SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 6

PROJECT 43

INVESTIGATION INTO THE ADVANCEMENT OF THE AGE OF MAJORITY

July 1984

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission, should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission not later than 30 June 1985. Please refer to the previous page for the address to which correspondence should be directed.

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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1 INTRODUCTION

In a memorandum addressed to the Commission on 3 March 1981 the Association of Trust Companies in South Africa requested the Commission to give serious consideration to advancing the age of majority to 18 years. The views of the Department of Internal Affairs were obtained. The Department pointed out that similar representations had been received from the Association of General Banks and Finance Houses. The Department still feels that the time has not yet come to advance the age of majority. At its October 1981 meeting the Commission added to its programme an investigation into the advancement of the age of majority.

2 THE RÔLE OF AGE

Age plays an important rôle with regard to the civil status and public law capacities of a person.[1] The age limit which is the single most important factor in determining a person's legal capacity, contractual capacity and locus standi in judicio is the age when a minor attains majority.[2] Another important milestone in a person's life is reached when he turns 7 years and outgrows the designation "infans" and when he graduates from incapacity to contract to a limited contractual capacity[3] and from lack of criminal capacity to criminal capacity (although for a few years there will still be a rebuttable presumption that he lacks criminal capacity).[4] Hereinafter when a minor is referred to, a person who is no longer an infans is meant.

3 PROTECTION OF A MINOR

Although a normal person of, say for argument's sake, 18 years and older will always have the necessary intellectus (intelligence) to perform a juristic act,

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1. Boberg Persons 235; Hosten Inleiding 304; Van der Vyver and Joubert Personereg 118.
2. Cf Boberg Persons 235; Hosten Inleiding 304; Olivier Persons 58 and Van der Vyver and Joubert Personereg 117.
3. In this paper the concepts of contractual capacity and locus standi in judicio are used in their traditional meaning and not as advocated by Van der Vyver and Van Zyl in their Inleiding tot die regswetenskap.
4. Boberg Persons 235-236; De Wet and Yeats Kontraktereg 55; Hosten Inleiding 304; Olivier Persons; cf Van der Vyver and Joubert Personereg 117 118 and 170.

the question is whether he has the necessary judicium (judgment).[5] When the legal literature refers to a minor's lack of intellectual maturity,[6] lack of experience,[7] immaturity,[8] impetuosity and irresponsibility,[9] lack of knowledge[10] and insight,[11] these can be classified under lack of judicium. To protect a minor from this lack of judicium, the law restricts his contractual capacity and his capacity to perform juristic acts.[12] Although the literature is usually only concerned with his limited contractual capacity[13] the minor is also limited in his legal capacities. This is probably because contractual capacity is the main sphere where limitations on a minor are apparent and because contractual capacity is often a reflection of legal capacity. A person for example has the contractual capacity to make a will and at the same time has the legal capacity to be a testator.[14] In some instances the reason for the limitation of the legal capacity of a minor is to be found in the protection of third parties, for example the fact that a minor cannot be a guardian.[15]

Further protection of the child is found in the parental power that a parent has over his child and that terminates inter alia when the child attains majority.[16] The parental power implies that the parents have a duty to supplement the child's qualified locus standi in judicio and capacity to perform juristic acts,[17] but encompasses much more than that. Thus the parent can administer the child's property[18] in its interest and the parent has a duty to provide the

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5. Cf Barnard and Van Aswegen 1978 THRHR 96; Donaldson Minors 7; Hosten Inleiding 304; Pauw 1976 THRHR 84 and Unisa Personereg 130.
6. Olivier Persons 58.
7. Hosten Inleiding 304; Olivier Persons 58; Strauss 1964 THRHR 116.
8. Van der Vyver and Joubert Personereg 143.
9. Strauss 1964 THRHR 116; Van der Vyver and Joubert Personereg 143.
10. Strauss 1964 THRHR 116.
11. Barnard and Van Aswegen 1978 THRHR 96.
12. Edelstein v Edelstein No 1952 3 SA 1 (A) 15; Grand Prix Motors W P (Pty) Ltd v Swart 1976 3 SA 221 (C) 224; Barnard and Van Aswegen 1978 THRHR 96; Boberg Persons 533; De Wet and Yeats Kontraktereg 59; HFB 1885 Cape L J 230; Hosten Inleiding 304; Palmer 1968 SALJ 26; Paton Jurisprudence 283; Pauw 1976 THRHR 84; Pont 1980 THRHR 363-364; Unisa Personereg 130; Van der Vyver and Joubert Personereg 143; Van Jaarsveld Handelsreg 53.
13. Cf sources quoted in note 12 above.
14. Van der Vyver and Joubert Personereg 149.
15. Dhanabakium v Subramanian 1943 AD 160 166.
16. Boberg Persons 316; Spiro Parent and child 227; Van der Vyver and Joubert Personereg 537
17. Van der Vyver and Joubert Personereg 527-528; cf Boberg Persons 534.
18. Boberg Persons 471.

child with accomodation[19] and to protect the child against evils or dangers.[20] It is therefore not only a question of the child's lack of judicium but also, especially in younger children, the child's physical dependence on adults. But the main consideration remains protection. The law goes even further however and gives children special protection against abuse of parental power and takes care of the child who has no parent or guardian.[21] This protection lasts only until the child reaches the age of 18 years.[22] In cases where the parental power has ceased a guardian may act in the parents' stead, where necessary.[23] In the sphere of public law one finds various provisions aimed at the protection of children which overlap the sphere of the criminal courts.[24] The age which generally serves as a watershed here is 18 years. Thus persons under 18 years (with certain exceptions) may not be present at criminal proceedings,[25] persons under 18 years awaiting trial must be detained in special places,[26] and special provisions apply for dealing with persons under 18 years.[27] The age limit of 21 years is however also applied, but to a lesser extent: for example section 294 of the Criminal Procedure Act 51 of 1977 specifically provides for whipping in cases where males under the age of 21 years are convicted of an offence. In such cases specific ages are taken into account rather than the concept of minority.[28]

Where criminal responsibility is concerned minority as such does not play a part. It is evaluated on the basis of the individual's development.[29]

4 THE AGE OF MAJORITY

At a relatively early age some people already possess what is necessary to make protection for them superfluous, while others are incapable even as adults of

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19. Van der Vyver and Joubert Personereg 521.
20. Ibid 524.
21. Chap III of the Children's Act 33 of 1960; sec 10-14 of the Child Care Act 74 of 1983 (the latter will repeal most of the former on coming into operation).
22. Definitions of "child" in sec 1 of the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.
23. Unisa Familiereg 151; Van der Vyver and Joubert Personereg 128.
24. Van der Vyver and Joubert Personereg 163.
25. Sec 153(6) of the Criminal Procedure Act 51 of 1977.
26. Sec 29 of the Prisons Act 8 of 1959.
27. Sec 290 of the Criminal Procedure Act 51 of 1977.
28. Cf Van der Vyver and Joubert Personereg 163-170.
29. Cf Bobert Persons 647 et seq.

managing their own affairs. To ensure certainty[30] section 1 of the Age of Majority Act 57 of 1972 stipulates 21 years as the uniform age at which a person attains majority. The above-mentioned Act has repealed[31] the legislation relating to the age of majority in the different provinces,[32] where the 25 years under Roman-Dutch Law was replaced by 21 years.[33]

A person then comes of age at the inception of his 21st birthday.[34] Hahlo and Kahn[35] envisage, on the authority of the common-law writers, that majority can be postponed until the moment corresponding to the exact time of birth where it is to the minor's benefit. All the protection to which a minor was entitled by virtue of his minority terminates on his coming of age.[36]

5 CONTRACTUAL CAPACITY OF A MINOR

Traditionally it has been taught that a minor has limited contractual capacity.[37] One would therefore expect that a minor's contractual capacity would have to be continually supplemented to enable him to perform valid juristic acts. There are instances though where a minor has complete contractual capacity,[38] for example in the case of a contract of donation where the minor is a recipient or where statutory exceptions[39] are made to the limited contractual capacity of the minor. There are of course other juristic acts for which a minor has no contractual capacity, for example the making of a will by a minor under the age of 16 years.[40] Although it is correct to refer as a general premise to the limited contractual capacity of a minor this should not be taken to mean that a minor can never perform a juristic act independently.

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30. Unisa Personereg 130-131; cf Hosten Inleiding 304.
31. Sec 9 of the Age of Majority Act 57 of 1972.
32. Ordinance 62 of 1829 (C) Ordinance 4 of 1846 (N); "Volksraadbesluit" of 1853 (T); Chap 89 of the "Wetboek" of 1901 (O).
33. Hahlo and Kahn Legal system 446; Hahlo and Kahn Union of S A 362; Rosenthal 1971 SALJ 106; Van der Vyver and Joubert Personereg 119.
34. Boberg Persons 373; Hahlo and Kahn Union of S A 362; Van der Vyver and Joubert Personereg 119.
35. Hahlo and Kahn Union of S A 362; see also Van der Vyver and Joubert Personereg 119.
36. Van der Vyver and Joubert Personereg 121.
37. De Wet and Yeats Kontraktereg 55; Hahlo and Kahn Union of S A 375 and 379; Hosten Inleiding 304; Lee and Honoré Obligations 15; Unisa Personereg 94; Van Jaarsveld Handelsreg 53.
38. Van Jaarsveld Handelsreg 53; cf Van der Vyver and Joubert Personereg 127 and 130.
39. See par 5.5 below.
40. Van Jaarsveld Handelsreg 53.

5.1 AGREEMENTS IN GENERAL[41]

The established rule in connection with agreements is that a minor has limited contractual capacity in cases where he incurs liability[42] or, as it is often put, a minor cannot independently burden his own position through his own declaration of intention.[43] When a minor concludes a unilateral agreement whereby he only receives rights or benefits and does not incur liability, for example a contract of donation or an agreement for release from a debt, he may do so independently and the agreement will be totally valid.[44] As regards non-obligatory agreements the above-mentioned general statement means that a minor can enter into real agreements where he is the recipient. He will for example acquire ownership of something delivered to him, but when he delivers the thing he must be assisted by either his parent or his guardian, otherwise his juristic act is void.[45] The same applies to a payment-of-debt agreement. A minor will thus be able to enter independently into an acquittal agreement with regard to his own debt, but will need assistance should the agreement contemplate the acquittal of the opposite party's debt to the minor.[46] By the same token a minor cannot independently settle a debt.[47] Where a minor performs under a contract and has been properly assisted by his parent or guardian it can usually be said that the parent or guardian has tacitly consented to the execution of the contract so that it is unnecessary to require assistance again for the performance.[48] The payment-of-debt agreement included in the performance is void if the minor is not assisted by his parent or guardian at the time of performance to the minor, but a real agreement included in the performance will result in real rights

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41. Although most of the references in the present paragraph's footnotes refer to contracts, the principles laid down also apply to other agreements - Van der Vyver and Joubert Personereg 151.
42. Cf Boberg Persons 568.
43. Hahlo and Kahn Union of S A 375; Hosten Inleiding 307; Reinecke 1964 THRHR 133; Unisa Personereg 141; cf Boberg Persons 571.
44. Boberg Persons 571; Christie Contract 227; De Wet and Yeats Kontraktereg 55; Hahlo and Kahn Union of S A 380; Hosten Inleiding 305 and 307; Olivier Persons 68; Van der Vyver and Joubert Personereg 127 and 130; Van Jaarsveld Handelsreg 54.
45. Boberg Persons 641-642; Reinecke 1964 THRHR 134; Unisa Personereg 156.
46. Unisa Personereg 154; Van der Vyver and Joubert Personereg 151.
47. Unisa Personereg 154; Reinecke 1964 THRHR 134.
48. Unisa Personereg 155; Reinecke 1964 THRHR 137.

being transferred to the minor.[49] The opposite party will therefore have to be content with an action for unjust enrichment and will not be able to reclaim the object.[50]

5.2 OBLIGATORY AGREEMENTS

In the case of contracts as well it is the duty of the parent or guardian, where necessary, to supplement the contractual capacity of the minor in those instances where the minor's contractual capacity is limited if it is to the benefit of the minor.[51] The parent or guardian does this by giving his consent,[52] express or implied,[53] to the conclusion of a specific contract or in general to certain categories of contracts.[54] It is also possible for the parent or guardian to contract on the minor's behalf.[55]

Where the minor is assisted by his parent or guardian in the above-mentioned manner, a contract comes into existence between the minor and the other contracting party[56] and the usual principles of the law of contract apply.[57] In cases where the parent or guardian refuses unreasonably to assist the minor in the conclusion of a contract the Supreme Court, as the upper guardian of minors, may be approached to consent in the place of the parent or guardian.[58]

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49. Unisa Personereg 156; Reinecke 1964 THRHR 133; cf also Boberg Persons 586; Hosten Inleiding 306-307 and Unisa Personereg 143.
50. Unisa Personereg 156; see par 5.2.2 below.
51. Boberg Persons 578; Olivier Persons 76; Van Jaarsveld Handelsreg 55; cf Magano v Mathope NO 1936 AD 502 507.
52. De Beer v Estate De Beer 1916 CPD 125 127; Boberg Persons 572; Christie Contract 223; De Wet and Yeats Kontraktereg 55; Hahlo and Kahn Union of S A 379; Hosten Inleiding 307; Olivier Persons 68 and 76; Van der Vyver and Joubert Personereg 128; Van Jaarsveld Handelsreg 53.
53. Ex parte Blignaut 1963 4 SA 36(O) 37; Christie Contract 223; Hahlo and Kahn Union of S A 379; Olivier Persons 76.
54. Boberg Persons 573; Hahlo and Kahn Union of S A 379.
55. Wood v Davies 1934 CPD 250; Boberg Persons 574; Christie Contract 224; Hosten Inleiding 307; Van der Vyver and Joubert Personereg 128; Van Jaarsveld Handelsreg 53.
56. Marshall v National Wool Industries Ltd 1924 OPD 238 248 and 250; Boberg Persons 574; Christie Contract 224; Hosten Inleiding 307; Lee and Honoré Obligations 15; Olivier Persons 68 76 and 77; Unisa Personereg 158; Van Jaarsveld Handelsreg 53; cf Skead v Colonial Banking & Trust Co Ltd 1924 TPD 497 503 which holds the guardian personally liable where the contract is detrimental to the minor - criticised in Hosten Inleiding 307 and Unisa Personereg 158.
57. Christie Contract 224; Unisa Personereg 158; Van der Vyver and Joubert Personereg 138; cf Boberg Persons 579.
58. Christie Contract 224; Hahlo and Kahn Union of S A 380; Lee and Honoré Obligations 15; Van der Vyver and Joubert Personereg 129.

Contracts entered into by a minor (without the parent's or guardian's assistance) and another party capable of contracting[59] result in a natural obligation[60] for the minor and an enforceable obligation against the other party.[61] For this reason the minor cannot be held liable on the contract, but the other party cannot simply resile from the contract.

Various attempts have been made to find a short descriptive term for contracts entered into by minors without assistance,[62] but it is certain that the labels "invalid" and "void" do not convey the position accurately.[63] Where the judiciary[64] does use these expressions it is probably done inadvertently.[65]

A minor who has performed his obligations under a contract that is unenforceable against him can recover his performance with the rei vindicatio.[66] Because money cannot be vindicated under the rei vindicatio[67] the minor will have to make use of a condictio.[68] Although a condictio indebiti is often referred to in these circumstances the money is in truth due even if it is due under a natural obligation.[69] De Vos[70] is of the opinion that the condictio sine causa is the suitable action.

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59. Of course, if the other party to the contract is also a minor, both enjoy the protection of the law - Van der Vyver and Joubert Personereg 147.
60. I e one which cannot be enforced.
61. Boberg Persons 584; Christie Contract 226; De Wet and Yeats Kontraktereg 55; Olivier Persons 68; Unisa Personereg 142; Van Jaarsveld Handelsreg 53.
62. Eg "relatively void": Donaldson Minors 14; "voidable at minor's option": HFB 1885 Cape LJ 232; "unilaterally inchoate": Hahlo and Kahn Union of S A 383; Kahn 1959 SALJ 345; "unilaterally void": Honoré 1958 SALJ 35; "limping contract" (negotium claudicans, "hinkende transaksie"): Hosten Inleiding 306, Lee and Honoré Obligations 15 and cf Christie Contract 225-226; "inchoate": Spiro 1952 SALJ 434; for criticism of the foregoing see Boberg Persons 614-615 who himself favours (at 616) "enforceable at minor's option".
63. Boberg Persons 612-613; Van der Vyver and Joubert Personereg 142.
64. Grand Prix Motors WP (Pty) Ltd v Swart supra 222 and 225; Louw v MJ & H Trust (Pty) Ltd 1975 4 SA 268 (T) 274; Tjollo Ateljees (Eins) Bpk v Small 1949 1 SA 856 (A) 872.
65. Boberg Persons 613; Van der Vyver and Joubert Personereg 142-143.
66. Breytenbach v Frankel 1913 AD 390 400; Boberg Persons 586; Hahlo en Kahn Union of S A 384; Van der Vyver and Joubert Personereg 144; Van Jaarsveld Handelsreg 54; see also par 5.1 above.
67. Hahlo and Kahn Union of S A 582.
68. Boberg Persons 586; Hahlo and Kahn Union of S A 382; Hosten Inleiding 305; Van der Vyver and Joubert Personereg 144.
69. Boberg Persons 586; Hosten Inleiding 305; Reinecke 1964 THRHR 133; Unisa Personereg 143; cf Le Riche v Hamman 1946 AD 648 656.
70. Verrykingsaanspreeklikheid 89.

It is possible to elevate a minor's unassisted contract by subsequent ratification to a full-fledged enforceable contract. The parent or guardian may ratify.[71] The Supreme Court (as upper guardian) may ratify.[72] The minor may ratify the contract himself when he comes of age.[73] The one contract that cannot be ratified is an antenuptial contract;[74] in fact an antenuptial contract entered into by a minor without the assistance of his parent or guardian is the one contract that may rightly be regarded as void at least after the marriage has taken place.[75]

5.2.1 Further protection of minors in connection with contracts

As the parent or guardian in practice is not always the ideal parent or guardian the law affords a minor further protection with regard to his immovable property. Section 80 of the Administration of Estates Act 66 of 1965 provides that the parent or guardian may not alienate or mortgage the immovable property of the minor unless authorised thereto by the court where the value of the property exceeds R10 000 or without the Master's permission if the value is less than R10 000. A guardian appointed by a will or written instrument may be exempted from this restriction by the will or written instrument appointing him.[76]

If the minor concluded a contract with the assistance of his guardian, he may obtain restitutio in integrum if the contract was prejudicial to him at the time of its conclusion.[77] Where the minor is not bound by the contract it is

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71. Phil Morkel Bpk v Niemand 1970 3 SA 455 (C) 456; Boberg Persons 573; De Wet and Yeats Kontraktereg 55; Hahlo and Kahn Union of S A 379; Hosten Inleiding 307; Lee and Honoré Obligations 15; Van der Vyver and Joubert Personereg 129; Van Jaarsveld Handelsreg 55.
72. Hosten Inleiding 307.
73. De Canha v Mitha 1960 1 SA 486 (T); Stuttaford & Co v Oberholzer 1921 CPD 855; Boberg Persons 588; De Wet and Yeats Kontraktereg 55; Hahlo and Kahn Union of S A 382; Hosten Inleiding 307; Lee and Honoré Obligations 15; Olivier Persons 76; Van der Vyver and Joubert Personereg 129; Van Jaarsveld Handelsreg 55.
74. Boberg Persons 590.
75. Edelstein v Edelstein NO supra; Reinecke 3964 THRHR 134; Unisa Personereg 157; Van der Vyver and Joubert Personereg 143.
76. Ex parte Ansermino 1949 1 SA 357 (W) cf in general Christie Contract 224; De Wet and Yeats Kontraktereg 58; Hosten Inleiding 308; Olivier Persons 77; Van Jaarsveld Handelsreg 55.
77. Edelstein v Edelstein NO supra 11; Skead v Colonial Banking and Trust Co Ltd supra 500; Tjollo Ateljees (Eins) Bpk v Small supra 879-880; Wood v Davies supra 258; De Wet and Yeats Kontraktereg 62; Hahlo and Kahn Union of S A 383; Hosten Inleiding 307-308; Olivier Persons 77; Unisa Personereg 159; Van der Vyver and Joubert Personereg 139; Van Jaarsveld Handelsreg 54.

unnecessary to obtain restitutio to escape the provisions of the prejudicial contract,[78] although some people are of the opinion that for the sake of certainty it can do no harm.[79] Van der Vyver and Joubert[80] point out that in such a case the minor is saddled with the additional onus to prove that the contract was at the time of its conclusion prejudicial to him.

Where restitutio in integrum is granted the previous position is restored so that the position is exactly the same as prior to the conclusion of the contract. Both parties therefore have to restore what they have received.[81] Restitutio is also available where the court has sanctioned the conclusion of a prejudicial contract,[82] but where the minor ratifies the contract after attainment of majority or fraudulently misrepresents himself as a major while contracting the protection is not available to him.[83]

5.2.2. Protection of the other contracting party

In the process of protecting the minor the law has not however overlooked the opposite party. Should the minor decide to hold the other party liable he will either have to do so with the assistance of his parent or guardian, in which case ratification of the contract by the parent or guardian will be implied, or he will have to wait until he comes of age, in which case ratification of the contract by himself will be implied.[84] The usual principles of an enforceable contract then apply and the minor himself will have to perform or tender performance to prevent the opposite party from raising the exceptio non adimpleti contractus.[85] The opposite party's protection is in fact implicit in the minor's limited locus standi in judicio.

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78. Boberg Persons 487; Van der Vyver and Joubert Personereg 140.
79. De Wet and Yeats Kontraktereg 63; Unisa Personereg 159.
80. Personereg 140.
81. De Wet and Yeats Kontraktereg 63; Hahlo and Kahn Union of S A 383; Hosten Inleiding 308; Unisa Personereg 159; Van der Vyver and Joubert Personereg 141; Van Jaarsveld Handelsreg 54.
82. De Wet v Bouwer 1919 CPD 43; De Wet and Yeats Kontraktereg 63; Hahlo and Kahn Union of S A 383; Unisa Personereg 160; Van der Vyver and Joubert Personereg 140.
83. De Wet and Yeats Kontraktereg 63; Hahlo and Kahn Union of S A 384; Van der Vyver and Joubert Personereg 140-141; Van Jaarsveld Handelsreg 54.
84. Boberg Persons 592-593; Van Jaarsveld Handelsreg 58.
85. Cf Boberg Persons 592; Hosten Inleiding 306; Olivier Persons 76; and Van Jaarsveld Handelsreg 58.

If the opposite party performs under a natural obligation, ownership will pass to the minor as a result of the performance.[86] The opposite party can however sue the minor on the ground of unjust enrichment,[87] as he in fact could also do if the minor should reclaim his performance to the opposite party.[88] The minor's estate will be enriched only to the extent of the opposite party's performance still contained therein, or to the extent to which the necessary expenditure of the estate was reduced by the application of the performance.[89] The enrichment is calculated at the date on which the minor is sued by the other party.[90] Although many writers[91] refer to litis contestatio as the material time, Christie[92] is of the opinion that litis contestatio cannot be the correct time because the minor would then have time, after the serving of the summons, to squander that with which he has been enriched and thus dispose of any enrichment. Nevertheless, it seems that everyone agrees that the material time is that of joinder of issue,[93] and not close of pleadings (as Christie obviously interprets litis contestatio), litis contestatio being capable of both translations.[94]

The other party can also hold the parent liable on the ground of enrichment[95] (or negotiorum gestio)[96] where the parent has been saved part of his duty of support by the fact that the minor used the money for maintenance.

Brief reference may be made to the benefit rule which was introduced by Nel v Divine, Hall & Co[97] as a result of the confusion that existed as regards the unjust enrichment liability.[98] That judgment declared that a minor is bound

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86. See par 5.1 above.
87. Boberg Persons 594; Hahlo and Kahn Union of S A 381; Hosten Inleiding 306; Olivier Persons 68; Van der Vyver and Joubert Personereg 145.
88. De Wet and Yeats Kontraktereg 56; Van Jaarsveld Handelsreg 58.
89. Boberg Persons 596; De Wet and Yeats Kontraktereg 56-57; Hahlo and Kahn Union of S A 381-382; Olivier Persons 69; Unisa Personereg 152; Van Jaarsveld Handelsreg 58.
90. De Wet and Yeats Kontraktereg 56.
91. Boberg Persons 595; Hahlo and Kahn Union of S A 381; Hosten Inleiding 306; Olivier Persons 69; Unisa Personereg 151; Van der Vyver and Joubert Personereg 145 and 146.
92. Contract 229.
93. Cf eg Unisa Personereg 151.
94. Hiemstra and Gonin Legal dictionary 216.
95. Boberg Persons 596; Christie Contract 230-231; Van Jaarsveld Handelsreg 58.
96. Boberg Persons 596; Hahlo and Kahn Union of S A 382.
97. (1890) 8 SC 16.
98. Van der Vyver and Joubert Personereg 131; cf Boberg Persons 553; De Wet and Yeats Kontraktereg 57; and Olivier Persons 69-70.

ex contractu if he benefits from a contract concluded without the assistance of his parent or guardian. The benefit rule has come in for much criticism[99] but there are those who support it,[100] even after the Appellate Division adopted the correct view concerning enrichment liability in Edelstein v Edelstein NO.[1] It is clear that the benefit rule no longer forms part of our law.[2]

Our law also protects the opposite party from a minor who fraudulently represented himself as a major by holding him liable to the deceived opposite party.[3] There is a divergence of opinion on what the basis for this liability is. On the one hand there are those[4] who would hold the minor liable ex contractu and on the other hand those[5] who feel he is liable ex delicto. Of course it is quite possible for both grounds for liability to co-exist.[6] In Louw v M J & H Trust (Pty) Ltd,[7] a case in which ex delicto liability was expressly affirmed, it was argued that a minor cannot claim restitutio in integrum, and is therefore not bound by the contract. It was, however, pointed out that to say that restitutio is not available to the minor rather implies that the minor is bound by the contract. Moreover a minor who is not bound by the contract is not in need of restitutio.[8]

Those who would hold the minor liable ex contractu often base their justification for their view on estoppel, namely that through his fraudulent misrepre-

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99. Boberg Persons 553 et seq; Coertze 1938 THRHR 297; Conradie 1964 SALJ 63 et seq; Hamman 1949 THRHR 229-230; Unisa Personereg 150; cf Van Reenen 1956 THRHR 159.
100. Caney 1930 SALJ 189-190; Donaldson Minors 17-27; Olivier Persons 74.
1. Supra 13; see also Tanne v Foggit 1938 TPD 43 49-50.
2. Van Reenen 1956 THRHR 159; Boberg Persons 566; Hosten Inleiding 306; cf De Wet and Yeats Kontraktereg 57 and Lee and Honoré Obligations 15.
3. Fouche v Battenhausen & Co 1939 CPD 228; Louw v MJ&H Trust (Pty) Ltd supra; Pleat v Van Staden 1921 OPD 91.
4. Caney 1930 SALJ 194; Coertze 1938 THRHR 283 and 296; De Wet and Yeats Kontraktereg 59; HFB 1885 Cape LJ 233 and 238; Hosten Inleiding 306; Olivier Persons 75; Pauw 1976 THRHR 83; Van der Vyver and Joubert Personereg 137.
5. Boberg Persons 609; Donaldson Minors 29-30; Hahlo and Kahn Union of S A 381; Hamman 1949 THRHR 230; Lee and Honoré Obligations 15; Spiro Parent and child 108; Van Reenen 1956 THRHR 159.
6. Boberg Persons 609; Unisa Personereg 147; Van Jaarsveld Handelsreg 56.
7. Supra.
8. Boberg Persons 605; Christie Contract 232-233; De Wet and Yeats Kontraktereg 59; Van der Vyver and Joubert Personereg 137.

sentation the minor gave a false impression upon which the other party contracted to his detriment, with the result that the minor cannot later rely on the true facts to evade liability.[9] The estoppel approach is criticised with the argument that estoppel cannot create contractual capacity where it does not exist and should not be applied to cases concerning legal status.[10]

Policy considerations play an important role in influencing a person's approach to a difference of opinion: it is said that to hold a person liable ex contractu is to forget that youthful irresponsibility may lead to the conclusion of a prejudicial contract as well as misrepresentation of age; the law should protect the minor in both cases.[11] On the other hand it is said that a minor who is old enough to represent himself fraudulently as a major should be held responsible for the damages resulting from his actions rather than the innocent opposite party.[12] Which ever way one looks at it everyone agrees that the opposite party should be accommodated in some way or other.

The opposite party is further protected indirectly because the minor's obligation is a natural one. Although it is unenforceable it remains an existing principal debt upon which a surety can be held liable.[13]

5.3 UNILATERAL JURISTIC ACTS

The same general rule that a minor may only improve his position independently will probably apply in the case of unilateral juristic acts that result in the acquisition or extinction of subjective rights. A minor will therefore for example be able to acquire ownership by occupatio without assistance but will require the assistance of his parent or guardian to renounce ownership by derelictio.

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9. Hosten Inleiding 306; Olivier Persons 75; Unisa Personereg 147; Van der Vyver and Joubert Personereg 138; cf Boberg Persons 607.
10. Boberg Persons 607.
11. Boberg Persons 610; cf Christie Contract 234.
12. De Wet and Yeats Kontraktereg 59; cf Christie Contract 234-235.
13. Boberg Persons 588; Christie Contract 227; Hahlo and Kahn Union of S A 382; Hosten Inleiding 307 and 435; Lee and Honoré Obligations 15; Unisa Personereg 136; Van der Vyver and Joubert Personereg 147.

5.4 MARRIAGE

Once again the law looks after the interests of the minor by requiring that both parents, or the surviving one, supplement his limited contractual capacity to contract a marriage by consenting to the marriage.[14] The parents, with their more extensive experience and knowledge of their child, are presumed to be able to judge whether the minor's choice is suitable and whether the minor is mature enough to shoulder the responsibilities of a marriage.

5.4.1 Persons who must consent

Where one parent has been deprived of his guardianship the consent of the other parent is sufficient.[15] The parent who has been granted sole guardianship of a minor may by testamentary disposition appoint any person to be the child's sole guardian.[16] In such a case the consent of the nominated guardian, if appointed, will be sufficient.[17] A father who does not have sole guardianship over his child may only nominate someone as guardian over his minor child to act jointly with the mother.[18] In the latter case only the mother's consent is necessary.[19]

In the past where a minor had no parents and a guardian was appointed for him the guardian probably had to consent to the marriage to prevent the application of the financial penalties[20] of the Perpetual Edict to the other marriage partner.[21] The marriage was however unassailable.[22] Since the Matrimonial Property Act 88 of 1984 came into operation, it is clear that the guardian of a minor will also be able to approach the court to annul a marriage contracted by a minor without the consent of the guardian.[23]

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14. Boberg Persons 617; Hahlo Husband and wife 89; Spiro Parent and child 169.
15. Sec 5(4) of the Matrimonial Affairs Act 37 of 1953 and sec 60(1) of the Childrens' Act 33 of 1960.
16. Sec 5(3)(a) of the Matrimonial Affairs Act 37 of 1953.
17. Sec 5(5) of the Matrimonial Affairs Act 37 of 1953.
18. Sec 5(3)(b) of the Matrimonial Affairs Act 37 of 1953.
19. Spiro Parent and child 169; Van der Vyver and Joubert Personereg 447.
20. See par 5.4.2 below.
21. Boberg Persons 619; Hahlo Husband and wife 98; Van der Vyver and Joubert Personereg 452.
22. Ex parte Dineen 1955 4 SA 49 (O) 54; cf Ex parte Nortje 1977 3 SA 1058 (T) 1059.
23. Cf sec 24 of the Matrimonial Property Act 88 of 1984.

If a minor has no parent or guardian or is unable to obtain the consent of the parent or guardian a commissioner of child welfare may consent provided that the parent or guardian did not refuse to grant consent.[24]

Should the parent, guardian or commissioner of child welfare refuse consent without adequate reason and contrary to the interests of the minor, a judge of the Supreme Court may grant consent.[25] There is uncertainty as to whether a court as upper guardian can ratify a minor's marriage contracted without consent after the marriage has taken place.[26]

The law further requires that boys under 18 years and girls under 15 years shall obtain the written permission of the Minister concerned (or his deputy) to contract a valid marriage. The permission will be granted where the Minister regards the marriage as desirable and does not relieve the parties from any other obligations prescribed by law.[27] The consent of the parents will therefore still have to be obtained. If a marriage is contracted without the necessary ministerial consent the marriage is void.[28] The Minister may later direct in writing that the marriage shall for all purposes be regarded as a valid marriage if he considers the marriage to be desirable and in the interests of the parties.[29] The Minister's permission is not necessary where the court has consented to the contracting of the marriage.[30]

Although section 24 of the Marriage Act 25 of 1961 provides that a marriage officer may not solemnize a marriage between parties of whom one or both are minors without the written consent of the persons whose consent is legally required, it is argued that the section merely lays down an administrative direction. Should the parents for example consent verbally or even tacitly, the fact that the consent is not in writing will not affect the validity of the marriage.[31]

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24. Sec 25(1) of the Marriage Act 25 of 1961; Ex parte Visick 1968 1 SA 151 (D).
25. Sec 25(4) of the Marriage Act 25 of 1961; Kruger v Fourie 1969 4 SA 469 (O).
26. Boberg Persons 621; cf Hahlo Husband and wife 100.
27. Sec 26(1) of the Marriage Act 25 of 1961.
28. Abels v Abels 1961 2 SA 639 (C); Shields v Shields 1959 4 SA 16 (W); Van der Vyver and Joubert Personereg 446.
29. Sec 26(2) of the Marriage Act 25 of 1961.
30. Sec 26(1) of the Marriage Act 25 of 1961.
31. Boberg Persons 618; Hahlo Husband and wife 91; Van der Vyver and Joubert Personereg 448; contra: Pont 1970 THRHR 90; cf De Vos 1974 AJ 261.

5.4.2 Consequences of a marriage contracted without consent

The Perpetual Edict of 1540 precludes persons who marry a minor without the consent of the latter's parents or guardian from deriving any pecuniary advantages to the detriment of the minor. The Perpetual Edict thus recognises the existence of a marriage contracted by a minor without the necessary consent. The Political Ordinance of 1580 however decrees that a marriage contracted by a minor without the necessary consent is null and void and deemed not to exist, but yet reaffirms the above provisions of the Perpetual Edict. This apparent contradiction has given rise to controversy among jurists about the effect of absence of consent on a marriage contracted by a minor.[32] Further uncertainty prevailed about the patrimonial consequences of such a marriage should it simply be voidable.[33]

These problems have received the Commission's attention in the matrimonial property law project.[34] The recommendations of the Commission resulted in the Matrimonial Property Act, 1984.[35] At present section 24 regulates the position as follows:

> (1) If a court dissolves a marriage to which a minor is a party on the ground of want of consent of the parents or guardian of that minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, it may make such order with regard to the division of the matrimonial property of the spouses as it may deem just.
>
> (2) If such a marriage is not dissolved, the patrimonial consequences of the marriage are the same as if the minor were of age when the marriage was entered into and any antenuptial contract in terms of which the accrual system is included and which has been executed with a view to such a marriage is deemed to have been validly executed.

Section 17 of the Perpetual Edict of 1540 and sections 3 and 13 of the Political Ordinance of 1580 were also repealed.[36]

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32. Boberg Persons 621-637; Conradie 1947 SALJ 26 et seq; Hahlo Husband and wife 91-95; Pont 1959 AJ 60 et seq; Spiro Parent and child 176-179; Van der Vyver and Joubert Personereg 448-451; Van Rensburg 1969 THRHR 74 et seq;
33. Boberg Persons 637-641; HRH 1954 SALJ 110 et seq; Hahlo Husband and wife 95-98; Scholtens 1954 SALJ 359 et seq.
34. S A Law Commission Report 78-79.
35. Act 88 of 1984.
36. Schedule to the Matrimonial Property Act 88 of 1984.

5.5 STATUTORY EXCEPTIONS TO THE LIMITATION

A number of laws lay down certain ages after which the assistance of the minor's parent or guardian is no longer required for him to perform a valid juristic act, or at which the minor may perform certain juristic acts for which he had no capacity earlier, sometimes even with the assistance of parents. Some examples are: after 7 years a minor's deposits in the Post Office Savings Bank may be repaid to him as if he were of full age;[37] after 10 years a child's consent is required for his adoption;[38] after 14 years a minor may be a witness to a will, provided he is competent to give evidence in a court;[39] after 16 years a minor may make a will;[40] after 16 years a minor may independently invest money in a building society and deal with the money as he thinks fit;[41] after 18 years a minor may take out an insurance policy on his own life and deal with the moneys paid out under the policy as he thinks fit;[42] and after 18 years a minor may consent to an operation upon or to medical treatment of himself.[43]

6 LEGAL CAPACITY OF A MINOR

Examples of cases where the law limits a minor's legal capacity not necessarily as a consequence of his limited contractual capacity[44] are the fact that a minor may not be a guardian,[45] may not be a director of a company,[46] may not be a director of a building society,[47] may not be a trustee in an insolvent estate[48] and probably may not be the executor in a deceased estate.[49]

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37. Sec 54(a) of the Post Office Act 44 of 1958.
38. Sec 71(2)(e) of the Children's Act 33 of 1960 soon to be replaced by sec 18(4)(e) of the Child Care Act 74 of 1983.
39. Definition of "competent witness" in sec 1 of the Wills Act 7 of 1953.
40. Sec 4 of the Wills Act 7 of 1953.
41. Sec 68 of the Building Society Act 24 of 1965.
42. Sec 37 of the Insurance Act 27 of 1943.
43. Sec 20(8A) of the Childrens' Act 33 of 1960; re-enacted as sec 39(4) of the Child Care Act 74 of 1983.
44. Cf Van der Vyver and Joubert Personereg 149.
45. Dhanabakium v Subramanian supra; Boberg Persons 646; Van der Vyver and Joubert Personereg 149.
46. Sec 218(1)(b) of the Companies Act 61 of 1973.
48. Sec 55 of the Insolvency Act 24 of 1936.
49. Cf sec 14(1)(b) and 19(d) of the Administration of Estates Act 66 of 1965; Boberg Persons 646; Meyerowitz Administration of estates 71-72; Spiro Parent and child 149; and Van der Vyver and Joubert Personereg 150.

7 ACTS UNDER PUBLIC LAW AND THE LEGAL CAPACITY OF A MINOR

In the sphere of public law the term "minority" is of no great significance since legislation usually specifies age limits in these cases, usually under 21 years. Some examples are: a minor under 16 years may not obtain a fire-arm licence or possess a fire-arm or ammunition;[50] from 16 years a minor may obtain a driver's licence for certain motor cycles, from 17 years a learner's licence for light duty vehicles, and from 18 years a driver's licence for all vehicles;[51] a South African citizen qualifies at the age of 17 for national service;[52] subject to certain provisos liquor may not be sold or supplied to a minor under 18 years on licensed premise;[53] from the age of 18 years a White minor may vote;[54] and 18-year-old Coloureds and Indians could vote in the first general elections for the House of Representatives and the House of Delegated.[55]

8 A MINOR'S LOCUS STANDI IN JUDICIO

Generally speaking it may be said that a minor's capacity to litigate is limited in the sense that he may not act as plaintiff or defendant, applicant or respondent in civil cases, motions or court applications without the assistance of his parent or guardian.[56] It is accordingly the duty of the parent or guardian to assist the minor by giving assistance or consent where the minor litigates in his own name[57] or by litigating on behalf of the minor in his ca-

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50. Secs 3(1) and 37 of the Arms and Ammunition Act 75 of 1969.
51. Sec 61(a) of the various provinces' road traffic ordinances - Ord 21 of 1966.
52. Sec 3(1)(b) of the Defence Act 44 of 1957.
53. Sec 60 of the Liquor Act 87 of 1977.
54. Sec 3(1) of the Electoral Act 45 of 1979.
55. Sec 2(e) of the Electoral Act Amendment Act 42 of 1984.
56. Cf Boberg Persons 681, Hahlo and Kahn Union of S A 376; Olivier Persons 83 and Unisa Personereg 133, which merely states that a minor has no locus standi in judicio, and the criticism of this statement in Van der Vyver and Joubert Personereg and Van der Vyver 1979 THRHR 130 who argue that the statement is incorrect since a minor is in fact the litigant in an action in which his parent or guardian acts on his behalf.
57. Tiruvengadam v Naidoo 1948 2 SA 746 (N) 751; Wolman v Wolman 1963 2 SA 452 (A) 459; Boberg Persons 682 and 689; Hahlo and Kahn Union of S A 376; Herbstein van Van Winsen Civil practice 144; Hosten Inleiding 305; Olivier Persons 83; Spiro Parent and child 188; Unisa Personereg 133; Van der Vyver and Joubert Personereg 156.

pacity as parent or guardian.[58] Incidentally the latter method is the only way in which an infans may be a party to a lawsuit.[59]

There are instances where assistance to the minor is not required. A minor who has attained the age of 18 years, for example, may apply without assistance for for an order declaring him to be a major[60] and he may act unassisted in a civil action concerning the results of an election in which he was a candidate.[61] A minor may also apply without assistance to the court for leave to marry[62] and, unless the absence of assistance might prejudice a minor, a maintenance court would not insist on assistance where the minor is sued for the maintenance of his illegitimate child.[63]

Where the parent or guardian assists the minor or acts in his capacity as parent or guardian the minor is the party to the suit,[64] with the result that the success or failure of the action affects the minor and not the parent or guardian.[65] Except where the parent or guardian has acted mala fide, unreasonably or negligently, the minor is also the one who is liable for the costs of an unsuccessful action.[66]

In cases where a minor has no parent or guardian, or the parent or guardian refuses to assist him, or the litigation is against the parent or guardian himself, or the interests of the minor clash with those of the parent or guardian,

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58. Nokoyo v AA Mutual Insurance Association Ltd 1976 2 SA 153 (E) 155; President Insurance Co Ltd v Yu Kwam 1963 3 SA 766 (A) 772; Boberg Persons 681; Hahlo and Kahn Union of S A 376; Herbstein and Van Winsen Civil practice 144; Hosten Inleiding 305; Olivier Persons 83; Spiro Parent and child 188; Unisa Personereg 133; Van der Vyver and Joubert Personereg 156.
59. Boberg Persons 681-682; Unisa Personereg 133; Van der Vyver 1979 THRHR 130-131.
60. Boberg Persons 381 and 690; D'Oliviera 1973 SALJ 68; contra: Spiro 1973 SALJ 49.
61. Olufsen v Klisser 1959 3 SA 351 (N) 358; Boberg Persons 690; Van der Vyver and Joubert Personereg 154.
62. Van der Vyver and Joubert Personereg 154.
63. Govender v Amurtham 1979 3 SA 358 (N) 362; Van der Vyver and Joubert Personereg 155.
64. Boberg Persons 682; Van der Vyver and Joubert Personereg 160.
65. Linsky v Prinsloo 1976 4 SA 843 (O) 847; Mokhesi NO v Demas 1951 2 SA 502 (T); Van der Vyver and Joubert Personereg 160.
66. Grobler v Potgieter 1954 2 SA 188 (O) 192; Ex parte Hodgert 1955 1 SA 371 (D) 372; Boberg Persons 683 and 693; Hahlo and Kahn Union of S A 376; Spiro Parent and child 191; Van der Vyver and Joubert Personereg 160 and 161.

the court may appoint a curator ad litem to assist the minor.[67] Instead of appointing a curator ad litem the Supreme Court may grant a minor who has the required intellectual development venia agendi thus empowering him to litigate without assistance.[68]

In Yu Kwam v President Insurance Co Ltd[69] it was argued that proceedings to which a minor without the necessary assistance is a party are a nullity.[70] Voet's[71] view is that where a minor is inadvertenly allowed to litigate unassisted only a judgment against him will be of no weight, but where it is in his favour it will be valid. Here again the principle emerges that a minor may improve his position but not worsen it.[72] This view is approved, or taken cognizance of by the judiciary and by jurists, but a pertinent decision in this connection is still lacking.[73]

9 PARENTAL POWER OVER A MINOR

In addition to the supplementing of the minor's limited contractual capacity and capacity to litigate, parental power also entails control and custody of the minor and the administration of his property.[74] The concept of "custody and control" embraces decision-making, and the carrying out of decisions concerning the child's upbringing (religious and intellectual), nutrition, accommodation, medical care, protection, social intercourse, control of the minor's behaviour and disciplining of the minor.[75] Even before the parental power ceases on the child's attainment of majority, the importance of many of these aspects of the parental power diminishes as the minor grows older. Thus a minor of 18 years will need less protection against the evils and dangers of life than a child of 18 months.

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67. Wolman v Wolman supra 459; Boberg Persons 686; Hahlo and Kahn Union of S A 377; Herbstein and Van Winsen Civil practice 147; Hosten Inleiding 305; Olivier Persons 83; Spiro Parent and child 189-190; Van der Vyver and Joubert Personereg 157.
68. Ex parte Goldman 1960 1 SA 89 (D); Boberg Persons 687; Olivier Persons 83; Unisa Personereg 133; Van der Vyver and Joubert Personereg 155.
69. 1963 1 SA 66 (T) 69.
70. Cf sources quoted by Spiro Parent and child 190.
71. Commentarius 5.1.11.
72. Cf Voet Commentarius 5.1.11; Boberg Persons 688.
73. Harms v Malherbe 1935 CPD 167 169; Lasersohn v Olivier 1962 1 SA 566 (T) 567; Boberg Persons 688; Van der Vyver 1978 THRHR 141; Van der Vyver and Joubert Personereg 154; cf Spiro Parent and child 190-191.
74. Boberg Persons 459.
75. Boberg Persons 460, 463 and 468; Lee and Honoré Family 163; Spiro Parent and child 82 and 83; Van der Vyver and Joubert Personereg 521; cf Hosten Inleiding 342; Unisa Familiereg 134.

In Meyer v Van Niekerk[76] and Coetzee v Meintjies[77] the Court refused to grant a parent an interdict (on the ground that an injuria was committed by encroaching on the parental power) to restrain persons of the opposite sex from associating with a 20-year-old minor. In Gordon v Barnard[78] a parent was however successful in a similar application concerning his 18-year-old daughter because the parental power had not yet diminished in the latter case. In Meyer v Van Niekerk[79] the court held that the duties of the parent concerning the intellectual and moral training of the child decrease as the child matures until later the parent must be content with merely giving advice, which advice can simply be disregarded - the decision thus revolved more round the child's age. In the Transvaal case (decided by the full bench) Coetzee v Meintjies[80] and the Cape decision Gordon v Barnard[81] it revolved round the degree to which the parental power had been retained by the parent. In the light of the latter two decisions it cannot be stated categorically that the mere fact that a minor is older diminishes the importance of central and custody in every respect.

10 ATTAINMENT OF MAJORITY

Attaining the age of majority is only one of the ways in which a minor can come of age,[82] that is to say when he attains complete legal capacity, contractual capacity and the capacity to litigate and is released from parental power.[83]

10.1 MARRIAGE

Where a man marries before he is 21 years old, he attains majority.[84] The same applied to a woman under 21 years who contracted a marriage with the exclusion

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76. 1976 1 SA 252 (T).
77. 1976 1 SA 257 (T).
78. 1977 1 SA 887 (C).
79. Supra 257.
80. Supra.
81. Supra.
82. For the distinction between the Afrikaans terms "mondig: meerderjarig" see Barnard and Van Aswegen 1978 THRHR 94-95, DP 1937 THRHR 120 and De Wet and Yeats Kontraktereg 61.
83. Barnard van Van Aswegen 1978 THRHR 94-95; Boberg Persons 316; DP 1937 THRHR 120; D'Oliveira 1973 SALJ 57; Unisa Personereg 134; Van der Vyver and Joubert Personereg 537.
84. Boberg Persons 377; De Wet and Yeats Kontraktereg 61; Hahlo Husband and wife 107-108; Hahlo and Kahn Union of S A 362; Olivier Persons 78 (which deals only with capacity to act); Van der Vyver and Joubert Personereg 119.

of the marital power.[85] If one limits the concept of "majority" to the limitations imposed on a minor by age it may be said that a woman under 21 years who got married with the retention of the marital power before the Matrimonial Property Act 88 of 1984 came into operation, did attain majority through the marriage but that her contractual capacity is limited by the marital power.[87] However, those who use "minority" as a broader concept to denote any limitations on contractual capacity come to the conclusion that marriage with the retention of the marital power may not confer majority on the wife but only release her from her parent's authority over her.[88] The Commission's recommendation regarding the matrimonial property law project that the marital power be abolished so that the woman's contractual capacity and capacity to litigate will no longer be limited[89] was implemented by sections 11 and 12 of the Matrimonial Property Act 88 of 1984 in respect of marriages entered into after commencement of the Act.

On the dissolution of the marriage by divorce or death the marriage partners retain their majority even if they are not yet 21 years old.[90] Olivier[91] deals with marriage only with reference to capacity to act and considers it uncertain whether a woman whose marriage is terminated before she is 21 years old acquires unlimited capacity to act on the strengh of a statement by Voet that in such a case a woman must be allowed to ask for restitutio in integrum. Olivier admits however that modern writers[92] hold that the woman remains competent to act. After all there is no reason to discriminate between men and women.

10.2 DECLARATION OF MAJORITY

A minor who has attained the age of 18 years may apply to the Supreme Court for an order declaring him to be a major.[93] It may be inferred[94] that the court will grant the application if it regards the applicant as a fit and proper person to manage his own affairs and that to arrive at this decision the court will take note of the applicant's behaviour, mental development, business acumen, and

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85. Boberg Persons 378.
87. Barnard van Van Aswegen 1978 THRHR 97; Unisa Personereg 161; Van der Vyver and Jouberg Personereg 119-120.
88. Boberg Persons 378; cf Hahlo and Kahn Union of S A 362.
89. S A Law Commission Report 139.
90. Boberg Persons 378; De Wet and Yeats Kontraktereg 61; Van der Vyver and Joubert Personereg 119-120.
91. Persons 78.
92. Hahlo and Kahn Union of S A 362 and authority quoted in footnote 90 above; cf Barnard and Van Aswegen 1978 THRHR 94 and Wessels Contract 262-263.
93. Sec 2 of the Age of Majority Act 57 of 1972.
94. From sec 3 of the Age of Majority Act 57 of 1972.

place of residence, the attitude of his parents, his property and other information that will give an indication whether it is necessary or desirable in the interests of the applicant to grant the application.[95] The effect of such a declaration is that thenceforth the minor "shall for all purposes be deemed to have attained the age of majority."[96] The applicant therefore becomes a major in every respect.[97]

10.3 VENIA AETATIS AND RELEASE FROM TUTELAGE

In common law the head of state could grant a minor majority by venia aetatis. The capacity to alienate or hypothecate his immovable property had to be expressly included in the grant in which case the minor probably had full majority status,[98] although it is sometimes contended that after the granting of venia aetatis the minor still requires his parents' consent to marriage.[99]

Venia aetatis has probably fallen into desuetude.[100] If this is not the case then the availability of the procedure under section 2 of the Age of Majority Act 57 of 1972 for the declaration of majority will render venia aetatis obsolete.[1] The courts have consistently held, and rightly so, that venia aetatis is the prerogative of the head of state.[2]

The Cape courts have developed the practice of granting release from tutelage.[3] A controversy has developed as to whether the courts are competent to do so.[4]

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95. Ex parte Botes 1978 2 SA 400 (O) 401-402; Ex parte Smith 1980 2 SA 533 (O) 535-536; Boberg Persons 383; Spiro 1973 SALJ 53.
96. Sec 7 of the Age of Majority Act 57 of 1972.
97. Boberg Persons 383; De Vos 1974 AJ 261; Olivier Persons 80; Spiro 1973 SALJ 54; Unisa Personereg 165; Van der Vyver and Joubert Personereg 120; however cf Hahlo 1972 A S 49-50 who foresees that it might be argued that consent for contracting a marriage must still be obtained.
98. D'Oliveira 1973 SALJ 58; Hahlo and Kahn Union of S A 363; Spiro 1973 SALJ 50; Unisa Personereg 162; Van der Vyver and Joubert Personereg 120.
99. Hahlo and Kahn Union of S A 363; Spiro Parent and child 229; Zeffertt 1969 SALJ 410; contra: D'Oliveira 1973 SALJ 58.
100. D'Oliveira 1973 SALJ 58; Hahlo and Kahn Union of S A 363; Unisa Personereg 162; cf Boberg 1975 SALJ 187 and Olivier Persons 79; contra: L IGN C 1937 THRHR 196-197.
1. Ex parte Van den Hever 1969 3 SA 96 (E) 97; Boberg Persons 378-379; L IGN C 1937 THRHR 193; Unisa Personereg 162; cf Olivier Persons 79; Spiro 1973 SALJ 50 and Van der Vyver and Joubert Personereg 120.
2. Boberg Persons 378-379.
3. Ex parte Van den Hever supra; Ex parte estate Van Schalkwyk 1927 CPD 268; Boberg Persons 379; Zeffert 1969 SALJ 407.
4. De Wet and Yeats Kontraktereg 57; L IGN C 1937 THRHR 194-195; cf Olivier Persons 79 and Zeffert 1969 SALJ 407 et seq.

In Ex Parte Van den Hever[5] the court held that the court acts as upper guardian of minors when it grants release from tutelage which is thus a kind of emancipation.[6] Release from tutelage cannot be seen as a way of attaining majority; a person thus released will for example still have to obtain his parents' consent to get married.[7] Once again section 2 of the Age of Majority Act 57 of 1972 should result in the disappearance of release from tutelage in practice.[8]

In the Free State Chapter 89 of the Law Book of 1901 governed the position in relation to venia aetatis by providing that the State President could grant venia aetatis on the recommendation of the Supreme Court.[9] The effect of such grant was that the minor attained majority provided that the capacity to alienate or encumber his immovable property was not expressly excluded[10] and if those[11] who felt that thenceforth parental consent to marriage was unnecessary were right. The Age of Majority Act 57 of 1972 expressly repealed the Free State procedure.

10.4 EMANCIPATION

Uncertainty prevails as to what exactly is to be understood by emancipation, along with uncertainty in connection with related matters. The Roman-Dutch law evolved the institution of express emancipation according to which the father could declare his child to emancipated before the court.[12] This form of emancipation was gradually superseded by venia aetatis.[13] Furthermore tacit emancipation was a well-known way of ending parental authority. The requirement for this was that the minor had gone to live on his own.[14] Boberg[15] convincingly points out that our courts have confused Roman-Dutch tacit emancipation with a parent's general authority to the minor to perform certain juristic

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5. Supra 99.
6. Boberg Persons 379 and 380.
7. D'Oliveira 1973 SALJ 62-63; cf Hahlo and Kahn Union of S A 363.
8. Boberg Persons 380; D'Oliveira 1973 SALJ 65; Hahlo 1972 AS 50; Unisa Personereg 166; cf Ex parte Smith supra 534; Olivier Persons 79 and Van der Vyver and Joubert Personereg 120.
9. Boberg Persons 380; Hahlo and Kahn Union of S A 363; Spiro Parent and child 229; Unisa Personereg 162.
10. Boberg Persons 380; Hahlo and Kahn Union of S A 363.
11. Eg Hahlo and Kahn Union of S A 363.
12. Boberg Persons 375; Olivier Persons 80-81; Pauw 1979 SALJ 321; Unisa Personereg 166-167.
13. Boberg Persons 377; Donaldson Minors 73; Olivier Persons 81; Unisa Personereg 167.
14. Boberg Persons 377; Olivier Persons 81; Unisa Personereg 167.
15. Persons 384-392; cf Van der Vyver and Joubert Personereg 132-133.

acts. As happens when evolution takes place in the law, it gives rise to uncertainty that at present still prevails on this subject.

The first problem that arises is whether emancipation is indeed a way of attaining majority nowadays. If it is accepted that emancipation is merely general authority to enter into certain transactions,[16] the inference is unavoidable that emancipation does not entirely free a minor of parental authority nor does it give him the status of a major.[17]

Although some writers[18] see emancipation as a form of attaining majority, the present view is rather that parental power is a duty that must be exercised in the interests of the child[19] and a method by which a father can arbitrarily relinquish his parental power is not in line with this view.[20]

The next question is whether emancipation is revocable. If the approach is that emancipation completely abolishes the parental power then the logical answer is that it is not revocable.[21] If it is regarded as general authority, however, the parent should always be able to revoke the authority.[22] The view is also held that the revocability of emancipation will depend on the degree of emancipation, in other words whether the parent released the minor completely from parental power or only consented to certain transactions.[23]

In Le Grange v Mostert[24] it was held that a guardian was alo entitled to emancipate, but this view has been criticised on the ground that a guardian cannot renounce his duties at will.[25] Once again if one regards emancipation merely as general authority to enter into certain transactions there is no reason why

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16. D'Oliveira 1973 SALJ 60; Pauw 1979 SALJ 323; Unisa Personereg 168; Van der Vyver and Joubert Personereg 135-136.
17. Boberg Persons 384; De Wet and Yeats Kontraktereg 55; Spiro Parent and child 231; cf Ahmed v Coovadia 1944 TPD 364 and Palmer 1968 SALJ 24 et seq.
18. Hahlo 1943 SALJ 298; Hahlo and Kahn Union of S A 365; Zeffertt 1969 SALJ 410-411; cf Conradie 1946 SALJ 31-34; and HFB 1885 Caoe LJ 237.
19. Ex parte Van Dam 1973 2 SA 182 (W) 185; Hahlo and Kahn Union of S A 367.
20. Boberg Persons 406-407; cf Spiro Parent and child 231-232.
21. Hahlo 1943 SALJ 298-299.
22. Donaldson Minors 80; Spiro Parent and child 231; Van der Vyver and Joubert Personereg 136.
23. Hahlo van Kahn Union of S A 366; Zeffertt 1969 SALJ 410-411.
24. (1909) 26 SC 321, quoted in Boberg Persons 403.
25. Donaldson Minors 83-84; Van Zyl Steyn 1927 SALJ 323-324.

a guardian should not be able to grant his ward a certain degree of freedom in this way.[26]

The term "relative or partial emancipation" ("beperkte handligting") is sometimes used to describe the case that does not amount to complete removal of the minor's limitations, but yet encompasses more than general authority to enter into transactions. Boberg[27] is of the opinion that the only reason why writers[28] seek to distinguish relative emancipation from general authority is that relative emancipation is supposed to confer locus standi in judicio on the minor, which general authority is not supposed to do. This special expression is in fact unnecessary because general authority, depending on the circumstances, can also confer locus standi in judicio.[29]

10.5 REQUIREMENT OF A SPECIFIC AGE

Where the law lays down a specific age for the lifting of restrictions on a person the attainment of majority will not cancel these restrictions,[30] for example on the acquisition or loss of South African citizenship where the South African Citizenship Act[31] defines minors in terms of age, and in regard to the provision that a person over 21 years has to apply personally to have his surname changed.[32] So also it was decided in Santam Versekeringsmaatskappy Bpk v Roux[33] that the term "minor" used in section 13(1) of the Prescription Act 68 of 1969 refers to the specific age limit of 21 years and that the attainment of majority therefore does not play a part in the calculation of periods of prescription where a minor is involved.[34] A further example is where a will postpones dies venit until after the age of 21 years is attained. A person under 21 years who has attained majority will not be able to claim the bequest.[35]

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26. Conradie 1946 SALJ 30; Donaldson Minors 84.
27. Boberg Persons 408.
28. Conradie 1946 SALJ 28 and Donaldson Minors 84-85.
29. Cf Boberg Persons 408-409 and Unisa Personereg 169.
30. Boberg Persons 383; Hahlo and Kahn Union of S A 362; Olivier Persons 79; Spiro 1973 SALJ 54-55.
31. Sec 1 of Act 44 of 1949.
32. Sec 8A(1) of the Births, Marriages and Deaths Registration Act 81 of 1963.
33. 1978 2 SA 856(A) 866.
34. Cf Barnard and Van Aswegen 1978 THRHR 95.
35. Cf Spiro 1973 SALJ 55.

11. ADVANCEMENT OF THE AGE OF MAJORITY AND THE CUSTOMARY LAW OF BLACK PEOPLE

The answer to the question as to how the advancement of the age of majority will affect the customary law of Black people must first be sought in section 11(3) of the Black Administration Act 38 of 1927 which reads:

> (3) The capacity of a Black to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European: Provided that -
>
> (a) if the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law;
>
> (b) a Black woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

What this provision amounts to is that where a Black enters into a transaction under the common law of South Africa (including here developments through legislation) or is involved in a lawsuit in which the common law is applied, his contractual capacity and locus standi in judicio are determined by the common law.[36] In such cases a Black man and an unmarried girl under the age of 21 years will be treated as minors in terms of the provisions of the Age of Majority Act 57 of 1972. They will therefore require the assistance of their fathers or guardians to supplement their contractual capacity and capacity to litigate. A minor married girl who has contracted a common law marriage with the retention of the marital power is in the same position as a White woman,[37] but a minor married girl whose marriage excludes the marital power will be deemed to be a major. From section 11(3)(b) of the Act quoted above it is clear that a minor Black girl who has entered into a customary union and is living with her husband remains a minor with her husband as guardian.[38]

Should the Black however enter into a transaction under customary law or if customary law is applied in a lawsuit the customary law determines the con-

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36. Olivier Privaatreg van Bantoetaalsprekendes 618.
37. Cf ibid 620 and see par 10.1 above.
38. Olivier Privaatreg vaa Bantoetaalsprekendes 620.

tractual capacity and locus standi in judicio of the Black person.[39] For example: where a woman institutes an action for lobolo for her illegitimate child, her locus standi in judicio will be determined by the customary law.[40] She will therefore, being unmarried, require her father's assistance and after her marriage the assistance of her husband (even where she gets married under common law).[41] The present position in the Zulu Law is that a married woman's husband is her guardian but that the marital power can be excluded by an ante-nuptial contract, and an unmarried woman who has attained majority, a widow or a divorced woman is not subject to guardianship.[42] In all these cases the woman thus has complete contractual capacity and locus standi in judicio. In this connection the Zulu Law has moved away from the traditional customary law.

As far as contracting a marriage is concerned the following applies: Should the parties decide to contract a common law marriage and if they are minors they would require the consent of their parents since this is a requirement of the common law governing marriage. Blacks who are of age will normally not require consent except in so far as section 22 of the Black Administration Act 38 of 1927 applies. It provides that a marriage officer may not solemnize a marriage in the Transvaal or Natal to which a Black woman, who is of age is a party unless her father or guardian has granted his written consent. The section makes provision for the Minister concerned or the court to grant consent in certain circumstances. Except in the Zulu Law where an unmarried woman who is of age no longer needs a guardian, a Black woman will therefore always require her father's consent, except where she was born of a common law marriage her status then being determined by the common law.[43] Similarly children born of a common law marriage will be released from the parental power at the age of 21 years.

As appears from the above an advancement of the age of majority would have exactly the same effect as in the case of Whites in those cases where the common law applies. The customary law as such would not be affected thereby. With regard to Black minors the question will have to be answered whether they have the necessary judicium at an earlier age than 21 years before an advancement of the age of majority can be considered.

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39. Ibid 618.
40. Ibid 620.
41. Cf Seymour Bantu law 219-220.
42. Sec 29 of the Kwazulu Act relating to the Code of Zulu Law 6 of 1981.
43. Olivier Privaatreg van Bantoetaalsprekendes 625.

12 ADVANCEMENT OF THE AGE OF MAJORITY

It is true that many countries have fixed the age of majority at an age below 21 years, for example Canada (where some provinces decided on 18 years and others 19 years), West Germany (18 years), Italy (18 years), New Zealand (20 years), Sweden (18 years), Switzerland (20 years) and Britain (18 years).[44] However, if this trend is to have any significance in local decision-making the underlying reasons for these countries' decisions in this connection will have to be examined. Those who advocate the lowering of the age of majority point to the anomaly that while the age of (especially) 18 years in many ways represents a turning point for a young person his civil contractual capacity continues to be limited until the age of 21 years.

At the age of 18 years, a minor is for example entitled to vote, to have a driver's licence, to buy liquor, and to become a member of parliament, and has to do national service.[45] This argument must however be placed in perspective. The law restricts the capacities of the minor largely in his own interests because of his lack of judicium. The fact that he may drive a car or take liquor, although representing acknowledgement of the sense of responsibility of the youth of 18 years, does not confer on an 18-year-old all the qualities implicit in the word judicium. The fact that the country needs a person for its defence likewise has nothing to do with the judicium of the youth.[46] Even if a national serviceman becomes an officer with accompanying responsibilities,[47] he is not necessarily typical of the average youth, but one whose character has been specifically evaluated, and even then the authority structure of the army limits his capacities. An 18-year-old member of parliament would furthermore be an exceptionally gifted young person. The only argument in this connection that carries considerable weight is the fact that 18-year-olds have the vote.

It is the policy of the law to protect a minor against his lack of judicium.[48] At present majority is attained at the age of 21 years, which is to some extent an arbitrary provision.[49] Whether 21 years should be retained is a decision of

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44. Law Reform Commission of Ireland Working paper 108-116.
45. Rosenthal 1971 SALJ 112; Spiro 1976 SALJ 204; Van der Vyver and Joubert Personereg 136.
46. Committee on the age of majority Report 39.
47. Cf Rosenthal 1971 SALJ 110.
48. See par 3 above.
49. Ex parte Botes supra 401-402; cf Rosenthal 1971 SALJ 111.

policy.[50] The crux of the matter is whether, as is often asserted, our youth are so developed at an earlier age that they can be denied this protection.[51] It must be remembered that judicium also includes experience of life and therefore the argument that fixing the age of majority at 21 years allows the great majority of children who leave school at the age of 18 years to acquire such experience and thus develop the necessary insight deserves serious consideration.

The pertinent question is whether a person under 21 years runs a greater risk of being swindled with contracts or has the necessary insight to understand the contractual obligations properly; whether he is capable of taking the right decisions concerning lawsuits and whether he has as much insight to choose the right marriage partner as a 21-year-old. A further question in connection with marriages is whether the parent's consent still has any effect in preventing an undesirable marriage. As regards parental power the question is whether a minor under 21 years has already been so matured by his upbringing that further strict control can be replaced by guidance. Since the duty of support is not linked to the parental power and can continue after majority has been attained[52] the maintenance of the young persons is not a problem that enters here. The restiction of the administration of the young person's property by him is merely a reflection of the restriction of his contractual capacity.

In an attempt to find a scientific basis on which to make its decision on the advancement of the age of majority, the Commission is at present engaged in negotiations to ascertain whether measurement of the degree of maturity of young people would be possible. In the mean time the Commission would welcome comments on the suggestion that the age of majority should be advanced to 18 (or 19 or 20) years.

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50. D'Oliveira 1973 SALJ 64.
51. Rosenthal 1971 SALJ 107 and 111; the allegation is also made in the representations by the Association of Trust Companies in South Africa and the Association of General Banks referred to in par 1 above.
52. Boberg Persons 264; Spiro Parent and child 375-376.

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