the point:<sup>197</sup>

A, a minor, enters into an exchange agreement with another party, B. The exchange takes place and B is in possession of the object that he received from A. If this object is destroyed, the options available at the instance of the parties will be the following: A may reclaim the object delivered to B. However, A is not required to tender

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<sup>191</sup> Zimmerman & du Plessis 1994 *RLR* 41.

<sup>192</sup> 42.

<sup>193</sup> 42.

<sup>194</sup> 42.

<sup>195</sup> Krebs *Restitution at crossroads* 181-183; Visser *Unjustified Enrichment* 523.

<sup>196</sup> Visser *Unjustified Enrichment* 550.

<sup>197</sup> 550.

performance of what he received from B. B, on the other hand, may only reclaim his performance if he offers to provide A with the value of the object that was destroyed. Therefore, B carries the risk for both what he has receives under the contract, as well as what he gives.<sup>198</sup> Since the minor is fully protected, the other party carries the risk of destruction and deterioration for what has been given as well as what has been received.<sup>199</sup> The enrichment claim available to the other party seems to have limited application, and it does not necessarily offer satisfactory relief for the other party.

There is a possibility that the other party could be protected by section 828 of the BGB.<sup>200</sup> According to this provision, a minor be held responsible for any damages inflicted on another person if he possesses the necessary understanding to identify his responsibilities. If this can be proved, a minor may be held responsible for damages inflicted on another party.<sup>201</sup>

To summarise: although it is correct to say that the other party is in a fortunate position to be able to resile from the contract if no repudiation takes place,<sup>202</sup> it does not necessarily provide him relief. As indicated above, while the minor receives full protection in these cases, the other party may carry the risk of both what he receives as well as what he gives.<sup>203</sup> It has recently been suggested that winding-up of all contracts should be treated similarly, regardless of whether the contract failed due to the incapacity of one of the parties.<sup>204</sup> Hellwege submits that to ensure fairness in these situations, the position regarding the restitutionary remedies of minors should rather be that none of the parties should be able to claim loss of enrichment.<sup>205</sup> He submits that if this is the position, the risk will be on the party who has control over

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<sup>198</sup> Visser *Unjustified Enrichment* 550-551.

<sup>199</sup> Visser *Unjustified Enrichment* 550.

<sup>200</sup> Markesinis *German Law of Contract* 236.

<sup>201</sup> S 828 BGB. If the minor does not have the required insight to recognize his responsibility, he will not be responsible for damages inflicted on another person: S 828(3) BGB.

<sup>202</sup> S 109 BGB.

<sup>203</sup> Visser *Unjustified Enrichment* 550.

<sup>204</sup> 549-550.

<sup>205</sup> 551.

the object. We will return to this argument at the end of the comparative overview, when possible avenues for reform of South African law are considered.<sup>206</sup>

## **4 5 Actions available at the instance of the parties: Scotland**

### **4 5 1 Introduction**

When considering the consequences of young persons' contracts in Scotland, it must be reiterated that Scots law works with a two-tier system. Young persons under the age of sixteen are generally incapable of entering into a contract.<sup>207</sup> If such a young person enters into a transaction without the required assistance, the transaction is void and the normal rules of unjustified enrichment will apply.<sup>208</sup> In other words, the remedies of restitution, repetition or recompense may be awarded, depending on the nature of the benefit. These remedies may be granted by the court once it has been established that enrichment is unjustified.<sup>209</sup>

On the other hand, young persons aged sixteen and seventeen can act on their own behalf.<sup>210</sup> In other words, it is not necessary for them to obtain parental consent to enter into contracts.<sup>211</sup> Effectively, they are treated as fully capacitated persons with regard to their contractual capacity. There is one exception which offers them some form of protection, namely that they may challenge "prejudicial transactions" entered into when they were sixteen and seventeen years old.<sup>212</sup> Section 3(5) of the Act<sup>213</sup>

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<sup>206</sup> See Par 4 6 and 4 7 in this regard.

<sup>207</sup> S 1(a) Age of Legal Capacity (Scotland) Act 1991.

<sup>208</sup> W W McBryde *The Law of Contract in Scotland* (2007) 3<sup>rd</sup> ed 35.

<sup>209</sup> Until recently, the law of Scotland contained three actions for the recovery of transfers and enrichments, namely repetition, restitution and recompense. These actions all offered different measures of recovery. This is not the case anymore. Today they are all treated as remedies which the court may grant once it has been established that the enrichment is unjustified: H L MacQueen "Unjustified Enrichment in Mixed Legal Systems" (2005) 13 *RLR* 21 30; Evans-Jones *Unjustified Enrichment* 193.

<sup>210</sup> S 1(b) Age of Legal Capacity (Scotland) Act 1991.

<sup>211</sup> McBryde *Contracts* 35.

<sup>212</sup> S 3(1) Age of Legal Capacity (Scotland) Act 1991.

empowers the court to make orders as they deem fit to give effect to the rights of the parties. As a result it has been suggested that “this limits the court to applying the principles of unjustified enrichment.”<sup>214</sup> However, it appears that if such a transaction is set aside by court, the transaction will be treated as void.<sup>215</sup>

#### **4 5 2 The action(s) available to the young person**

Although it is accepted that the young person is liable for enrichment, it is not always certain which *condictio* is applicable.<sup>216</sup> For a proper discussion in this regard, a distinction must be drawn between young persons under the age of sixteen, and sixteen and seventeen year olds.

As already indicated in the introduction, the former’s actions are void. Since the cause of action is derived from the invalidity of the transaction, consideration must be given to the *condictio indebiti*. With this *condictio* one claims for the return of the performance which was not owed at all, such as where the transaction was void.<sup>217</sup> However, one problem which may arise with the application of the *condictio indebiti* is the absence of error on the side of the young person.<sup>218</sup> In other words, if he or she knew the transaction was void, there would be no error on his side.<sup>219</sup> In such a case the application of the *condictio indebiti* to recover benefits already transferred will not succeed.

The *condictio sine causa* may possibly be available to the young person who seeks to reclaim his performance.<sup>220</sup> This is also the case if the child knew that the

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<sup>213</sup> Age of Legal Capacity (Scotland) Act 1991.

<sup>214</sup> McBryde *Contracts* 38.

<sup>215</sup> 38.

<sup>216</sup> Evans-Jones *Unjustified Enrichment* 193

<sup>217</sup> Visser *Unjustified Enrichment* 5.

<sup>218</sup> Evans-Jones *Unjustified Enrichment* 193.

<sup>219</sup> 193.

<sup>220</sup> 193.

transaction was invalid.<sup>221</sup> In other words, the availability of this cause of action is regardless of any possible knowledge on the side of the young person, since

“the regime of ‘invalidity’ exists to protect the interests of the young person.”<sup>222</sup>

Transactions entered into by sixteen and seventeen years old are generally valid unless set aside.<sup>223</sup> Consequently, enrichment actions may arise once a prejudicial transaction has been set aside. In considering the *condictio indebiti* as a possible cause of action, it must be reiterated that these young persons’ transactions are valid until set aside. Inasmuch as mistake is an essential requirement of this *condictio*, it may not be the appropriate remedy by which the child may reclaim his performance.

It has been submitted that if the transaction was subsequently set aside by a court, the cause of action to recover any benefits transferred in the process is the *condictio ob causam finitam*, since the transfer was made in terms of a valid obligation that later fell away.<sup>224</sup>

#### **4 5 3 The action(s) available to the other party**

Although young persons are liable for restitution, they are always entitled to rely on the defence of change of position, even if they knew that the transaction which they entered into was void.<sup>225</sup> This is an exceptional position, since the defence of change of position is generally only available to persons who acted *bona fide* in receiving and retaining the benefit.<sup>226</sup> Therefore, it is not available to a party who knew from the beginning that he was not entitled to it. Young persons, however, are always

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<sup>221</sup> 193.

<sup>222</sup> 193.

<sup>223</sup> S 1(1)(b) and S 3(1) Age of Legal Capacity (Scotland) Act 1991.

<sup>224</sup> Evans-Jones *Unjustified Enrichment* 194.

<sup>225</sup> 139.

<sup>226</sup> Evans-Jones *Unjustified Enrichment* 194.

presumed to have been acting in good faith, as a result of the fact that the law aims to protect them.<sup>227</sup> Evans-Jones states that

“[A] special regime regarding measure of recovery may apply to young persons lacking capacity when compared to defenders who have full legal capacity.”<sup>228</sup>

This exceptional rule exists to ensure the protective aim of the law is not undermined. As explained by Schneider:

“[D]enying the defence of change of position in this case would undermine the protective purpose of a minor’s lack of capacity and could lead to a reduction of his general resources.”<sup>229</sup>

There are different opinions regarding the appropriate cause of action. There is authority supporting an action of repetition or restitution based on the *condictio indebiti* for the recovery of money or property which has been transferred to a young person in error.<sup>230</sup> The measure of recovery will be the value of the object received, subject to the defence of change of position.<sup>231</sup> There is also authority supporting recompense as the basis to redress the unjustified enrichment of a young person, in

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<sup>227</sup> 194.

<sup>228</sup> 194.

<sup>229</sup> H Schneider *Incapacity and Restitution: A comparative study of the benefits transferred to persons and public bodies lacking capacity*. LLM Thesis Aberdeen (1998) 139.

<sup>230</sup> N R Whitty & D Visser “Unjustified Enrichment” in R Zimmerman, D Visser & K Reid *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 399 426. This view is also supported (to some extent) by Schneider. He held the following: “If the requirements are fulfilled, a minor may be liable under a *condictio indebiti* or any other enrichment action which is to be recognised in a new law of unjustified enrichment, subject to the defence of change of position.” Schneider *Incapacity and Restitution* 138-139. For a more comprehensive discussion on the need to reform the law of enrichment with regard to young persons, see Schneider *Incapacity and Restitution* 121-139.

<sup>231</sup> Whitty & Visser “Unjustified Enrichment” in Zimmerman *et al Mixed Legal Systems* 426.

which case the measure of recovery will be the value surviving.<sup>232</sup> This view is supported by Walker:

“Sometimes a claim for recompense has been considered where a claim founded on a contract could not have been made [because] the other party [is] a pupil or a minor.”<sup>233</sup>

However, the problem with the *condictio indebiti* is that if the other party knew the transaction he entered into with the young person was void and continued to perform in terms of the contract, his claim with a *condictio indebiti* to recover any benefits transferred will fail.<sup>234</sup> This is due to the rule that states that if a party made a transfer with the knowledge that it is not due, the transfer will not be recoverable. Consequently, if the other party knew that the transaction is void, therefore not due, his claim with a *condictio indebiti* will fail.

In essence, the appropriate cause of action for young persons’ enrichment liability is not always certain. As Whitty & Visser state:

“This branch of enrichment law has proved troublesome in Scotland. [T]he issues have not yet been fully ventilated and the result is not free from doubt.”<sup>235</sup>

However, it is trite that young persons who lack the required capacity will be held liable for restitution.<sup>236</sup> They are, however, in a preferable position, since the defence of change of position is always available to them, regardless of whether they knew that the transaction may be void.<sup>237</sup>

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<sup>232</sup> As discussed in Whitty & Visser “Unjustified Enrichment” in Zimmerman *et al Mixed Legal Systems* 426.

<sup>233</sup> D M Walker *The Law of Contracts and related Obligations in Scotland* (1995) 3<sup>rd</sup> ed 589.

<sup>234</sup> Evans-Jones *Unjustified Enrichment* 193.

<sup>235</sup> Whitty & Visser “Unjustified Enrichment” in Zimmerman *et al Mixed Legal Systems* 426 & 428.

<sup>236</sup> Evans-Jones *Unjustified Enrichment* 194.

<sup>237</sup> 194.

## 4 6 Comparative evaluation

As indicated in Par 4 2 above, the current position in South African law favours the interests of the minor. First, the minor's guardian is left with the decision to enforce or repudiate the "limping agreement". The other party has no power of repudiation. Secondly, the minor enjoys exceptional protection against possible enrichment claims. Whether the minor gained any knowledge or should have gained any knowledge that he had been enriched *sine causa* is irrelevant. The minor will still be allowed to raise loss of enrichment as a defence and his enrichment will be limited to his actual enrichment at the time the action is instituted.<sup>238</sup> This position applies to all minors, regardless of the personal circumstances of the contracting parties. The other party, on the other hand, will be held liable for the full amount of enrichment if it is established that he knew or should have known that the enrichment was *sine causa* and continued to part with it.<sup>239</sup>

In England the position seems rather different. Unlike in South Africa, minority itself is not enough for the minor to reclaim property delivered to another party. An independent ground for restitution must be proved for the minor to reclaim property transferred.<sup>240</sup> The other party may also institute a claim in terms of the common law if he can prove that there has been total failure of consideration.<sup>241</sup> The other party may also claim in terms of the statutory remedy provided by the Minors' Contracts Act,<sup>242</sup> but the liability is not definite but at the discretion of the court.<sup>243</sup> Whether the court will hold the minor liable for enrichment depends on whether it is "just and equitable to do so."<sup>244</sup> This differs from the position in South Africa, where there is no such discretion. By affording the court such a discretion the court can treat each

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<sup>238</sup> De Vos *Verrykingsaanspreeklikheid* 336; Lotz & Brand "Enrichment" in *LAWSA* 9 Par 209 fn 12.

<sup>239</sup> De Vos *Verrykingsaanspreeklikheid* 336.

<sup>240</sup> Furmston *Contract* 557.

<sup>241</sup> See Par 4 3 3.

<sup>242</sup> 1987.

<sup>243</sup> S 3(1) Minors' Contracts Act 1987.

<sup>244</sup> S 3(1)(b).

case on its own merits and ensure that the restitutionary consequences are dealt with equitably.

The German law regarding the unwinding of minors' unassisted contracts is characterised by uncertainty, especially regarding the extent to which the parties' claims for restitution must be "linked".<sup>245</sup> Both the *Zweikonditionenlehre* and the *Saldotheorie* provide unsatisfactory results. Due to the unsatisfactory results flowing from the *Zweikonditionenlehre*, the *Saldotheorie* is often preferred by courts. This theory effectively denies a party the defence of loss of enrichment. However, minors are treated as an exception and may plead loss of enrichment in terms of this theory.<sup>246</sup> This ultimately leaves the other party in an unfavourable position. We will return to the merits of this approach when considering Hellwege's views below.

The law of Scotland is unique in the sense that it makes use of a two-tier system. Similar to the law in South Africa, Scots law provides the young person with an enrichment action based on the invalidity of the action. This is available even though he knew or may have known of the invalidity of the transaction.<sup>247</sup> The other party also has an enrichment claim against the child.<sup>248</sup> This claim, however, is subject to the defence of change of position. Young persons may raise this defence even if they knew they were not entitled to the benefit. This differs from its availability to the other party, since this defence is usually only available if the party acted *bona fide*.<sup>249</sup> As a result, the measure of recovery from a young person may differ from the measure of recovery from a fully capacitated person.<sup>250</sup> There are a few notable similarities between Scotland and South Africa in this regard. Both countries offer special protection to young persons due to their incapacity. Both countries realise that this should not prevail over the general principle that no one should be enriched at another one's expense. As a result, both countries allow for enrichment claims for

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<sup>245</sup> See Par 4 4 3 on the *Zweikonditionenlehre* and *Saldotheorie*.

<sup>246</sup> Krebs *Restitution at crossroads* 181-183.

<sup>247</sup> Evans-Jones *Unjustified Enrichment* 193.

<sup>248</sup> 194.

<sup>249</sup> 194.

<sup>250</sup> 194.

the young person as well as the other party, although the claim of the other party is often a limited one. Scotland has, however, implemented a distinctive two-tier system to properly distinguish between the capacities of very young children and those of sixteen and seventeen year olds. A similar flexible approach is absent in South Africa.

Against the background of this comparative overview, we can now consider the suggestion by Hellwege regarding the unwinding of minors' contracts. This suggestion is also the result of comparative analysis, and provides a valuable framework of reference for identifying similarities and differences between the various approaches. In essence, Hellwege suggests that the unwinding of all contracts should be treated similarly, regardless of the unwinding factor.<sup>251</sup> Furthermore, he submits that the defence of change of position should not be applicable at all to the unwinding of contracts.<sup>252</sup> He argues that there is no justification for having different models regulating the unwinding of mutual contracts, and as the defence of change of position is only "sometimes applicable,"<sup>253</sup> it will be contrary to his suggestion that the winding up of all contracts should be simplified.<sup>254</sup> He summarises the winding-up of all contracts into four basic models<sup>255</sup> and explains them by way of example. In his evaluation of applicable principles and models he compares the law of unjustified enrichment in England, Scotland and Germany. The example used by Hellwege and his four models will now be discussed in more detail.

A and B enter into an agreement whereby A undertakes to exchange his cow for B's horse. After performance by both parties has taken place, the horse dies due to a supervening occurrence. Neither of the parties was at fault in this regard. Afterwards they find out that the contract could be unwound for some reason, such as the

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<sup>251</sup> Visser *Unjustified Enrichment* 551.

<sup>252</sup> Hellwege "Unwinding mutual contracts" in Johnston & Zimmermann *Unjustified Enrichment* 243.

<sup>253</sup> 286.

<sup>254</sup> 286.

<sup>255</sup> 260-261. For a comprehensive discussion regarding this issue, see p 243-286.

incapacity of A.<sup>256</sup> The question under consideration is how does A's impossibility to return the horse affect the parties' respective claims? Also, is the defence of change of position the correct instrument to help resolve these issues?

i) The first model is "Total failure of consideration." In the example above, once A has received the horse as B's counter performance, A is not able to reclaim the cow which he transferred to B. There was no total failure of consideration.<sup>257</sup>

ii) The second model is "*Zweikonditionenlehre*". In terms of this model, A will be able to reclaim his cow, although he himself is not able to return the horse received from B. B, on the other hand, will be unsuccessful with his claim, since the horse no longer exists.<sup>258</sup>

iii) The third model is "*Saldotheorie, restitutio in integrum* and counter-restitution". In order to reclaim the cow, A will have to render restitution to B, either the object itself or the value thereof. As indicated by Hellwege, there is more than one way to achieve this result. The first possibility is to make *restitutio in integrum* a precondition for rescinding a contract. *Restitutio in integrum* presupposes that the aim of the unwinding of the contract is that it be done as a whole. Therefore, if A is not able to return the horse (or its value), or, alternatively, if A is not willing to do this, he will not be allowed to rescind, and hence not claim back his cow. A second way of achieving this result is to make counter-restitution a precondition for claiming restitution. Counter-restitution seeks so ensure that the propriety and factual consequences of the contract are unwound equally for both parties. Therefore, A will only be allowed to reclaim the cow if he is able and willing to return the horse (or its value). Also, A would only be allowed to claim that the factual and proprietary consequences be unwound if he is able to do so himself in return. Consequently, the contract is either unwound altogether in totality, or not at all. Lastly there is the *Saldotheorie*, which is very similar to the abovementioned options. The *Saldotheorie* requires that the enrichment debtor must subtract from his counterclaim the value of

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<sup>256</sup> Hellwege mentions many possible reasons for the contract to unwind: See p 243.

<sup>257</sup> 260.

<sup>258</sup> 261.

that which he cannot return. The defence of change of position cannot be raised. In essence, in terms of this model, the loss of the horse will fall on A, since A will not be allowed to reclaim his cow unless he renders restitution to B either by returning the horse or by making good the value of the horse.<sup>259</sup>

iv) The last model Hellwege mentions is “splitting the loss”. This means that in certain situations, the loss will be split between the concerned parties.<sup>260</sup>

Hellwege submits that Model III is the most suitable basis for England and Scotland to develop their law in this regard towards a unified approach.<sup>261</sup> Germany, on the other hand, could apply either Model II or III. He explains that, if Model II is applied, B will carry the loss of the horse on him. However, he argues that German law has sufficient tools which helps shift the loss from B to A in specific cases.<sup>262</sup> The tools Hellwege refers to include, for example, that if the contract is void for illegality and A knew or should have known of the illegality, B will be allowed to claim his reliance damages from A in terms of section 307 & 309 of the BGB.<sup>263</sup> Furthermore, Hellwege explains that B will always be able to shift the loss on to A where A knew or should have known that he was not entitled to the horse, yet A erroneously dealt with the horse in such a way that it ceased to exist.<sup>264</sup> He also argues that Model III could be applied. In terms of the *Saldotheorie*, the risk of deterioration falls on the party who controls the object.<sup>265</sup> This means that if Model III is applied the risk of the loss of the horse will fall on A, because the *Saldotheorie* effectively deprives a party of loss of enrichment as a defence. Although an exception to the *Saldotheorie* allows minors to rely on the defence of loss of enrichment, Hellwege has suggested that the

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<sup>259</sup> 261.

<sup>260</sup> 261.

<sup>261</sup> 281.

<sup>262</sup> 278-279.

<sup>263</sup> 278. For a complete list of the availability of tools in German law which may assist B in shifting the loss on to A, see discussion on p 278-279.

<sup>264</sup> S 989, 990 BGB; See Hellwege “Unwinding mutual contracts” in Johnston & Zimmermann *Unjustified Enrichment* 278.

<sup>265</sup> Zimmerman & du Plessis 1994 *RLR* 42.

unwinding factor should be irrelevant and that no one should be allowed to rely on this defence.<sup>266</sup>

Hellwege argues that these respective appropriate models (together with the developed applicable law in this regard) should apply regardless of the unwinding factor (such as the incapacity of the minor).<sup>267</sup> Furthermore, Hellwege strongly recommends that the defence of change of position should not have any impact on these situations. He holds that *restitutio in integrum* governs the unwinding of contracts, and that it requires that a party returns what he received under the contract in specie or, alternatively, by making good the value thereof.<sup>268</sup> If one allows for the defence of change of position to play a role (as it currently does), “there would be a risk of subverting the results achieved by *restitutio in integrum*”.<sup>269</sup>

Visser agrees with Hellwege’s suggestion regarding the unwinding of mutual contracts, namely that the defence of change of position should not be allowed at all.<sup>270</sup> If the defence of change of position is allowed, the risk falls on the party who transferred the object or made the payment. If the defence is not available at all, the risk will fall on the person who is in control over the object.<sup>271</sup> As a result it is suggested that neither the minor nor the other party should be allowed to raise the defence of change of position.

There is some merit in the general argument made by Hellwege, namely that *restitutio in integrum* requires that a party return what he received under the contract (or the value thereof) and allowing the defence of change of position interferes in a way that might subvert the expected results. However, in suggesting that the defence of change of position should not be allowed at all, it is implied that in some instances the risk may also fall on minors. If it is the minor who transferred the

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<sup>266</sup> This will be discussed in the following paragraph.

<sup>267</sup> 281.

<sup>268</sup> 285.

<sup>269</sup> 285.

<sup>270</sup> Visser *Unjustified Enrichment* 526.

<sup>271</sup> 526.

object, and the defence of change of position is not allowed, it is the minor who carries the risk of destruction. This may appear reasonable towards the other party. In fact, it may be argued that this presents a proper balance between the interests of the parties, since the risk falls on the party who transferred the object or made the payment. However, such result is not compatible with the approach of South African law, which is primarily aimed at protecting the minor against his youthful lack of judgement.<sup>272</sup> Although it has repeatedly been submitted that a proper balance between the competing interests of the parties must be achieved, denying the minor the right to raise loss of enrichment as a defence will undermine the protective aim of the law. It is proposed that a flexible approach would be preferable to introducing a fixed approach as suggested by Hellwege. This concept of a flexible approach will be discussed below.

#### **4 7 Suggestions and recommendations for possible reform in South Africa**

The main question in this chapter is to determine to what extent the unassisted minor should be liable for enrichment. In this regard it is of particular concern to determine whether minors should be allowed more scope to rely on the defence of loss of enrichment than the other party. In other words, the question which needs to be considered is whether the risk placed on the respective parties during the unwinding of unassisted contracts of minors is correct and fair, given the need to balance their respective interests properly.

As we have seen, the suggestion by Hellwege for German law, namely that no party should be allowed to claim loss of enrichment,<sup>273</sup> is motivated by his argument that the accumulation of the risk on the side of the other party does not seem fair. However, because this implies that in certain instances the risk will be on the minor, this idea seems contrary to our basic principle that the minor should be protected against his inability to make mature decisions. If this suggestion is incorporated into South African law, it would mean that the minor would not be able to recover his performance without returning the value of the object which he received if it has been

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<sup>272</sup> Lambiris *Specific Performance and Restitutio in Integrum* 224.

<sup>273</sup> Visser *Unjustified Enrichment* 525. See Par 4 6.

destroyed. As a result, the minor would not be protected by such a system, and therefore it is submitted that this strict approach does not offer an encompassing solution regarding the treatment of minors' unassisted contracts.

The strict approach, similar to the one followed in our law has justly been criticised in the past.

“The problem [the clash between the two competing principles] is aggravated...by the rigidity of traditional restitutionary rules which do not admit intermediate solutions.”<sup>274</sup>

It is submitted that a more flexible approach should be considered to ensure a proper balance between the interests of the competing parties is achieved.<sup>275</sup> This flexible approach could operate as follows:

#### **4 7 1 Distinction: a two tier system**

It is suggested that a distinction should be drawn between the abilities of young minors and older minors.<sup>276</sup> The Children's Act<sup>277</sup> requires the law to bear in mind the general well-being and the development of the child into adulthood when taking decisions which affects the minor.<sup>278</sup> This can be done more effectively if the law acknowledges the differences between the capacities of younger and older children.

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<sup>274</sup> I England “Restitution of Benefits Conferred Without Obligation” in E von Caemmerer & P Schlechtriem *International Encyclopedia of Comparative Law* 5 (2007) Ch 5- 63.

<sup>275</sup> This was also initially suggested by the Scottish Law Commission: “[A] more flexible rule would be desirable, providing that the rights of the parties would be determined according to common law principles of unjustified enrichment but that the court should be able to modify the young person's obligation to make restitution or recompense in any way it considered equitable in the circumstances.” See Scottish Law Commission's Report on The Legal Capacity and Responsibility of Minors and Pupils, No 110 (1987) [http://www.scotlawcom.gov.uk/download\\_file/view/439/](http://www.scotlawcom.gov.uk/download_file/view/439/) (Accessed 31 March 2011) Par 3.35. However, this suggestion was not welcomed by all of the consultees. As a result, it was ultimately rejected.

<sup>276</sup> This was also suggested in Ch 3 Par 3 6.

<sup>277</sup> 38 of 2005.

<sup>278</sup> S 2(i).

In this regard the classification system of Scotland provides a good example of a two-tier system. By distinguishing between different age groups, Scots law indicates their acknowledgement of a child's maturity into adulthood. In other words, the law recognizes that the levels of intelligence and abilities of the children in these groups differ. If such a system is adopted in the law of South Africa, the law will be presented with a similar opportunity to classify different age groups.

#### **4 7 2 Recommended position of the younger minor**

##### **4 7 2 1 The enrichment action available to the minor**

Although it has been established that some authors regard the remedy of *restitutio in integrum* as appropriate,<sup>279</sup> most authorities prefer awarding enrichment claims and indicate that *restitutio in integrum* is only required for detrimental contracts entered into by minors who have been assisted by their guardians.<sup>280</sup> In the light of the comparative overview and evaluation, it is submitted that in terms of the outcome, the majority position is preferable, and that normal rules of unjustified enrichment should apply when a younger minor claims restitution from another party. The general rule which states that the enrichment liability of a party is reduced or extinguished if the object in question was damaged or destroyed while it was in his possession, regardless of whether this was done due to the fault of the enriched party, must apply.<sup>281</sup> In other words, if the other party is no longer in possession of the object received, he is no longer enriched and the young minor's claim will fail. Crucially, however, the minor will be protected if the other party knew or should have known that the enrichment was *sine causa*. If this question is answered in the positive, the other party will not be able to raise the defence of loss of enrichment.<sup>282</sup> The young minor will then be able to claim for the full amount of the enrichment, as

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<sup>279</sup> See for example Visser *Unjustified Enrichment* 549; Scott *Unjust Enrichment by Transfer* 195-196.

<sup>280</sup> See discussion above in Par 4 2 2.

<sup>281</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>282</sup> De Vos *Verrykingsaanspreeklikheid* 336.

determined at the time the other party knew or should have known that the enrichment was *sine causa*.<sup>283</sup>

#### **4 7 2 2 The enrichment action available to the other party**

It is submitted that the younger minor should fully enjoy the protection offered to him by the law. If an adult enters into a contract with a young minor, he should do so at his own risk. It is difficult to believe that an adult would not enquire about the minor's age if the child is (for example) fourteen years old. Generally speaking, the average fourteen year old child does not appear to have reached the age of majority. The other party may institute a claim based on enrichment against the younger minor. It should be of no consequence if the younger minor knew or should have known that the enrichment was *sine causa* and subsequently parted with the object received under the contract. The other party must bear the full risk of such a loss.<sup>284</sup> It is submitted that this approach sufficiently balances the interests of the parties, since this would ensure that younger children enjoy the protection provided by law; other persons should be cautious when entering into contracts with such young minors.

#### **4 7 3 Recommended position of the older minor**

##### **4 7 3 1 The enrichment action available to the minor<sup>285</sup>**

It is submitted that the normal rules of unjustified enrichment should apply to the enrichment claim of the older minor against the other party. Similar to the position of the younger minor, the other party's enrichment will be confined to the amount of his actual enrichment at the time the action was instituted. In other words, if the object in question was damaged or destroyed while it was in the possession of the other party, the minor's claim for enrichment will fail. However, if the other party knew or

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<sup>283</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>284</sup> This is also how the law currently deals with minors' enrichment liability: See Par 4 2 3.

<sup>285</sup> The enrichment action available to the younger minor and older minor is the same. The suggested difference, however, lies in the enrichment actions instituted against them, as will be seen in Para 4 7 2 and 4 7 3.

should have known that the enrichment was *sine causa* yet subsequently parted with the object received under the contract, he will no longer be allowed to raise loss of enrichment as a defence. If this happens, the minor will be able to claim for the full amount of the enrichment, as determined at the time the other party knew or should have known that the enrichment was *sine causa*.<sup>286</sup>

#### **4 7 3 2 The enrichment action available to the other party**

It is suggested that the specific circumstances of the case be considered to allow the court to alter the older minor's obligation to make restitution, and in this way ensure that fair results are achieved. It is suggested that the following factors be taken into consideration in determining the older minor's enrichment liability.

(a) First, it must be established whether the other party acted in good faith. To determine whether the other party did act *bona fide*, one could, for example, enquire whether the other party made any representations to the minor relating to the contract or the object of the contract, or encouraged or persuaded him to enter into the contract. This may indicate an absence of good faith on the side of the other party. Although this jurisdiction was not considered in detail, it is worth pointing out that the *bona fides* of the other party plays an important role in American law. In terms of that system, a minor may disaffirm a transaction entered into by himself based on his minority, and he will have a claim in restitution, but it is subject to the counterclaim of the other party. Although the law aims to protect the minor, it has been held that:

“rescission must not result in unjust enrichment of the incapacitated claimant, at the expense of a person who has dealt with the claimant *in good faith on reasonable terms*.”<sup>287</sup>

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<sup>286</sup> Eiselen & Pienaar *Unjustified Enrichment* 40.

<sup>287</sup> American Law Institute *Restatement of the Law Third, Restitution and Unjust Enrichment* I Vol (2011) 3<sup>rd</sup> ed 220-221. My emphasis.

Therefore, to avoid the potentially inequitable consequences of rescission, the law may protect a party who dealt with a minor in good faith and on reasonable terms. When dealing with such a party, the remedy of rescission and restitution may be relaxed in the sense that it may be qualified or denied to avoid any possible inequitable results.<sup>288</sup> In this way, hardship on innocent contracting parties may be reduced. It is therefore submitted that the attitude of the other party and the reasonableness of the terms of the contract should be a factor worth considering in determining the minor's enrichment liability.

(b) The second factor that should be considered is the older minor's personal experience and understanding of the contract. This factor consists of various elements. One of them would be to consider the older minors' understanding of the contractual terms. Did he understand the effects thereof? If it is established that he understood the effects of the contract it may point towards a higher level of understanding than what the current law presumes a minor to have.

Another element that ties in with this factor is whether the minor has entered into similar contracts previously, or whether he has entered into any other contracts without assistance. In other words, is he familiar with such matters? This may indicate that the minor is experienced in these types of transactions, and consequently may be more aware of the consequences of the unwinding of such contracts.

Finally, it is important to establish what the motive(s) of the minor were at the time of the disposal of the benefit. Was it an innocent disposal, or was it deliberate? If it was done deliberately, it may indicate that the minor had done so to circumvent his enrichment liability.<sup>289</sup>

If allowed to consider these factors and the specific circumstances at hand, the court will be in a better position to make an informed decision regarding the minor's

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<sup>288</sup> 224.

<sup>289</sup> This was also a factor initially considered by the Scottish Law Commission: See Scottish Law Commission *Report on Minors and Pupils* Par 3.35

enrichment liability towards the other party. This would present the court with an opportunity to alter the exceptional application of the so-called knowledge rule, to prevent the older minor from being protected at the expense of the other party.

It is not intended that the factors discussed above should present a *numerus clausus*. It is merely a list of recommended factors that the court should consider when determining a minor's enrichment liability. This, together with the two-tier system suggested above, will provide the courts with the opportunity to treat each case on its own merits. In this way, the minor will continue to enjoy the protection offered by law, while the potential risks carried by the other party will be reduced. Ultimately, the unsatisfactory results flowing from the current inflexible system should be mitigated and a more even-handed remedy will be introduced.

#### **4 8 Conclusion**

In the discussion above it has been established that unassisted minors' exceptional enrichment liability places him in a significantly more favourable position than the other party. It has also been indicated that the current approach applied in South Africa differs from the somewhat more flexible approaches applied in the other jurisdictions under review. In essence, the current position is out of touch with modern tendencies and legislation.<sup>290</sup> It does not keep trend with the minor's development into adulthood, and it unduly protects older minors at the expense of the other contracting party.

As a result, it is submitted that the position regarding the restitutionary consequences that arise from contracts entered into by unassisted minors calls for re-consideration. A proper balance of the competing principles and interests should be established. This may be effected by replacing the current strict approach with a more flexible one. While it is accepted that the primary aim of the law in this regard is to protect the minor, it is submitted that a flexible approach will lead to a more equitable system which may ultimately provide satisfactory solutions.

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<sup>290</sup> The Children's Act 38 of 2005.

## Chapter 5: The Fraudulent Minor

### 5 1 Introduction

A minor who induced a contract by representing that he is of full age may enforce the contract, even though he made the representation fraudulently.<sup>1</sup> However, if the contract is not enforced and consequently fails, the liability of fraudulent minors in South Africa is governed by a different set of rules than that which applies to other minors who enter into unassisted contracts. More specifically, the minor's dishonest behaviour may affect the restitutionary consequences of his transaction.<sup>2</sup> Unfortunately, some confusion exists regarding the basis for the minor's liability for restitution.<sup>3</sup> Once again, a conflict of principles presents themselves: on the one hand, the law aims to protect the minor against his immaturity and lack of experience; on the other hand, the law must defend the interests of the third parties who innocently entered into a contract with him.<sup>4</sup>

In South African law, it is traditionally accepted that there are two general grounds on which the fraudulent minor may be held liable, namely contract and delict.<sup>5</sup> This chapter provides an analysis of these grounds, and pays special attention to certain solutions advocated by Boberg. Thereafter, the position in England, Germany and Scotland will also be considered to establish how the fraudulent minor's liability is determined in these jurisdictions. Against the background of these comparative investigations, it will then be considered how the law of South Africa should deal with fraudulent minors to ensure they enjoy proper legal protection, without disregarding the interests of the other innocent party.

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<sup>1</sup> Boberg *Persons* 829.

<sup>2</sup> Boberg *Persons* 817-826; De Wet & Van Wyk *Kontraktereg en Handelsreg* 63.

<sup>3</sup> D S P Cronjé "Persons" in W A Joubert & J A Faris *LAWSA 20* (2010) 2<sup>nd</sup> ed Par 470.

<sup>4</sup> Christie *Contract* 248.

<sup>5</sup> Cronjé "Persons" in *LAWSA 20* Par 470.

## 5 2 South Africa

There seems to be conformity among modern authors that a minor who fraudulently represents to be of age,<sup>6</sup> and so doing induces another party into contracting with him on the ground of this belief, should be held liable.<sup>7</sup> However, as indicated above, difficulty has arisen in identifying the most appropriate basis of such liability. In the discussion that follows it will be considered to what extent and under which circumstances the other party will be allowed to recover goods or money transferred to a fraudulent minor. The possibilities that will be considered below include binding the minor to his contract, not binding the minor to his contract, but possibly limiting his restitutionary remedies and also the possibility of delictual liability.

### 5 2 1 *The minor is bound contractually*

The first solution seems to find its support in some Roman-Dutch texts, where the rule stated that minors cannot claim *restitutio in integrum* with regard to contracts entered into by them by means of false statements that they were of age.<sup>8</sup> The argument follows that since they may not claim restitution, they must be bound by the contract.<sup>9</sup> This effectively implies that they are treated as if they were adults at the time the contract was concluded.<sup>10</sup> It has been explained as follows:

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<sup>6</sup> Or to have the necessary consent or to be emancipated.

<sup>7</sup> J A Robinson *The Law of Children and Young Persons in South Africa* (1997) 30; Boberg *Persons* 817; De Wet & Van Wyk *Kontraktereg en Handelsreg* 63; *Auret v Hind* 1884 4 EDC 283 288; *Pleat v Van Staden* 1921 OPD 91 97-100.

<sup>8</sup> Voet 4.4.43.

<sup>9</sup> *J C Vogel & Co v Greentley* 1903 24 NLR 252 254; *Christie Contract* 251.

<sup>10</sup> L Ing.Coertze "Die gebondenheid van 'n minderjarige uit 'n kontrak" (1938) 2 *THRHR* 280 296: "Op hierdie kontrak volg daar geen restituisie nie." See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 63.

“A minor who fraudulently misrepresents himself to be a major is bound by his contracts entered into by others with him in consequence, and the *onus* is on him to show that the others knew he was not a minor unless the others be blood relations.”<sup>11</sup>

An additional prerequisite which must be complied with is that the minor should at least be old enough to look like a person of full age.<sup>12</sup>

Support for this suggestion regarding the minor’s liability may also be found in case law. *Cohen v Sytner*<sup>13</sup> concerned the defendant, a minor, who signed a promissory note for £50, promising to repay a set amount per week to the plaintiff. The agreement read that if one payment was missed, the entire amount would fall due. The minor in this case applied for a discharge of his arrest for outstanding payments, relying on his minority as defence, while the plaintiff stated that the defendant was emancipated. Here it was held *obiter* that

“when a minor incurs a debt by representing that he is of full age, he is bound”.<sup>14</sup>

A few years later in *Vogel v Greentley*,<sup>15</sup> the respondent, a minor, presented himself to be of full age and entered into a contract with the plaintiff. The contract included a restraint of trade clause, which read as follows:

“The said W.A. Greentley will not during the continuance of this agreement by any means whatsoever take employment in Durban, or indirectly be interested or concerned in any other similar business, or manage on commission, or otherwise aid in or assist, or work for wages or salary in any other business in Durban without first obtaining the written consent of the firm.”<sup>16</sup>

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<sup>11</sup> L R Caney “Minors Contracts” (1930) XLVII SALJ 180 194. This view is also supported by Coertze 1938 THRHR 296.

<sup>12</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 63: “Dit spreek vanself dat hy darem minstens oud genoeg moet wees om vir meerderjarig aangesien te kan word.”

<sup>13</sup> 1897 14 SC 13.

<sup>14</sup> 14.

<sup>15</sup> 1903 24 NLR 252.

<sup>16</sup> 253.

After working for the plaintiff for one year, the respondent breached the agreement by starting a business similar to that of the plaintiff. The plaintiff applied for an interdict preventing him from doing so. The defendant, on the other hand, pleaded minority as a defence. Bale C J stated the following with regard to the fraudulent misrepresentations by the minor:

“I think, however, there can be no doubt that under Roman Dutch Law where the minor represents himself to be of age, and by virtue of the representation enters into a contract that he is generally bound by that representation. It is right it should be so, otherwise it would give scope for fraud of a very serious description indeed.”<sup>17</sup>

In a concurring judgment in *Pleat v Van Staden*,<sup>18</sup> Finnemore J followed the decision of Bale C J and enforced a contract entered into by a minor due to the minor’s fraudulent misrepresentation of age. The court held that

“[A] minor who makes a false representation as to his age is not protected by his minority from responsibility.”<sup>19</sup>

A contractual liability based on estoppel has also been suggested.<sup>20</sup> It is argued that the fraudulent minor should be bound by his contract because he deliberately misrepresented himself to be of full age, and thereby induced the other party to enter into a contract based on this belief.<sup>21</sup> In other words, due to their deliberate

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<sup>17</sup> 254.

<sup>18</sup> 1921 OPD 91.

<sup>19</sup> 97.

<sup>20</sup> P Pauw “*Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T): Kontraktuele aanspreeklikheid van minderjariges- Estoppel” (1976) 39 *THRHR* 82 83-84; J D Van der Vyfer & D J Joubert *Persone-en Familiereg* (1991) 3<sup>rd</sup> ed 157.

<sup>21</sup> Boberg *Persons* 823.

misrepresentation of their age they are estopped from relying on the actual lack of capacity they possess.<sup>22</sup>

Another aspect to consider in this regard is the impact of the Consumer Protection Act.<sup>23</sup> Section 39 deals with agreements entered into by persons lacking legal capacity. In terms of section 39(1)(b)(i),

“[a]n agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer (b) is voidable at the option of the consumer, if, at the time the agreement was made the consumer was an unemancipated minor.”<sup>24</sup>

Section 39(2) refers to the position of the fraudulent minor. It reads as follows:

“Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission—  
(a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or  
(b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract.”

This section seems to imply that if a fraudulent minor induces a supplier to believe that he is legally capacitated, or attempts to hide the fact that he did not have such a legal capacity, and by doing so enters into an agreement with the supplier for the supply of goods or services to him, he will be bound by such a contract. However, it must be reiterated that the Consumer Protection Act only applies to transactions which are within the ambit of the Act and its field of application.

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<sup>22</sup> 823; J D Van der Vyfer “Kontrakteregtelike Kompetensies van ‘n Minderjarige” in D J Joubert *Petere Fontes LC-Steyn Gedenkbundel* (1980) 195 212; Van der Vyfer & Joubert *Persone- en Familiereg* 157. It has rightly been held that this view does not propose an “independent solution”, but merely a different justification for binding minors contractually: Boberg *Persons* 823.

<sup>23</sup> 68 of 2008.

<sup>24</sup> Ch 4 Par 4 2 2 (d).

## **5 2 2 The minor is not bound contractually**

(a) Minor is not bound contractually, but he is barred from claiming his performance with *restitutio in integrum*

In contrast to the views set out in the previous sections, it has been suggested that the fraudulent minor is not bound by his contract, but that he is barred from claiming *restitutio in integrum*. The pivotal case is *Louw v MJ & H Trust (Pty) Ltd*,<sup>25</sup> The facts of this case are shortly the following. The appellant, while being a minor, bought a motorcycle from the respondent. At a later stage, the appellant reclaimed the amount of R338 which he had paid over to the respondent, claiming that he was a minor at the time the contract was entered into. The respondent disputed this claim on the ground that the appellant induced him to enter into the agreement by misrepresenting that he was an emancipated orphan. The respondent also filed a counterclaim for the outstanding two instalments.<sup>26</sup>

The court *a quo* held that the minor is bound by the contract due to his dishonest actions, and also held in favour of the respondent for the counterclaims he instituted. On appeal, the appellant's counsel argued that because the appellant was a minor, the respondent's employee should not have merely accepted his statement without an extensive enquiry as to the truth of his averment. Alternatively it was argued that, even if the contract was induced by the misrepresentation alleged, it does not detract from the legal consequence that the agreement is void, and that appellant was entitled to *restitutio in integrum*.

The court first considered whether the respondent should have enquired as to the truth about the minor's age. It held that the respondent was entitled to accept what the minor said regarding his age, except if he had good reason to believe that he

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<sup>25</sup> 1975 4 SA 268 (T).

<sup>26</sup> There was also an issue regarding a claim for negligence which the respondent instituted. Since this is not relevant to the issue at hand it will not be discussed.

was dealing with a minor.<sup>27</sup> Whether the minor is bound by a contract he induced the other party to enter into is another issue. Eloff J referred to case law in which it was found that the minor was, in fact, bound to such a contract. This includes *Auret v Hind*,<sup>28</sup> *Vogel & Co. v Greentley*<sup>29</sup> and *Pleat v Van Staden*.<sup>30</sup> The court drew the attention to the failure to refer to authority in the *Vogel*-case.<sup>31</sup> Furthermore, he added that the comment made in *Auret v Hind*<sup>32</sup> was *obiter*. The only case which referred to some of the Roman and Roman-Dutch authorities is *Pleat's* case.<sup>33</sup> Eloff J continued to examine these paragraphs. The first passage referred to by Ward J is one of Van Leeuwen:

"Nor is this decree granted to those who have committed fraud as, for instance, they who have lied in saying that they were of age."<sup>34</sup>

Eloff J then makes an important point in this regard. He says that "this decree" is *restitutio in integrum*. The mere fact that the fraudulent minor is precluded from claiming *restitutio in integrum* does not imply that his contract binds him because of his fraud. It is not suggested that the contract may be enforced against the minor. Ward J also referred to Voet<sup>35</sup> who says the following:

"In many cases, however, restitution on the ground of minority is denied. Instances are...(ii) when he has fraudulently stated that he is a major to the person with whom he was contracting, such person standing in good faith and being mistaken in fact for it was ordained generally that the law of the State assist minors who are mistaken indeed but does not those who are deceptive and fraudulent, evil intent liars making up for age."

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<sup>27</sup> 1975 4 SA 268 (T) 270. This view was also followed in *Fouché v Battenhausen & Co* 1939 CPD 228 234 and *Pleat v Van Staden* 1921 OPD 91 99.

<sup>28</sup> 1884 4 EDC 283.

<sup>29</sup> 1903 24 NLR 252.

<sup>30</sup> 1921 OPD 91.

<sup>31</sup> *Vogel v Greentley* 1903 24 NLR 252.

<sup>32</sup> 1884 4 EDC 283.

<sup>33</sup> *Pleat v Van Staden* 1921 OPD 91.

<sup>34</sup> *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 272.

<sup>35</sup> Voet 4.4.43 tr Gane *Commentary on the Pandectas* Vol 1 696.

Eloff J suggested that this also indicates that the minor is barred from claiming restitutionary relief, and does not mean that the minor is bound by the contract.<sup>36</sup>

The last authority Ward J referred to was Domat. The relevant passage reads as follows:

"If a minor has given out that he is of age and by producing a false certificate of his registering of his christening, or by some other way, has made people believe that he is a major he cannot be relieved against those facts into which he shall have engaged anyone by this surprise."<sup>37</sup>

Ultimately Eloff J suggests that a fraudulent minor is not contractually liable, but that he is barred from reclaiming his performance with *restitutio in integrum*.

(b)The minor is not bound contractually, and restitutionary relief by way of unjustified enrichment may be awarded

It was already discussed in Chapter four<sup>38</sup> that the law of South Africa provides a party with a claim based on unjustified enrichment if one person's estate is increased at the expense of another person, without any legal cause.<sup>39</sup> As indicated in Chapter four,<sup>40</sup> although the law of South Africa does not have a general enrichment action, there are certain general requirements for any action based on enrichment that have to be met. First, the defendant must be enriched. Secondly, the plaintiff must have been impoverished. Thirdly, there must be a causal link: the enrichment of the defendant must have taken place at the expense of the plaintiff. Lastly, the enrichment must be without legal ground or *sine causa*. The pivotal requirement in this regard is the last one, namely the absence of a legal ground for the enrichment. In other words, there should be no valid contract which supports retention of the

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<sup>36</sup> *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 272.

<sup>37</sup> J Domat *Civil Law* 4.6.2.7 tr Strahan Vol 1 939.

<sup>38</sup> Par 4 2 2 (c).

<sup>39</sup> J G Lotz & F D J Brand "Enrichment" in W A Joubert (ed) *LAWSA* 9 (2005) 2<sup>nd</sup> ed Par 207.

<sup>40</sup> Par 4 2 2 (c).

enrichment.<sup>41</sup> Similar to the position of the non-fraudulent unassisted minor, if a fraudulent minor's contract is not enforced by him, the contract will subsequently fail. Consequently, it appears that a *condictio* should also be considered to be available to persons who have entered into contracts with fraudulent minors.

### **5 2 3 The minor is liable for delictual damages**

The last solution mentioned by Boberg is that the contract is invalid and the minor is liable to the other party in delict for damages caused by his fraudulent misrepresentation.<sup>42</sup> The delictual liability of minors was also not unknown in Roman-Dutch law. Grotius often referred to the delictual liability of minors, “[m]inors...may not bind themselves except by delict.”<sup>43</sup>

The minor's capacity to commit a delict depends on the individual minor's actual level of maturity.<sup>44</sup> It is generally accepted that minors who are old enough to convince others in a fraudulent manner that they are of age should be old enough to incur delictual liability.<sup>45</sup> The prerequisites for a minor's liability in such a case are as follows: first, he should at least have the appearance of someone who has attained majority; secondly, it must be shown that it was the misrepresentation that induced the other party to conclude the contract with the minor; and lastly that the other party has suffered losses because of this.<sup>46</sup> Furthermore, the party who is contracting with a minor is entitled to assume from the minor's appearance that he is of full age; there is no obligation on the other party to enquire whether the minor has been honest in his statement or appearance.<sup>47</sup>

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<sup>41</sup> J du Plessis “Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from two mixed jurisdictions” (2005) 122 *SALJ* 142 148-152.

<sup>42</sup> Boberg *Persons* 825; Cronjé “Persons” in *LAWSA 20* Par 470.

<sup>43</sup> De Groot *Inleidinge* 1.8.5 tr Lee *The Jurisprudence of Holland* Vol 1 41-43. This is repeated at another stage: See De Groot *Inleidinge* 3.1.26 tr Lee *The Jurisprudence of Holland* Vol 1 299.

<sup>44</sup> Boberg *Persons* 826.

<sup>45</sup> 826.

<sup>46</sup> 827.

<sup>47</sup> Cronjé “Persons” in *LAWSA 20* Par 470.

It has been submitted that this solution presents a proper balance between the competing principles. With the application of this solution the minor's contractual immunity is preserved, which effectively ensures that the protection offered by law to all minors also remains. However, this does not imply that the minor is released from all forms of liability. Eloff J explains:

“[T]he minor is liable in delict and, should the other party suffer a loss by reason of the minor's fraud, he can always recover those losses by an action or counterclaim.”<sup>48</sup>

The merits of the delictual approach will be considered at a later stage.<sup>49</sup>

### 5 3 England

The position of the fraudulent minor in England differs from the position in South Africa. When a minor fraudulently poses to be of age, and in this way induces another party to enter into a contract with him, neither he nor the other party will be allowed to enforce the contract.<sup>50</sup> However, the minor may be liable in tort, although this liability is limited. The other party cannot sue the fraudulent minor in tort if it would amount to an indirect enforcement of the contract.<sup>51</sup> Put differently, the minor may only be sued in tort if it is an act independent from the contract. As McKendrick states:

“[W]here the effect of allowing a claim to succeed in tort would be to undermine the protection afforded to the child by the law of contract, then the child will, to that extent, enjoy a defence to the action in tort.”<sup>52</sup>

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<sup>48</sup> *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 273-274.

<sup>49</sup> See Par 5 6.

<sup>50</sup> P S Atiyah “The liability of infants in fraud and restitution” (1959) 22 *MLR* 273 291.

<sup>51</sup> *Visser Unjustified Enrichment* 525. See Par 4 6.

<sup>51</sup> I England “Restitution of Benefits Conferred Without Obligation” in E von Caemmerer & P Schlechtriem *International Encyclopedia of Comparative Law* 5 (2007) Ch 5 67.

<sup>52</sup> E McKendrick *Contract Law: Text, Cases and Materials* (2003) 792.

Therefore, a minor is protected regardless of his fraudulent actions. Fortunately, the other party is not left without a remedy. In some circumstances the law of equity intervenes.<sup>53</sup> In this way the interests of the other party are protected by ensuring that the minor does not take advantage of creating the façade that he is of age.<sup>54</sup> Equity also relieves the other party from obligations imposed on him.<sup>55</sup>

Unfortunately, the rules of equitable relief have not been properly developed,<sup>56</sup> and this results in uncertainty as to their exact scope and application. Possibly the most important form this remedy can take is the power of the law of equity to order the fraudulent minor to restore any benefits received under the contract.<sup>57</sup> The court enjoys a discretion in this regard.<sup>58</sup> Identifying the circumstances under which an action for the restoration of benefits lies against minors have always been problematic. It is clear that the minor will be liable to restore goods which are still in his possession. In other words, here it is accepted that the doctrine is applied and the minor will be held liable to restore the objects which he, at that time, still possesses.<sup>59</sup> However, the difficulty arises in the situation where the minor is no longer in possession of the object obtained, but is in possession of other money or property (possibly) representing it.<sup>60</sup> In other words, will the fraudulent minor be liable to make good the value of the goods he no longer possesses? This issue may be illustrated by two well-known cases in this regard.

In *Stocks v Wilson*,<sup>61</sup> a minor acted fraudulently by posing to be of age, and in this way obtained furniture from the plaintiff under an absolute bill of sale. Because the

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<sup>53</sup> The relief offered by the intervention of equity is not connected the law of contract in any way.

<sup>54</sup> Beatson *Anson's Contract* 226.

<sup>55</sup> 227.

<sup>56</sup> R Goff & G Jones *The Law of Restitution* (2007) 7<sup>th</sup> ed 648 fn 3.

<sup>57</sup> Peel *Treitel Contract* 583.

<sup>58</sup> 583. This discretion is similar to the discretion offered in S 3(2) Minors' Contracts Act 1987. A discussion in this regard will follow shortly.

<sup>59</sup> Beatson *Anson's Contract* 226.

<sup>60</sup> 227.

<sup>61</sup> [1913] 2 K.B. 235.

minor was not in a financial position to pay the purchase price immediately, the minor entered into an agreement whereby he promised the plaintiff that he would pay the purchase price of £300 at a fixed date. In terms of the same instrument the minor added that if he failed to do so the plaintiff would be allowed to reclaim the goods from him. At a later stage and with the knowledge of the plaintiff, the minor sold some of the furniture to another party. The minor subsequently failed to pay the outstanding purchase price on the agreed date and a claim for equitable relief was instituted to recover the reasonable value of the goods supplied to the minor. The court held that the aim of the remedy of equitable relief is to prevent the infant from retaining the benefit which he obtained by way of his fraudulent actions. The court added the following:

“If the infant has obtained property by fraud he can be compelled to restore it; if he has obtained money he can be compelled to refund it.”<sup>62</sup>

The court decided in favour of the plaintiff and the minor was liable to account for the value of the goods he sold (£30) as well as the £100 advance that he obtained as a result of the transactions into which he had entered. Lush J explained the liability as follows:

“In my opinion it follows that, if an infant has wrongfully sold the property which he acquired by a fraudulent misrepresentation as to his age, he must at all events account for the proceeds to the party he has defrauded. I can see no logical ground on which he can be allowed to resist such a claim in that case, if he is accountable for the money itself in a case where he has obtained money and not goods by means of a like fraud.”<sup>63</sup>

This decision has led to much uncertainty. It is accepted that the application of the law of equity is limited. Generally, equity will not enforce contracts which are void at law.<sup>64</sup>

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<sup>62</sup> 242-243.

<sup>63</sup> 247.

<sup>64</sup> Goff & Jones *Restitution* 646.

One year after this judgment was laid down, a different result was achieved in *R Leslie Ltd v Sheill*,<sup>65</sup> where the court doubted this decision.<sup>66</sup> In this case a minor, while fraudulently representing that he was of full age, induced the plaintiffs to lend him money. The plaintiffs were a firm of registered money-lenders. They instituted action to recover the £400 lent to the minor based on the fact that the minor obtained the advances by fraudulently representing that he was of full age at the time. This was an appeal by the minor against the decision of the court *a quo*, where full judgment was given against him for the money he owed. The minor argued that there is no process of law by which the money-lenders can recover their money from him.

The judge referred to the case of *Stocks v Wilson*,<sup>67</sup> and mentioned that this case largely influenced Horridge J in the court *a quo*. However, Lord Sumner distinguished it from the present case. He placed emphasis on the difference between restoring the property acquired (or the proceeds thereof), and paying or accounting for the proceeds thereof. According to Lord Sumner:

“[T]he money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract.”<sup>68</sup>

Peel rightly points out that in the latter case there was no accounting, while in *Stocks v Wilson*<sup>69</sup> the court ordered the minor to account for the proceeds of sale without enquiring whether it was still in his possession.<sup>70</sup> As Peel explains:

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<sup>65</sup> [1914] 3 K.B. 607.

<sup>66</sup> Goff & Jones *Restitution* 646.

<sup>67</sup> [1913] 2 K.B. 235.

<sup>68</sup> *R Leslie Ltd v Sheill* [1914] 3 K.B. 607 619.

<sup>69</sup> [1913] 2 K.B. 235.

<sup>70</sup> Peel *Treitel Contract* 585.

“[The minor] cannot be made liable to *pay* for the property acquired or to *account* for its proceeds by a personal judgement enforceable against his general assets.”<sup>71</sup>

Furthermore, if the minor fraudulently induced another party to enter into a contract with him to lend him money and the minor subsequently becomes bankrupt, the other party will be entitled to a claim in the bankrupt estate.<sup>72</sup> This is the position not because the other party has a claim against the fraudulent minor, but because he will have a claim against the minor’s assets.<sup>73</sup>

Similar to the position of the non-fraudulent minor, the fraudulent minor will not be liable to restore money obtained in terms of a loan agreement. It is accepted that the remedy of equitable relief does not stretch this far.<sup>74</sup> The essence of a loan agreement is that the borrower shall be compelled to restore the amount borrowed at a later stage. If the doctrine is applied and the minor is compelled to restore the equivalent amount, it would constitute an indirect enforcement of the contract.<sup>75</sup>

Another remedy which may assist the other party is the statutory remedy offered by Minors’ Contracts Act.<sup>76</sup> Section 3(1) reads as follows:

“Where—

(a) a person (“the plaintiff”) has after the commencement of this Act entered into a contract with another (“the defendant”), and

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<sup>71</sup> 585.

<sup>72</sup> *Re King, ex Parte The Unity Joint Stock Mutual Banking Association* (1858) De Gex & Jones 63.

<sup>73</sup> *Beatson Anson’s Contract* 228. This claim will be in competition with any other creditors there might be.

<sup>74</sup> 226.

<sup>75</sup> M P Furmston *Cheshire, Fifoot and Furmston’s Law of Contract* (2007) 15<sup>th</sup> ed 565. Furmston adds that if the money obtained by the infant were rightly identifiable and still in his possession, the doctrine will justly be invoked. However, this situation is highly unlikely.

<sup>76</sup> 1987.

(b) the contract is unenforceable against the defendant (or he repudiates it) because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract, or any property representing it.”

In terms of this remedy the other party may also claim for the return of property received under the contract, or property representing it. If the court finds it “just and equitable to do so”, it may order the minor to retransfer the object received. However, as indicated in Chapter 4,<sup>77</sup> this section only empowers the court to make an order for the return of property or representing property acquired under the contract. The court may not, in terms of this section, order the minor to pay the value or reasonable value of what he has received under the contract.<sup>78</sup> As a result this remedy exists only insofar the property has not been consumed or lost. Furthermore, it is also uncertain whether “property” also includes “money”.<sup>79</sup> It must be reiterated that these remedies cannot be employed if it amounts to indirect enforcement of the contract. Therefore, when interpreting this section one must not disregard the importance of this rule of policy.

The statutory remedy does not replace the doctrine of equitable relief.<sup>80</sup> As a result, if a party wants to institute action against the fraudulent minor, he may choose between these possibilities. The statutory remedy has been suggested to be the more preferable one, though, because it is clear that section 3(1) extends to the proceeds obtained of the object received, while there remains uncertainty whether the relief offered in terms of equity would be available in respect of such proceeds.<sup>81</sup>

The preceding discussion indicates that the protective attitude the law adopts towards minors’ contracts remains dominant even when the minor has fraudulently induced another party to enter into a contract. A contract entered into by a fraudulent

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<sup>77</sup> Par 4 3 3.

<sup>78</sup> Peel *Treitel Contract* 581.

<sup>79</sup> See discussion in Ch 4 Par 4 3 3.

<sup>80</sup> Peel *Treitel Contract* 584.

<sup>81</sup> 584.

minor cannot be enforced by him. Even under the law of torts,<sup>82</sup> the law operates to protect a fraudulent minor which makes it difficult for the other party to place a tortious liability on a fraudulent minor. However, the other party is not left without any remedies at all. The law of equity will intervene where necessary. In this regard the court will have a discretion to order a fraudulent minor to restore any benefits received under the contract.<sup>83</sup> However, because the rules regulating the law of equity have not been properly developed, case law demonstrates how problematic the application of the principles of equitable relief may be. The statutory remedy found in section 3(1) of the Minors' Contracts Act<sup>84</sup> may also offer some assistance to the other party, although it is not a comprehensive solution due to the fact that the court may not, in terms of this remedy, order the minor to pay the value or reasonable value of what he has received under the contract. As a result this remedy exists only insofar the property has not been consumed or lost, and where the court finds it "just and equitable" to restore the property.

#### 5 4 Germany

Also in Germany, the mere fact that a minor acted fraudulently does not bar him from the protection offered by the law. The law adopts a favourable attitude towards minors regarding possible restitutionary awards that may be instituted against them. Minors will enjoy this protection regardless of their fraudulent misrepresentation of their age. The minor's liability will depend on whether his guardian "was unaware of the acquisition and its want of legal justification."<sup>85</sup> This must be established to determine whether the fraudulent minor should be held liable or not. If the guardian had no knowledge of the acquisition, the minor's *mala fides* will not be held against him and he will consequently not be held liable. On the other hand, if the guardian knew about the minor's fraudulent activities, the minor will be held liable for his fraudulent actions.<sup>86</sup>

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<sup>82</sup> This is known as the law of delict in South Africa.

<sup>83</sup> Peel *Treitel Contract* 583.

<sup>84</sup> 1987.

<sup>85</sup> Zweigert & Kötz *Comparative Law* 590.

<sup>86</sup> Markesinis *German law of Contract* 236.

In cases of invalid reciprocal contracts, the *Saldotheorie*, which has been discussed in detail in Chapter 4,<sup>87</sup> does not allow any party to raise the defence of loss of enrichment. However, minors are treated as an exception to this theory. Although they may have been aware of the defect in the legal basis, minors are nevertheless only obliged to return the enrichment surviving, while they are able to reclaim full enrichment from the *bona fide* other party who may have lost some of that enrichment.<sup>88</sup> Ultimately, this theory also protects fraudulent minors who have induced others to enter into a contract.<sup>89</sup>

Another possibility is that of delictual liability. This remedy may be found in section 828 of the BGB.<sup>90</sup> In terms of this remedy, a minor<sup>91</sup> may be held liable for delictual damages if it can be shown that he has the required insight to recognise his responsibility.<sup>92</sup>

In the well-known case of the *Flugreisefall*<sup>93</sup> the court combined the provisions of enrichment law and delict to impose liability on the minor. The facts of this case are shortly as follows:<sup>94</sup> X, a minor, who travelled from Munich to Hamburg, joined the transit passengers and sneaked onto a plane from Hamburg to New York without a plane ticket. When he arrived in New York, he was refused entry as he did not have a visa. The airline had him sign a form stating that he owed them \$250 and subsequently transported him on a flight back to Hamburg. Due to his minority, any

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<sup>87</sup> Par 4 4 3.

<sup>88</sup> M Chen-Wishart "In defence of unjust factors: a study of rescission for duress, fraud and exploitation" in D Johnston & R Zimmerman *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 159 179.

<sup>89</sup> R Zimmerman & J E du Plessis "Basic Features of the German law of Unjustified Enrichment" (1994) 2 *RLR* 14 42.

<sup>90</sup> This was also discussed in Ch 4 Par 4 4 3. It is also relevant in this regard which is why it is discussed again.

<sup>91</sup> This excludes a minor under the age of seven years old: See S 828(1) BGB.

<sup>92</sup> S 828(3).

<sup>93</sup> BGHZ 55, 128.

<sup>94</sup> As translated in J Beatson & E Schrage *Cases, Materials and Texts on Unjustified Enrichment* (2003) 545.

transaction entered into by him had no force unless ratified by the guardians. After his guardians refused to ratify, the airline demanded payment for the flight he boarded dishonestly, based on unjustified enrichment. The minor raised the defence of change of position, contained in section 818(3) BGB, to escape liability. The court had to consider whether the minor's knowledge that he had boarded the flight without permission possibly barred reference to section 818(3). This section reads as follows:

"The liability to undertake restitution or to reimburse the value is excluded to the extent that *the receiver is no longer enriched*."<sup>95</sup>

In answering this question the court reasoned in terms of the law of delict. It was explained that a person who had obtained an advantage through an intentional, unlawful action should bear the liability imposed by section 819. This reads as follows:

"If the receiver, at the time of receipt, knows of the defect in the legal basis or if he learns of it later, then he is obliged to make restitution from the moment of receipt or of obtaining knowledge of the defect to make restitution as if the claim for restitution had been pending from this time on."<sup>96</sup>

However, a minor may raise loss of enrichment as defence even if he knew of the invalidity of the contract at the time of receipt of the benefit, "since the courts do not hold this knowledge against him."<sup>97</sup>

The court considered section 828 of the BGB to impute knowledge to the minor. Under this section the minor may be held liable for delictual damages if it can be shown that he had the necessary understanding to recognise his responsibility at the time he committed the action (which consequently resulted in the loss).<sup>98</sup> The court

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<sup>95</sup> My emphasis.

<sup>96</sup> S 819(1) BGB.

<sup>97</sup> Zweigert & Kötz *Comparative Law* 557.

<sup>98</sup> S 828(3).

finally regarded the minor as enriched, by claiming that the enrichment of the minor lies in the fact that the service he used has a monetary value and he therefore acquired an asset, even if it does not physically come into his fortune in appearance. The court declared that the minor is liable to return the value of the service<sup>99</sup> (in other words the use of the aircraft), due to the fact that he acquired this by way of an intentional tort.<sup>100</sup> Ultimately it was held that the minor's protection "should give way to the rules of delictual liability."<sup>101</sup> This method, namely to combine principles of delict and unjustified enrichment to impose a liability on the minor, is rejected by most authors.<sup>102</sup>

Although the position of the other party is often uncertain, it is rather clear that the prevailing protection offered to the minor, regardless of his fraudulent actions, results in limited or no restitutionary remedies for the other party. If the other party institutes an action based on unjustified enrichment, the defence of change of position will be available to minors, regardless of their fraudulent actions. Consequently they will only be required to return the enrichment surviving. The other party, however, will be liable for the full enrichment, since the *Saldotheorie* will not allow them to raise this defence. Furthermore, a fraudulent minor will only be held liable in delict if it can be shown that he had the necessary understanding to recognise his responsibility at the time he committed the action.

The other party is left in an unfortunate position since he once again carries the risk when contracting with a fraudulent minor. Zweigert & Kötz correctly conclude that the restrictive approach followed in German law fails to value the interests of the other contracting party.<sup>103</sup>

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<sup>99</sup> The value of the service was said to be calculated according to the usual fee for the service provided.

<sup>100</sup> Markesinis *German law of Contract* 236.

<sup>101</sup> England "Restitution of Benefits Conferred" in *International Encyclopedia of International Law* 66.

<sup>102</sup> Beatson & Schrage *Cases Unjustified Enrichment* 545.

<sup>103</sup> Zweigert & Kötz *Comparative Law* 355.

## 5 5 Scotland

In Chapter 3<sup>104</sup> it was indicated that the general position is that transactions entered into by young persons under the age of sixteen are void.<sup>105</sup> It was initially considered by the Scottish Law Commission that when a young person under the age of sixteen fraudulently misrepresents his age and thereby induces another party to contract with him, the contract should be binding on both parties.<sup>106</sup> It was originally considered to be the “most equitable solution.”<sup>107</sup> Ultimately it was decided that these transactions should remain void. It was submitted that because the other party is entitled to institute an action in delict for damages, binding a fraudulent young person to his contract would be unnecessary.<sup>108</sup>

In essence, the following may assist in understanding the Commission’s justification:

“So the practical effect of leaving the adult to his remedy in delict would probably be to increase the protection afforded to young people in such cases while still preserving the principle that they are liable for fraud and while still preserving a remedy for the victims of fraud who care to take proceedings.”<sup>109</sup>

Therefore, the remedy found in the law of delict may be of assistance for the other party to relieve him from possible damages incurred due to the transactions he entered into with a fraudulent young person.

With regard to the enrichment liability of fraudulent young persons, it must be reiterated that young persons’ enrichment liability will always be limited to the actual

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<sup>104</sup> Par 3 3 2.

<sup>105</sup> W W McBryde *The Law of Contracts in Scotland* (2007) 3<sup>rd</sup> ed 35.

<sup>106</sup> Scottish Law Commission’s *Report on The Legal Capacity and Responsibility of Minors and Pupils*, No 110 (1987) [http://www.scotlawcom.gov.uk/download\\_file/view/439/](http://www.scotlawcom.gov.uk/download_file/view/439/) (Accessed 31 March 2011) Par 3.30.

<sup>107</sup> Par 3.30.

<sup>108</sup> Par 3.31.

<sup>109</sup> Par 3.32.

enrichment left in his possession.<sup>110</sup> As previously explained,<sup>111</sup> the defence of change of position will also be available to the fraudulent young person.<sup>112</sup>

Sixteen and seventeen year old young persons are treated differently. Although their transactions are generally valid and enforceable against them, they may still apply to have a “prejudicial transaction” set aside.<sup>113</sup> However, there is a list of transactions which are excluded and consequently cannot be challenged under these rules.<sup>114</sup> Transactions entered into by the fraudulent young person by way of a misrepresentation (as defined by the Act)<sup>115</sup> are one of these exceptions. If a fraudulent young person induced the other party to enter into a transaction with him by fraudulently misrepresenting his age or any other material fact, he will be barred from challenging that transaction. This was suggested by the Scottish Law Commission<sup>116</sup> and also appears as an exception in the Act<sup>117</sup> regarding sixteen and seventeen year old children’s right to set aside a prejudicial transaction. This broader approach regarding the young person’s fraudulent misrepresentations was included to ensure that the he cannot, for example, say that his curator or representative has consented (when they had in fact not), and in this way not be liable because it was not a positive misrepresentation of his age.<sup>118</sup>

As a result, transactions entered into by the fraudulent young person will be valid and enforceable against him as if he was an adult at the time the transaction was instituted.

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<sup>110</sup> Ch 4 Par 4 5 3.

<sup>111</sup> Ch 4 Par 4 5 3.

<sup>112</sup> See also H Schneider *Incapacity and Restitution: A comparative study of the benefits transferred to persons and public bodies lacking capacity*. LLM Thesis Aberdeen (1998) 139.

<sup>113</sup> S 3(1) Age of Legal Capacity (Scotland) Act 1991.

<sup>114</sup> McBryde *Contracts* 38.

<sup>115</sup> S 3(g) Age of Legal Capacity (Scotland) Act 1991.

<sup>116</sup> Scottish Law Commission *Report on Minors and Pupils* Par 3.121.

<sup>117</sup> S 3(g) Age of Legal Capacity (Scotland) Act 1991.

<sup>118</sup> Scottish Law Commission *Report on Minors and Pupils* Par 3.122.

## **5 6 Comparative evaluation and suggestions for reform**

### **5 6 1 Introduction**

From the discussion above it may be concluded that all the jurisdictions under review place some form of liability on the fraudulent minor. Their fraudulent actions may also affect their right to restitution. Although the aim of the law remains to protect minors against their immaturity in judgement, it is accepted that the other party should not be prejudiced by the dishonest actions of the minor. Therefore, in deciding which one of the suggested solutions provide the most sensible solution, attention should be paid to the conflicting principles that need to be properly balanced.

### **5 6 2 Suggested solutions**

#### *(a) The minor is bound contractually*

The first suggested solution is to bind the fraudulent minor to the contract.<sup>119</sup> However, to bind a minor contractually based on his fraudulent misrepresentation regarding his age is inconsistent with a basic principle of South African law, namely that a minor is inherently incapable of forming the necessary intention to create contractual obligations.<sup>120</sup> As correctly stated by Boberg:<sup>121</sup>

“If minors cannot bind themselves contractually by their folly, they should also not be able to do so by their fraud.”

Furthermore, case law which held that fraudulent minors are bound by their contracts is contentious due to the lack of authority relied upon to draw such a conclusion.<sup>122</sup>

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<sup>119</sup> See Par 5 2 1.

<sup>120</sup> C Himonga “Children” in F du Bois Wille’s *Principles of South African Law* (2007) 9<sup>th</sup> ed 170 181.

<sup>121</sup> Boberg *Persons* 825.

<sup>122</sup> *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 271-272.

It has been submitted that while the minor must be protected, the interests of the other party must not be ignored. If the minor is contractually liable, the other party's interests will be safeguarded. One might argue that this seems fair, keeping in mind that the other party was acting under a misconception as to the minor's actual contractual capacity. However, if the fraudulent minor is bound by his contract, the protective aim of the law is undermined.

There is a counter-argument which has been raised in this regard, namely that once a minor is old enough to fraudulently pose to be of age he forfeits the protection the law offers him, and he should suffer the prejudice rather than the other innocent party.<sup>123</sup> However, one cannot simply assume that the immaturity of the minor disappears once the minor fraudulently induces another party to enter into a contract. In other words, the mere fact that the minor acted fraudulently does not necessarily indicate that he enjoys the required level of understanding and judgement.<sup>124</sup> In fact this may prove how immature the minor actually is. This point may be explained as follows:

“To tell a lie in order to get for the moment what is desired, is as much a part of the weakness of youth as to give more for a thing than it is worth or to purchase what is not necessary.”<sup>125</sup>

Ultimately, if a minor fraudulently induces another to enter into a contract, this may emphasise his lack of maturity.

Boberg stresses another important problem with the suggested contractual liability, namely that this would empower minors to create for themselves a contractual capacity which they otherwise would have been denied by law.<sup>126</sup>

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<sup>123</sup> De Wet & Van Wyk *Kontraktereg en Handelsreg* 63.

<sup>124</sup> D S P Cronjé & J Heaton *Casebook on the South African Law of Persons* (2003) 2<sup>nd</sup> ed 199.

<sup>125</sup> Wessels *Contract* 263.

<sup>126</sup> Boberg *Persons* 825 fn 190.

“[W]ily minors are enabled to slough off the law’s protection and elevate themselves, by the bootstraps of their own fraud, to effective majority status.”<sup>127</sup>

With the exception of sixteen and seventeen year old young persons in Scots law,<sup>128</sup> the other jurisdictions under review do not bind fraudulent minors to their contracts, either. The law continues to protect them, at least to some extent, regardless of their fraudulent actions. Under the law of South Africa, it would be difficult to justify the contractual liability of a fraudulent minor. Although it is submitted that a proper balance must be established between the interests of both parties, it must be done within the scope of the law. If one were to bind fraudulent minors to their unassisted contracts, it would undermine the protective aim that the law applies towards minors, because the law refuses to bind minors to their unassisted contracts. Ultimately this would also place the power in the minor’s hands to validly enter into a contract. Additionally, the fraudulent actions of the minor may just as well be indicative of his immaturity in this regard. Furthermore, the case law supporting this view is questionable due to the lack of authority relied upon within the supporting judgments. As a result it is submitted that binding the minor to the contract is not a tenable solution.

*(b) The minor is not bound contractually, but he is barred from claiming his performance with restitutio in integrum*

This solution has been proposed in the case of *Louw v MJ & H Trust (Pty) Ltd.*<sup>129</sup> However, as indicated earlier<sup>130</sup> the authorities do not clearly support the notion that *restitutio in integrum* is at all applicable to minors’ unassisted contracts.<sup>131</sup> Although

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<sup>127</sup> 824.

<sup>128</sup> See Par 5 5.

<sup>129</sup> 1975 4 SA 268 (T).

<sup>130</sup> Ch 4 Par 4 2 2(a).

<sup>131</sup> See Ch 4 Par 4 2 2(a) for a detailed discussion regarding why *restitutio in integrum* is not accepted to be the appropriate action for the minor to reclaim performance delivered to the other party.

Boberg agrees that the fraudulent minor is not contractually bound, he explains the problem with this remedy as follows:

“The flaw in the decision, [in the *Louw*-case] it is respectfully submitted, lies in the characterisation of the minor’s remedy. He assumed that, because the minor sued to recover his performance, he was seeking *restitutio in integrum*, which had to be denied on account of his fraud. But the minor’s claim was not a claim for *restitutio in integrum* at all. It was clearly a *condictio*.”<sup>132</sup>

The point is essentially that the remedy of *restitutio in integrum* simply does not apply in the case where an *unassisted* minor enters into a contract; it is only applicable where a minor has concluded a detrimental contract with the assistance of his guardian, or if he has ratified it.<sup>133</sup> Consequently this second solution, namely to state that the minor is barred from claiming *restitutio in integrum*, is untenable due to the fact that it seems to be based on a mistaken belief as to the minor’s remedy. The real question is therefore not whether restitution should be denied by refusing to award *restitutio in integrum*, but rather whether restitution should be denied by refusing a *condictio*. It is to the latter remedy, which is based on unjustified enrichment, that we turn to in the next section.

*(c) The minor is not bound contractually, and restitutionary relief by way of unjustified enrichment may be awarded*

If it is accepted that an enrichment action could apply (as suggested above),<sup>134</sup> a policy argument could be made that due to the minors’ fraudulent behaviour, he should be barred from reclaiming his performance with an enrichment action. However, this would bar the minor from the protection offered by law, namely that minors should not be able to bind themselves to contracts without the required assistance. If the minor is denied the recovery of his performance, this could have

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<sup>132</sup> Boberg *Persons* 821.

<sup>133</sup> 822 fn 184.

<sup>134</sup> Par 5 2 2 (b).

the result that he is effectively bound by the contract.<sup>135</sup> This would be the case if the contract has been performed in full. It is further in any event not clear that courts enjoy a general discretion to refuse enrichment-based remedies on policy grounds.<sup>136</sup> It may be that once it is decided in principle that the claim is based on unjustified enrichment, it must follow that restitution has to be awarded. Boberg makes this point succinctly:

“The contract is either binding on the minor or it is not. If it is, the minor can neither recover past performance nor resist a claim for future performance. If it is not, the minor can do both.”<sup>137</sup>

As a result, it is submitted that minors should not be barred from instituting an enrichment claim, regardless of their fraudulent actions, and that this remedy should also be available to the other contracting party.

This remedy of unjustified enrichment is also applied in some of the other jurisdictions under review. In German law, relief may be provided by the law of unjustified enrichment. The minor’s liability will depend on the knowledge of the minor’s guardian regarding the transaction.<sup>138</sup>

In conclusion, it must be emphasised that the remarks above deal with the question whether an enrichment claim should at all be provided. The question how an enrichment claim should be quantified, once it has been decided to award one, is a different matter. In this regard it has been argued in chapter 4 that where unassisted contracts are concluded by older minors, there is scope for a nuanced approach, which takes a variety of factors into account in determining the extent of their liability. These principles could also apply to fraudulent older minors.

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<sup>135</sup> Boberg *Persons* 822 fn 184.

<sup>136</sup> J du Plessis *The South African Law of Unjustified Enrichment* (2012) 175.

<sup>137</sup> 822.

<sup>138</sup> It will depend on whether the guardian “was unaware of the acquisition and its want for legal protection.” Zweigert & Kötz *Comparative Law* 590.

*(d) The contract is invalid and minor is liable for delictual damages*

Another proposed solution is that the fraudulent minor should be held liable in delict for any damages incurred by the other party due to the minor's fraudulent misrepresentation.<sup>139</sup> This form of liability would preserve the minor's contractual immunity provided by law, while also presenting the other party with a remedy. It appears that this proposed solution creates a proper balance between the competing principles: the interests of the other party are protected by allowing them to claim for any losses suffered due to the minor's fraudulent misrepresentation, and at the same time contractual protection towards the minor against his immaturity and lack of judgement is maintained. Boberg states it succinctly:

"[I]t is believed that the law will protect a fraudulent minor quite sufficiently if it preserves the minor's contractual immunity. There is no need to overdo it."<sup>140</sup>

It appears that this correctly portrays the position in South Africa:

"In practice, much would depend on the individual character of the child...and therefore...a great deal must be left to the discretion of the Court in arriving at a conclusion as to whether the child is intelligently capable of entertaining an intention to do wrong or not."<sup>141</sup>

This solution will also be in accordance with the suggested two-tier system, which will ultimately distinguish between the abilities of very young minors and older

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<sup>139</sup> This view is supported by Wessels *Contract* 267; Boberg *Persons* 826; Cronjé "Persons" in *LAWSA 20* Par 470; *Louw v M J & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 273-274; Donaldson *Minors* 30; Himonga "Children" in *Wille's Principles* 181; Robinson *Children and Young Persons* 31.

<sup>140</sup> Boberg *Persons* 829 fn 210.

<sup>141</sup> Wessels *Contract* 264.

minors.<sup>142</sup> The court will be left with a discretion in determining whether the minor should be held liable for the delict. In this way, courts can ensure that the interests of both parties are protected.

This remedy is also applied in the jurisdictions under review. In England, the law of torts also offers some assistance to the other party when he has entered into a contract with a fraudulent minor.<sup>143</sup> Also in Germany a fraudulent minor may be held liable for delictual damages if it can be shown that he has the required insight to recognise his responsibility.<sup>144</sup> Similarly, in Scots law a young person under the age of sixteen will be held liable for damages inflicted on the other party as a result of the young person's fraudulent misrepresentations.<sup>145</sup>

There is some merit in the argument that whether the fraudulent minor is bound contractually or whether it is in terms of delict, it ultimately amounts to the same principle, namely that the minor will be held accountable for his dishonest representations which resulted in a contract. However, if one were to bind the minor to his contract, one would do away with the protection offered by the law to all minors. Conversely, if the minor would be held liable in terms of the law of delict, the "contractual immunity" offered by the law would be preserved.<sup>146</sup> The following extract strengthens this point:

*"Net soos die feit dat die minderjarige ten koste van die ander verryk is, 'n van buite komende grond vir aanspreeklikheid vorm, sal die skuld van die minderjarige in hierdie geval ook 'n van buite komende grond vir aanspreeklikheid wees, in die een geval vir die vergoeding van die verryking, in die ander geval vir die doen van skadevergoeding."*<sup>147</sup>

In essence, there is a clear difference between binding a fraudulent minor contractually or placing a delictual liability on him. With the exception of the example provided in English law, namely that a delictual claim could indirectly bind the minor

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<sup>142</sup> For a discussion regarding the suggestion to introduce a two-tier system, see Ch 3 Par 3 6 and Ch 4 Par 4 7 1.

<sup>143</sup> See Par 5 3.

<sup>144</sup> See Par 5 4.

<sup>145</sup> See Par 5 5.

if a loan is being reclaimed, it is submitted that if the minor is held liable in terms of the law of delict, his contractual immunity is preserved while at the same time the interests of the other party are protected.

## 5 7 Conclusion

From the discussion above it is clear that in all of the jurisdictions under review a minor's fraudulent behaviour regarding the transactions he entered into affects the restitutionary consequences of his transactions. All of the jurisdictions under review continue to protect the fraudulent minor, while at the same time providing the other party with some instruments to obtain relief for possible losses incurred. In England, tort law indirectly protects the fraudulent minor, since the other party can only claim damages from the minor if it is due to an act independent of the contract.<sup>148</sup> This is stricter when compared to the position in South Africa. However, the other party may possibly have a remedy in equity, or he may claim in terms of statutory relief.<sup>149</sup> In Germany the other party may institute an action based on unjustified enrichment, although it will probably be a limited one, due to the fact that even the fraudulent minor may raise the defence of loss of enrichment.<sup>150</sup> If it can be shown that the minor has the required insight to recognise his responsibility, he may be held liable for damages.<sup>151</sup> Scots law<sup>152</sup> allows the other party to claim damages in terms of the law of delict if he has entered into a contract with a young person under the age of sixteen. If a sixteen or seventeen year old fraudulently induces another party to enter into a contract, the contract will be valid and enforceable against him as if he was an adult at the time the transaction was instituted.<sup>153</sup>

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<sup>146</sup> Boberg *Persons* 825 fn 191.

<sup>147</sup> De Wet & Van Wyk, as quoted in Boberg *Persons* 825-826 fn 191.

<sup>148</sup> Englard "Restitution of Benefits Conferred" in *International Encyclopedia of International Law* 67.

<sup>149</sup> See above Par 5 3.

<sup>150</sup> See above Par 5 4.

<sup>151</sup> See above Par 5 4.

<sup>152</sup> Scottish Law Commission *Report on Minors and Pupils* Par 3.32.

<sup>153</sup> S 3(g) Age of Legal Capacity (Scotland) Act 1991.

Authorities in South African law have not yet concurred as to the basis of the liability of the fraudulent minor. Although the law primarily aims to protect the minor against his inexperience and lack of understanding, it should also protect the interests of innocent third parties who have entered into a contract with a fraudulent minor. To achieve a proper balance between the interests of both parties, it is submitted that the older fraudulent minor's restitutionary obligations should be determined according to the rules of unjustified enrichment, assisted by the suggested factors worthy of consideration. Younger fraudulent minors' inexperience and lack of understanding and judgement should prevail over the interests of the other party, implying that their enrichment liability should be determined according to the normal rules of unjustified enrichment.

Furthermore, it is also suggested that should the other party incur any losses by virtue of the minor's fraudulent actions, the law of delict shall provide him with a claim to recover such damages. The court will have a discretion in deciding whether the child has the intelligence to form an intention to do wrong and consequently if he could be held liable under the law of delict.<sup>154</sup>

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<sup>154</sup> Wessels *Contract* 264.

## **6 Conclusion**

### **6 1 Introduction**

From the preceding chapters it is apparent that the current treatment of minors' unassisted contracts in South African law is unsatisfactory and needs to be re-considered, especially when viewed from a historical and comparative perspective. While the position in South Africa is still regulated to a large extent by the principles of common law, some of the jurisdictions under review have recently conducted extensive research in this regard, to ensure that these contracts are dealt with in a proper manner. This chapter provides a brief overview of the main problems and the suggested solutions. In the line with the main division of the thesis, it will distinguish between the position of non-fraudulent and fraudulent unassisted minor.

In the discussion to follow a few suggestions for reform in South African law relating to the consequences of contracts concluded by unassisted minors will be made. Some of the suggestions for reform have been inspired by the other three jurisdictions under review. It must be reiterated that it is not suggested that the position of the other three jurisdictions should merely be imported or applied in South African law, but rather that a considered approach using the valuable and useful insights from them be used as a basis of re-consideration.

The key suggestion is that the current dated position in South Africa should be re-considered. It is submitted that an extensive research and consultation process, similar to the one conducted in Scots law, should be carried out. This will create an opportunity to re-evaluate the current regulatory position. It will also provide an opportunity to create a system that is in line with current tendencies and legislation. It is suggested that in the process of reform, a flexible approach, which includes a two-tier system similar to the one applied in Scots law, should be considered. It is submitted that the suggestions for reform should be applied within the ambit of a two-tier system.

## 6 2 The position of the non-fraudulent minor

### 6 2 1 Enforceability of the contract

In South Africa, a contract entered into between an unassisted minor and another party is known as a limping transaction: while the minor is not bound by it, the party is bound.<sup>1</sup> The general position is that minors' unassisted contracts are unenforceable against them, unless enforced by the guardian or ratified by the minor after attaining majority.<sup>2</sup> This leaves the other party in an unfortunate position, because the effectiveness of the contract remains uncertain until the minor's guardian decides to enforce or repudiate the contract, or the minor ratifies it after attaining majority. The other party cannot control or influence the effectiveness of the contract, since the decision to enforce or repudiate the contract rests solely with the minor's guardian.<sup>3</sup> In the meantime, the other party may not resile from the contract before the guardian seeks to enforce it. The other party may also not sue the unassisted minor for any damages incurred due to non-performance on the side of the minor.<sup>4</sup> Once it has been established that the contract has failed, his only remedy will be to institute a claim for unjustified enrichment.<sup>5</sup>

In this thesis it is argued that the other party's unsatisfactory position regarding the enforceability of the contract should be addressed. It is not apparent why the effectiveness of the contract has to be pending, and the other party has to await the decision of the minor's guardian to enforce or repudiate the contract. It is submitted that the other party should enjoy a right to resile from the contract before the guardian enforces it. This is also what Germany allows the other party to do.<sup>6</sup> In German law the validity of minors' contracts depends on the subsequent ratification by the minor's legal guardian. Until this is obtained, a contract entered into by a

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<sup>1</sup> Ch 3 Par 3 3 1.

<sup>2</sup> Ch 3 Par 3 3 1.

<sup>3</sup> Ch 3 Par 3 3 1.

<sup>4</sup> Ch 3 Par 3 3 1.

<sup>5</sup> Ch 4 Par 4 2 3.

<sup>6</sup> Ch 3 Par 3 3 3.

minor remains “provisionally invalid”.<sup>7</sup> Before the legal guardian of the minor ratifies the contract, the other party is entitled to resile from the contract, resulting in neither parties being bound by it.<sup>8</sup> By giving the other party a right to resile from the contract up until the contract is enforced, it would promote fairness towards the other party with regard to his available options.

Furthermore, within the ambit of a two-tier system, the re-introduction of the benefit rule could be re-considered.<sup>9</sup> This is also the position in English law, since contracts for necessities are both valid and enforceable against the minor.<sup>10</sup> It is submitted that the re-introduction of the benefit rule would contribute to the establishment of a balanced system, which also protects the interests of the other party.

### **6 2 2 Restitutory consequences resulting from the failed contract**

In South Africa, once it has been established that the contract has failed, both parties may institute a claim based on unjustified enrichment for the recovery of performances transferred in purported fulfilment of the contract.<sup>11</sup> Both claims will be limited to the extent of the recipient’s enrichment at the time the action is instituted.<sup>12</sup> There exists an exception in this regard, namely if the other party knew or should have known that the enrichment was *sine causa* and subsequently parted with it, he will not be able to claim loss of enrichment; he will be held liable for the full amount of the enrichment, as determined at the time he knew or should have known that the enrichment was *sine causa*.<sup>13</sup> However, this rule does not apply to minors’ enrichment liability. Similar to the position in German law,<sup>14</sup> minors are allowed to raise the defence of loss of enrichment regardless of whether they knew or should

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<sup>7</sup> S 108 BGB.

<sup>8</sup> S 109.

<sup>9</sup> Ch 3 Par 3 6.

<sup>10</sup> Ch 3 Par 3 3 2.

<sup>11</sup> Ch 4 Par 4 1.

<sup>12</sup> Ch 4 Par 4 1.

<sup>13</sup> Ch 4 Par 4 2 3.

<sup>14</sup> Ch 4 Par 4 4 3.

have known that the enrichment was *sine causa*.<sup>15</sup> This exception is applied to all minors, without giving regard to the specific circumstances at hand. This indicates that the other party carries the risk while the minor enjoys large amount of protection, and no consideration is given to the individual minor's state of affairs.

This study considered whether minors should be allowed more scope to rely on the defence of loss of enrichment than the other party. Given the need to balance the competing principles, the issue at hand is whether the risk placed on the respective parties during the unwinding of contracts entered into by unassisted minors is correct and fair. These principles have been explained, namely the desire to protect the minor from his own immaturity and lack of experience, while, at the same time, safeguarding the interests of the other party.

It is submitted that the unsatisfactory restitutionary remedies which arise after it has been established that the contract has failed should be reconsidered. This refers specifically to the minor's exceptional enrichment liability which places him in a preferable position to that of the other party. It is suggested that a flexible approach to the qualification of claims be considered, while distinguishing between older and younger minors. Suggested factors worthy of consideration in determining the older minor's enrichment liability have been explained, namely the *bona fides* of the other party and the minor's personal experience and understanding of the contract.<sup>16</sup> In considering the *bona fides* of the other party, it should be established whether the other party made any representation(s) to the minor. The reasonableness of the terms of the contract should also be taken into account.<sup>17</sup> When examining the minor's personal experience and understanding of the contract, specific attention should be paid to the minor's understanding of the effects of entering into the contract. Another element that lies within this factor is whether the minor has previously entered into an unassisted and/or similar contract. In considering this factor, it is suggested that the motive of the minor could also be established.<sup>18</sup>

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<sup>15</sup> Ch 4 Par 4 2 3.

<sup>16</sup> Ch 4 Par 4 7 3.

<sup>17</sup> Ch 4 Par 4 7 3.

<sup>18</sup> Ch 4 Par 4 7 3.

Under a flexible system these factors should be considered by the courts to determine whether older minors should be allowed more scope to rely on the defence of loss of enrichment than the other party. Ultimately, it is submitted that the current inflexible approach should be replaced with a flexible one, which, within the ambit of the two-tier system, would allow the courts to individually determine the restitutionary liabilities of the older minors.

Regarding younger minors, it is suggested that the protective aim of the law should prevail over the interests of the other party. Consequently, the normal rules of unjustified enrichment should apply when an unassisted younger minor has entered into a contract with another party.<sup>19</sup>

It is believed that a flexible approach such as the one suggested above would lead to more equitable results for both parties. It will allow the courts to consider factors which have, to date, not received adequate attention, and ultimately provide equitable results.

### **6 3 The position of the fraudulent minor**

In the case of the fraudulent minor, the position in South African law differs to that of non-fraudulent minors. Although these contracts are generally enforceable by the minor's guardian, the nature of the liability imposed on the minor is uncertain.<sup>20</sup> Two major grounds for the nature of the minor's liability have been suggested, namely contract and delict. Authorities who support the former argue that a minor who fraudulently poses to be of age should not be protected by his minority, and must be bound by such a contract induced by him.<sup>21</sup> Authorities who support the latter argue that if a contractual liability is placed on the minor, it will disregard the protection offered by the law to all minors. They argue that if a delictual liability is placed on the fraudulent minor, the other party can claim for any damages suffered as a result of the contract, while maintaining the protective aim the law applies towards minors.<sup>22</sup> The authorities have yet to concur in this regard, which indicates that the position is uncertain. This study has proposed that a claim for restitution based on unjustified

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<sup>19</sup> Ch 4 Par 4 7 2.

enrichment is also possible, since, once the contract fails, the general requirements for such a claim are complied with.<sup>23</sup>

In the process of reform, it is submitted that, under the suggested two-tier system, the older fraudulent minor should be liable for restitution under the law of unjustified enrichment. This is also the position in German law, although the fraudulent minor's enrichment liability will depend on the knowledge of the guardian.<sup>24</sup> In this study, it has previously<sup>25</sup> been explained that if the contract of the fraudulent minor is not enforced by his guardian, and subsequently fails, the general requirements for an enrichment claim are complied with.<sup>26</sup> It has been suggested that the older fraudulent minor's restitutionary obligations should be determined according to the rules of unjustified enrichment, together with the suggested factors worthy of consideration. This would allow the court to determine the fraudulent minor's enrichment liability on its own merits. It is suggested that the younger fraudulent minor should be liable for restitution according to the normal rules of unjustified enrichment, due to the general acceptance that he lacks the necessary level of intelligence and maturity to understand his actions. In other words, the suggested factors should not be considered in determining the young minor's liability.

It is also suggested that fraudulent minors should be liable in terms of the law of delict. In other words, should the other party incur any losses by virtue of the minor's fraudulent actions, the other party will be allowed to claim these losses in terms of an action for damages. The court will have a discretion in this regard to decide whether the child has the intelligence to form an intention to do wrong and consequently if he could be held liable under the law of delict.<sup>27</sup> By imposing delictual liability on the

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<sup>20</sup> The restitutionary remedies will flow from the nature of the liability; they will follow the normal principles of either contract or delict.

<sup>21</sup> Ch 5 Par 5 2 1.

<sup>22</sup> Ch 5 Par 5 2 3.

<sup>23</sup> Ch 5 Par 5 2 2 (b).

<sup>24</sup> Ch 5 Par 5 4.

<sup>25</sup> Ch 5 Par 5 6 2 (c).

<sup>26</sup> Ch 5 Par 5 2 2 (b).

<sup>27</sup> Ch 5 Par 5 6 2 (d).

fraudulent minor, the contractual immunity offered by law to all minors is not undermined, while at the same time the minor does not escape his liability towards the other innocent party.<sup>28</sup> Ultimately, it is submitted that this approach, applied within the ambit of a two-tier system, will provide a proper balance between the competing principles.

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<sup>28</sup> Ch 5 Par 5 7.

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