

SOUTH AFRICAN LAW COMMISSION

PROJECT 43

INVESTIGATION INTO THE ADVANCEMENT
OF THE AGE OF MAJORITY

REPORT

December 1985

To Mr H J Coetsee, MP, Minister of Justice

I am pleased to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973, (Act 19 of 1973), the Commission's report on the investigation into the advancement of the age of majority or your consideration.


G VILJOEN
CHAIRMAN

31 December 1985

INTRODUCTION

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

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The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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SOURCES QUOTED WITH MODE OF CITATION

- Barnard and Van Aswegen
1978 THRHR Barnard A H en A van Aswegen "Roux v Santam Versekeringsmaatskappy Bpk 1977 3 SA 261 (T)" 1978 tydskrif vir hedendaagse Romeins-Hollandse reg 94-97
- Boberg Persons Boberg P Q R The law of persons and the family 1977 Juta: Cape Town
- Boberg 1975 SALJ Boberg P Q R "Emancipation and the attainment of majority" 1975 The South African law journal 183-206
- Caney 1930 SALJ Caney L R "Minor's contracts" 1930 The South African law journal 180-196
- Christie Contract Christie R H The law of contract in South Africa 1981 Butterworths: Durban
- Coertze 1938 THRHR Coertze L Ign "Die gebondenheid van 'n minderjarige uit 'n kontrak" 1938 Tydskrif vir hedendaagse Romeins-Hollandse reg 280-297

Conradie 1946 SALJ

Conradie P J "Iets oor beperkte hand-
ligting" 1946 The South African law
journal 25-36

Conradie 1947 SALJ

Conradie P J "Van die toestemming van
ouers tot die huwelik van 'n minderjarige
kind volgens die Romeins-Hollandse reg"
1947 The South African law journal 26-35

Conradie 1964 SALJ

Conradie P J "Ratification by the court
as upper guardian of the unassisted
onerous contracts of a minor" 1964 The
South African law journal 63-65

D P 1937 THRHR

D P "Meyer v the Master (1935 SWA 3)"
1937 Tydskrif vir hedendaagse
Romeins-Hollandse reg 119-121

De Vos 1974 AJ

De Vos W Book review: The South
African law of husband and wife 4th ed
1974 Acta juridica 259-262

De Vos Verrykings-
aanspreeklikheid

De Vos W Verrykingsaanspreeklikheid in
die Suid-Afrikaanse reg 2de uitgawe 1971
Juta: Kaapstad

De Wet and Yeats
Kontraktereg

De Wet en Yeats Die Suid-Afrikaanse
kontraktereg en handelsreg 4de uitgawe
deur J C de Wet en A H van Wyk 1978
Butterworths: Durban

D'Oliveira 1973 SALJ

D'Oliveira J A v S "Venia aetatis,
emancipation and release from tutelage
revisited: the Age of Majority Act 1972"
1973 The South African law journal 57-68

Donaldson Minors

Donaldson M Minors in Roman-Dutch law
1955 Butterworths: Durban

HFB 1885 Cape L J

HFB "Contracts of minors" 1885 Cape
law journal 229-241

HRH 1954 SALJ

HRH "Penalizing the major spouse" 1954
The South African law journal 110-112

Hahlo 1972 AS

Hahlo H R "Law of persons: legislation:
age of majority" 1972 Annual survey of
South African law 49-51

Hahlo Husband and wife

Hahlo H R The South African law of
husband and wife 5th ed 1985 Juta:
Cape Town

- Hahlo 1943 SALJ
- Hahlo H R "The legal effect of tacit emancipation" 1943 The South African law journal 289-299
- Hahlo and Kahn Legal system
- Hahlo H R and E Kahn The South African legal system and its background 1968 Juta: Cape Town
- Hahlo and Kahn Union of SA
- Hahlo H R and E Kahn The Union of South Africa; the development of its laws and constitution 1960 Juta: South Africa
- Hamman 1949 THRHR
- Hamman E M Boekbespreking: Die Suid-Afrikaanse kontraktereg en handelsreg 1ste uitgawe 1949 Tydskrif vir hedendaagse Romeins-Hollandse reg 218-260
- Herbstein and Van Winsen Civil practice
- Herbstein and Van Winsen The civil practice of the superior courts in South Africa 3rd ed by L de V Van Winsen, J P G Eksteen and A C Cilliers 1979 Juta: Cape Town
- Hiemstra and Gonin Legal dictionary
- Hiemstra V G and H L Gonin Trilingual legal dictionary 1981 Juta: Kenwyn

Honoré 1958 SALJ

Honoré A M "Degrees of invalidity" 1958
The South African law journal 32-38

Hosten Inleiding

Hosten W J e a Inleiding tot die
Suid-Af. caanse reg en regsleer
Afrikaanse bewerking deur F Bosman en
W J Hosten 1979 Butterworths: Durban

Kahn 1959 SALJ

Kahn E Book review: Law of parent and
child 2nd ed 1959 The South African law
journal 343-346

Kahn 1984 SALJ

Kahn E Book review: Family law in the
last two decades of the Twentieth
Century 1984 The South African law
journal 758-764

L IGN C 1937 THRHR

L IGN C "In re Cachet, 15. (1898) S.C.
3..." 1937 Tydskrif vir hedendaagse
Romeins-Hollandse reg 190-197

Law Reform Commission of
Ireland Working paper

The Law Reform Commission The law
relating to the age of majority, the age
for marriage and some connected subjects
Working paper 2-1977 The Law Reform
Commission: Ireland

Lee and Honoré Family

Lee and Honoré Family, things and
succession 2nd ed by H J Erasmus, C G

van der Merwe and A H van Wyk 1983
Butterworths: Durban

Lee and Honoré Obligations

Lee and Honoré The South African law of obligations 2nd ed edited by E Newman and D J McQuoid-Mason 1978
Butterworths: Durban

Meyerowitz Administration of estates

Meyerowitz D The law and practice of administration of estates 5th ed 1976
Juta: Cape Town

Olivier 1983 AJ

Olivier P J J "Minority and the parental power" 1983 Acta juridica 97-107

Olivier Persons

Olivier P J J The South African law of persons and family law 2nd ed by A H Barnard and D S P Cronjé translated by C Nathan 1980 Butterworths: Durban

Olivier Privaatreg van Bantoetaalsprekendes

Olivier N J J, N J J Olivier (Jnr) en W H Olivier Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes 1981 Butterworths: Durban

Ontario Law Reform Commission Report

Ontario Law Reform Commission Report on the law of trusts Vol II 1984
Ministry of the Attorney General:
Ontario

Palmer 1968 SALJ

Palmer V V "Absolute emancipation" 1968
The South African law journal 24-30

Paton Jurisprudence

Paton G W A text-book of jurisprudence
3rd ed edited by D P Derham 1967
Oxford University Press: London

Pauw 1979 SALJ

Pauw P "Historical notes on
emancipation" 1979 The South African law
journal 319-323

Pauw 1976 THRHR

Pauw P "Louw v M J & H Trust (Pty)
Ltd 1975 4 SA 268(T)" 1976 Tydskrif vir
hedendaagse Romeins-Hollandse reg 82-84

Pont 1959 AJ

Pont D "Marriages of minors without
parental consent" 1959 Acta juridica
60-73

Pont 1970 THRHR

Pont D Boekbespreking: The South
African law of Husband and wife 3de
uitgawe 1970 Tydskrif vir hedendaagse
Romeins-Hollandse reg 82-92

Pont 1980 THRHR

Pont D "Kan 'n minderjarige sonder die
toestemming van sy ouers regsgeldig in
die huwelik bevestig word?" 1980

Tydskrif vir hedendaagse
Romeins-Hollandse reg 356-373

Reinecke 1964 THRHR

Reinecke M F B "Minderjariges se
kontrakte: 'n nuwe gesigspunt" 1964
Tydskrif vir hedendaagse
Romeins-Hollandse reg 133-138

Rosenthal 1971 SALJ

Rosenthal D "The age of majority" 1971
The South African law journal 106-112

S A Law Commission Report

South African Law Commission Report
pertaining to the matrimonial property
law with special reference to the
Matrimonial Affairs Act, 1953, the status
of the married woman and the law of
succession in so far as it affects the
spouses 1982 Government Printer:
Pretoria

S A Law Commission Working
paper 10

South African Law Commission Marriages
and customary unions of Black persons
working paper 10 1985 South African
Law Commission: Pretoria

Scholtens 1954 SALJ

Scholtens J E "Minors' marriages and the
penalties of the Edict of Charles V" 1954
The South African law journal 359-368

Unisa Personereg

Universiteit van Suid-Afrika Privaatreg
studiegids: inleiding tot die regstudie
en personereg saamgestel deur A H
Barnard en A van Aswegen 1982 UNISA:
Pretoria

Van der Vyver
"Kontrakteregtelike
kompetensies"

Van der Vyver J D "Die kontrakte-
regtelike kompetensies van minderjariges"
in D J Joubert red Petere fontes: L C
Steyn gedenkbundel Die Vereniging Hugo
de Groot: Pretoria 195-225

Van der Vyver 1979 THRHR

Van der Vyver J D "Verskynings-
bevoegdheid van minderjariges" 1979
Tydskrif vir hedendaagse
Romeins-Hollandse reg 129-141

Van der Vyver and Joubert
Personereg

Van der Vyver J D en D J Joubert
Persone- en familiereg 2de uitgawe 1985
Juta: Kaapstad

Van der Vyver and Van Zyl
Inleiding tot die regs-
wetenskap

Van der Vyver J D en F J van Zyl
Inleiding tot die regswetenskap 1972
Butterworths: Durban

Van Jaarsveld Handelsreg

Van Jaarsveld S R red e a
Suid-Afrikaanse handelsreg Vol 1 2de
uitgawe 1984 Lex Patria: Johannesburg

- Van Reenen 1956 THRHR Van Reenen T H Boekbespreking: Minors in Roman-Dutch law 1956 Tydskrif vir hedendaagse Romeins-Hollandse reg 158-160
- Van Rensburg 1969 THRHR Van Rensburg A D J "Engelbrecht v Engelbrecht na 26 jaar" 1969 Tydskrif vir hedendaagse Romeins-Hollandse reg 74-84
- Van Zyl Steyn 1927 SALJ Van Zyl Steyn I "n Paar aspekte van die emansipasie van minderjariges" 1927 The South African law journal 313-325
- Voet Commentarius Voet J The selective Voet being the commentary on the pandects and the supplement to that work by J van der Linden translated by P Gane Vol 5 1956 Butterworths: Durban
- Wessels Contract Wessels J W The law of Contract in South Africa edited by A A Roberts Vol 1 1937 Hortors Ltd: Johannesburg
- Zeffertt 1969 SALJ Zeffertt D "Venia aetatis, release from tutelage and emancipation" 1969 The South African law journal 407-412

TABLE OF CASES

Abels v Abels 1961 2 SA 639 (C).
Ahmed v Coovadia 1944 TPD 364.
Ansermino (Ex parte) 1949 1 SA 357 (W).
Blignaut (Ex parte) 1963 4 SA 36 (O).
Botes (Ex parte) 1978 2 SA 400 (O).
Breytenbach v Frankel 1913 AD 390.
Coetzee v Meintjies 1976 1 SA 257 (T).
De Beer v Estate De Beer 1916 CPD 125.
De Canha v Mitha 1960 1 SA 486 (T).
De Wet v Bouwer 1919 CPD 43.
Dhanabakium v Subramanian 1943 AD 160.
Dineen (Ex parte) 1955 4 SA 49 (O).
Edelstein v Edelstein NO 1952 3 SA 1 (A).
Fouche v Battenhausen & Co 1939 CPD 228.
Goldman (Ex parte) 1960 1 SA 89 (D).
Gordon v Barnard 1977 1 SA 887 (C).
Govender v Amurtham 1979 3 SA 358 (N).
Grand Prix Motors WP (Pty) Ltd v Swart 1976 3 SA 221 (C).
Grobler v Potgieter 1954 2 SA 188 (O).
H v I 1985 3 SA 237 (C).
Harms v Malherbe 1935 CPD 167.
Hodgert (Ex parte) 1955 1 SA 371 (D).
Kruger v Fourie 1969 4 SA 469 (O).
Lasersohn v Olivier 1962 1 SA 566 (T).
Le Riche v Hamman 1946 AD 648.
Louw v M J & H Trust (Pty) Ltd 1975 4 SA 268 (T).
Magano v Mathope NO 1936 AD 502.
Marshall v National Wool Industries Ltd 1924 OPD 238.
Meyer v Van Niekerk 1976 1 SA 252 (T).
Mokhesi NO v Demas 1951 2 SA 502 (T).
Nel v Divine, Hall & Co (1890) 8 SC 16.

Nokoyo v AA Mutual Insurance Association Ltd 1976 2 SA 153 (E).
Nortje (Ex parte) 1977 3 SA 1058 (T).
O'Linsky v Prinsloo 1976 4 SA 843 (O).
Olufsen v Klisser 1959 3 SA 351 (N).
Phil Morkel Bpk v Niemand 1970 3 SA 455 (C).
Ple t v Van Staden 1921 OPD 91.
President Insurance Co Ltd v Yu Kwam 1963 3 SA 766 (A).
Santam Versekeringsmaatskappy Bpk v Roux 1978 2 SA 856 (A).
Shields v Shields 1959 4 SA 16 (W).
Skead v Colonial Banking & Trust Co Ltd 1924 TPD 497.
Smith (Ex parte) 1980 2 SA 533 (O).
Stuttaford & Co v Oberholzer 1921 CPD 855.
Tanne v Foggitt 1938 TPD 43.
Tiruvengadam v Naidoo 1948 2 SA 746 (N).
Tjollo Ateljees (Eins) Bpk v Small 1949 1 SA 856 (A).
Van Dam (Ex parte) 1973 2 SA 182 (W).
Van den Hever (Ex parte) 1969 3 SA 96 (E).
Van Schalkwyk (Ex parte estate) 1927 CPD 268.
Visick (Ex parte) 1968 1 SA 151 (D).
Wolman v Wolman 1963 2 SA 452 (A).
Wood v Davies 1934 CPD 250.
Yu Kwam v President Insurance Co Ltd 1963 1 SA 66 (T).

1. INTRODUCTION

1.1 The Commission has investigated the desirability of advancing the age of majority. A working paper with background information was made available to those who wished to comment on the issue. The Working Paper (Working Paper 6) was forwarded on the Commission's own initiative to several persons and bodies.¹ About 80 other persons and bodies asked for the Working Paper. A considerable volume of comment² was received in response to the Working Paper and in wide coverage of the investigation by the media.³ The Commission would like to thank everybody who responded to its invitation to submit comments.

1.2 In an attempt to find a scientific basis on which to make its decision on the advancement of the age of majority, the Commission requested Prof H L Crause, Head of the Department of Sociology at the University of Port Elizabeth, to ascertain whether measurement of the degree of maturity of young people would be possible. Prof Crause went further and had sociological surveys made. He presented the Commission with an 83-page report. The Commission sincerely appreciates the pains he took and his professional assistance to the Commission. The Commission would also like to thank all those who assisted Prof Crause⁴ for their contributions.

2. THE RÔLE OF AGE

1 See Annexure A.

2 See Annexure B.

3 To the Commission's knowledge in a radio news bulletin, a radio actuality programme, four television news bulletins, a television actuality programme, a television youth programme, eight news items and three editorials in newspapers and an article in a magazine.

4 Quoted in par 12.2, par 12.15 and par 12.19.

2.1 Age plays an important role with regard to the civil status and public law capacities of a person.⁵ 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.⁶ 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 capacity⁷ 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).⁸ Hereinafter when a minor is referred to, a person who is no longer an infans is meant.

3. PROTECTION OF A MINOR

3.1 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, the question is whether he has the necessary judicium (judgment).⁹ When the legal literature refers to a minor's lack of intellectual maturity,¹⁰ lack of experience,¹¹ immaturity,¹² impetuosity and

5 Boberg Persons 235; Hosten Inleiding 304; Van der Vyver and Joubert Personereg 136.

6 Cf Boberg Persons 235; Hosten Inleiding 304; Olivier Persons 58 and Van der Vyver and Joubert Personereg 135.

7 In this paper the concepts of contractual capacity and locus standi in judicio are used in their traditional meanings and not as advocated by Van der Vyver and Van Zyl in their Inleiding tot die regs wetenskap.

8 Boberg Persons 235-236; De Wet and Yeats Kontraktereg 55; Hosten Inleiding 304; cf Van der Vyver and Joubert Personereg 135, 136 and 190-191.

9 Cf Barnard and Van Aswegen 1978 THRHR 96; Donaldson Minors 7; Hosten Inleiding 304; Pauw 1976 THRHR 84 and Unisa Personereg 130.

10 Olivier Persons 58.

(Footnote Continued)

irresponsibility,¹³ lack of knowledge¹⁴ and insight,¹⁵ 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.¹⁶ Although the literature is usually only concerned with his limited contractual capacity¹⁷ 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.¹⁸ 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.¹⁹

3.2 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.²⁰ The parental power implies that the parents have a duty to supplement the child's qualified locus standi in judicio and

(Footnote Continued)

- 11 Hosten Inleiding 304; Olivier Persons 58; Strauss 1964 THRHR 116.
- 12 Van der Vyver and Joubert Personereg 162.
- 13 Strauss 1964 THRHR 116; Van der Vyver and Joubert Personereg 162.
- 14 Strauss 1964 THRHR 116.
- 15 Barnard and Van Aswegen 1978 THRHR 96.
- 16 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 Jaarsveld Handelsreg 66.
- 17 Cf sources quoted in the preceding note.
- 18 Van der Vyver and Joubert Personereg 168.
- 19 Dhanabakium v Subramanian 1943 AD 160 166.
- 20 Boberg Persons 316; Spiro Parent and child 245; Van der Vyver and Joubert Personereg 628.

capacity to perform juristic acts,²¹ but encompasses much more than that. Thus the parent can administer the child's property²² in its interest and the parent has a duty to provide the child with accomodation²³ and to protect the child against evils or dangers.²⁴ 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.²⁵ This protection lasts only until the child reaches the age of 18 years.²⁶ In cases where the parental power has ceased a guardian may act in the parents' stead, where necessary.²⁷

3.3 In the sphere of public law one finds various provisions aimed at the protection of children which overlap the sphere of the criminal courts.²⁸ 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,²⁹ persons under 18 years awaiting trial must be

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- 21 Van der Vyver and Joubert Personereg 616-617; cf Boberg Persons 534.
- 22 Boberg Persons 471.
- 23 Van der Vyver and Joubert Personereg 610.
- 24 Ibid 613.
- 25 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, which, at the time of writing, has not yet happened).
- 26 Definitions of "child" in sec 1 of the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.
- 27 Unisa Familiereg 151; Van der Vyver and Joubert Personereg 146-147.
- 28 Van der Vyver and Joubert Personereg 183.
- 29 Sec 153(6) of the Criminal Procedure Act 51 of 1977.

detained in special places,³⁰ and special provisions apply for dealing with persons under 18 years.³¹ 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.³² Where criminal responsibility is concerned minority as such does not play a part. It is evaluated on the basis of the individual's development.³³

4. THE AGE OF MAJORITY

4.1 At a relatively early age some people already have what is necessary to make protection for them superfluous, while others are incapable even as adults of managing their own affairs. To ensure certainty³⁴ 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 repealed³⁵ the legislation relating to the age of majority in the different provinces,³⁶ where the 25 years under Roman-Dutch Law was replaced by 21 years.³⁷

30 Sec 29 of the Prisons Act 8 of 1959.

31 Sec 290 of the Criminal Procedure Act 51 of 1977.

32 Cf Van der Vyver and Joubert Personereg 183-190.

33 Cf Boberg Persons 647 et seq.

34 Unisa Personereg 130-131; cf Hosten Inleiding 304.

35 Sec 9 of the Age of Majority Act 57 of 1972.

36 Ordinance 62 of 1829 (C); Ordinance 4 of 1846 (N); "Volksraadsbesluit" of 1853 (T); Chap 89 of the "Wetboek" of 1901 (O).

37 Hahlo and Kahn Legal system 446; Hahlo and Kahn Union of S A 362; Rosenthal 1971 SALJ 106; Van der Vyver and Joubert Personereg 137.

4.2 A person then comes of age at the inception of his 21st birthday.³⁸ Hahlo and Kahn³⁹ 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.⁴⁰

4.3 Attaining the age of majority is only one possible way of coming of age. The other ways are discussed in Chapter 10.

5. CONTRACTUAL CAPACITY OF A MINOR

5.1 Traditionally it has been taught that a minor has limited contractual capacity.⁴¹ 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,⁴² for example in the case of a contract of donation where the minor is a recipient or where statutory exceptions⁴³ 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 (even with assistance) for example the making of a will by a minor

38 Boberg Persons 373; Hahlo and Kahn Union of S A 362; Van der Vyver and Joubert Personereg 137.

39 Hahlo and Kahn Union of S A 362; see also Van der Vyver and Joubert Personereg 137.

40 Van der Vyver and Joubert Personereg 139.

41 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 66.

42 Van Jaarsveld Handelsreg 66; cf Van der Vyver and Joubert Personereg 145 and 148.

43 See par 5.30.

under the age of 16 years.⁴⁴ 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.

AGREEMENTS IN GENERAL⁴⁵

5.2 The established rule in connection with agreements is that a minor has limited contractual capacity in cases where he incurs liability⁴⁶ or, as it is often put, a minor cannot independently burden his own position through his own declaration of intention.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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

44 Sec 4 of the Wills Act 7 of 1953.

45 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 170.

46 Cf Boberg Persons 568.

47 Hahlo and Kahn Union of S A 375; Hosten Inleiding 307; Reinecke 1964 THRHR 133; Unisa Personereg 141; cf Boberg Persons 571.

48 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 145 and 148-149; Van Jaarsveld Handelsreg 66.

49 Boberg Persons 641-642; Reinecke 1964 THRHR 134; Unisa Personereg 156.

will need assistance should the agreement contemplate the acquittal of the opposite party's debt to the minor.⁵⁰ By the same token a minor cannot independently settle a debt.⁵¹ 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.⁵² 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 being transferred to the minor.⁵³ The opposite party will therefore have to be content with an action for unjust enrichment and will not be able to reclaim the object.⁵⁴

OBLIGATORY AGREEMENTS

5.3 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.⁵⁵ The parent or guardian does this by giving his consent,⁵⁶ express or implied,⁵⁷ to the conclusion of a specific

50 Unisa Personereg 154; Van der Vyver and Joubert Personereg 170-171.

51 Unisa Personereg 154; Reinecke 1964 THRHR 134.

52 Unisa Personereg 155; Reinecke 1964 THRHR 137.

53 Unisa Personereg 156; Reinecke 1964 THRHR 133; cf also Boberg Persons 586; Hosten Inleiding 306-307 and Unisa Personereg 143.

54 Unisa Personereg 156; however, cf Van Jaarsveld Handelsreg 70; see par 5.13.

55 Boberg Persons 578; Olivier Persons 76; Van Jaarsveld Handelsreg 67-68; cf Magano v Mathope NO 1936 AD 502 507.

56 De Beer v Estate De Beer 1916 CPD 125 127; Boberg Persons 572; Christie Contract 223; De Wet and Yeats Kontraktereg 55; Hahlo and
(Footnote Continued)

contract or in general to certain categories of contracts.⁵⁸ It is also possible for the parent or guardian to contract on the minor's behalf.⁵⁹

5.4 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 party⁶⁰ and the usual principles of the law of contract apply.⁶¹ 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.⁶²

5.5 Contracts entered into by a minor (without the parent's or guardian's assistance) and another party capable of contracting⁶³ result in a natural

(Footnote Continued)

Kahn Union of S A 379; Hosten Inleiding 307; Olivier Persons 68 and 76; Van der Vyver and Joubert Personereg 147; Van Jaarsveld Handelsreg 67.

57 Ex parte Blignaut 1963 4 SA 36(O) 37; Christie Contract 223; Hahlo and Kahn Union of S A 379; Olivier Persons 76.

58 Boberg Persons 573; Hahlo and Kahn Union of S A 379.

59 Wood v Davies 1934 CPD 250; Boberg Persons 574; Christie Contract 224; Hosten Inleiding 307; Van der Vyver and Joubert Personereg 146; Van Jaarsveld Handelsreg 67.

60 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 67; 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.

61 Christie Contract 224; Unisa Personereg 158; Van der Vyver and Joubert Personereg 156-157; cf Boberg Persons 579.

62 Christie Contract 224; Hahlo and Kahn Union of S A 380; Lee and Honoré Obligations 15; Van der Vyver and Joubert Personereg 147.

63 Of course, if the other party to the contract is also a minor, both
(Footnote Continued)

obligation⁶⁴ for the minor and an enforceable obligation against the other party.⁶⁵ For this reason the minor cannot be held liable on the contract, but the other party cannot simply resile from the contract.

5.6 Various attempts have been made to find a short descriptive term for contracts entered into by minors without assistance,⁶⁶ but it is certain that the labels "invalid" and "void" do not convey the position accurately. Where the judiciary⁶⁷ does use these expressions it is probably done inadvertently.⁶⁸

5.7 A minor who has performed his obligations under a contract that is unenforceable against him can recover his performance with the rei vindicatio.⁶⁹ Because money cannot be vindicated under the rei

(Footnote Continued)

enjoy the protection of the law - Van der Vyver and Joubert Personereg 166.

64 I.e. one which cannot be enforced.

65 Boberg Persons 584; Christie Contract 226; De Wet and Yeats Kontraktereg 55; Olivier Persons 68; Unisa Personereg 142; Van Jaarsveld Handelsreg 70.

66 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": Honore 1958 SALJ 35; "limping contract" (negotium claudicans, "hinkende transaksie"): Hosten Inleiding 306, Lee and Honore 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".

67 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.

68 Boberg Persons 613; Van der Vyver and Joubert Personereg 162.

69 Breytenbach v Frankel 1913 AD 390 400; Boberg Persons 586; Hahlo and Kahn Union of S A 384; Van der Vyver and Joubert Personereg 163-164; Van Jaarsveld Handelsreg 71; see also par 5.2.

vindicatio⁷⁰ the minor will have to make use of a condictio.⁷¹ 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.⁷² De Vos⁷³ is of the opinion that the condictio sine causa is the suitable action.

5.8 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.⁷⁴ The Supreme Court (as upper guardian) may ratify.⁷⁵ The minor may ratify the contract himself when he comes of age.⁷⁶ The one contract that cannot be ratified is an antenuptial contract;⁷⁷ 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.⁷⁸

70 Hahlo and Kahn Union of S A 582.

71 Boberg Persons 586; Hahlo and Kahn Union of S A 382; Hosten Inleiding 305; Van der Vyver and Joubert Personereg 163.

72 Boberg Persons 586; Hosten Inleiding 305; Reinecke 1964 THRHR 133; Unisa Personereg 143; Van Jaarsveld Handelsreg 71; cf Le Riche v Hamman 1946 AD 648 656.

73 Verrykingsaanspreeklikheid 89; however, cf the reasoning of Van der Vyver "Kontrakteregtelike kompetensies" 219 footnote 107.

74 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 147; Van Jaarsveld Handelsreg 67.

75 Hosten Inleiding 307.

76 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 147; Van Jaarsveld Handelsreg 67.

77 Boberg Persons 590.

78 Edelstein v Edelstein NO supra; Reinecke 1964 THRHR 134; Unisa Personereg 157; Van der Vyver and Joubert Personereg 162.

Further protection of minors in connection with contracts

5.9 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.⁷⁹

5.10 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.⁸⁰ Where the minor is not bound by the contract it is unnecessary to obtain restitutio to escape the provisions of the prejudicial contract,⁸¹ although some people are of the opinion that for the sake of certainty it can do no harm.⁸² Van der Vyver and Joubert⁸³ 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.

79 Ex parte Ansermini 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 67.

80 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 158; Van Jaarsveld Handelsreg 68.

81 Boberg Persons 487; Van der Vyver and Joubert Personereg 158.

82 De Wet and Yeats Kontraktereg 63; Unisa Personereg 159.

83 Personereg 158.

5.11 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.⁸⁴ Restitutio is also available where the court has sanctioned the conclusion of a prejudicial contract,⁸⁵ 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.⁸⁶

Protection of the other contracting party

5.12 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.⁸⁷ 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.⁸⁸ The opposite party's protection is in fact implicit in the minor's limited locus standi in judicio.

84 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 160; Van Jaarsveld Handelsreg 81.

85 De Wet v Bouver 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 159.

86 De Wet and Yeats Kontraktereg 63; Hahlo and Kahn Union of S A 384; Van der Vyver and Joubert Personereg 159; Van Jaarsveld Handelsreg 69.

87 Boberg Persons 592-593; Van Jaarsveld Handelsreg 70.

88 Cf Boberg Persons 592; Hosten Inleiding 306; Olivier Persons 76; and Van Jaarsveld Handelsreg 69.

5.13 If the opposite party performs under a natural obligation, ownership will pass to the minor as a result of the performance.⁸⁹ The opposite party can however sue the minor on the ground of unjust enrichment,⁹⁰ as he in fact could also do if the minor should reclaim his performance to the opposite party.⁹¹ 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.⁹² The enrichment is calculated at the date on which the minor is sued by the other party.⁹³ Although many writers⁹⁴ refer to litis contestatio as the material time, Christie⁹⁵ 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,⁹⁶ and not close of pleadings (as Christie obviously interprets litis contestatio), litis contestatio being capable of both meanings.⁹⁷

89 See par 5.2.

90 Boberg Persons 594; Hahlo and Kahn Union of S A 381; Hosten Inleiding 306; Olivier Persons 68; Van der Vyver and Joubert Personereg 164.

91 De Wet and Yeats Kontraktereg 56.

92 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 71.

93 De Wet and Yeats Kontraktereg 56.

94 Boberg Persons 595; Hahlo and Kahn Union of S A 381; Hosten Inleiding 306; Olivier Persons 69; Unisa Personereg 151.

95 Contract 229.

96 Van der Vyver and Joubert Personereg 146 and cf Unisa Personereg 151.

97 Hiemstra and Gonin Legal dictionary 216.

5.14 The other party can also hold the parent liable on the ground of enrichment⁹⁸ (or negotiorum gestio⁹⁹) where the parent has been saved part of his duty of support by the fact that the minor used the money for maintenance.

5.15 Brief reference may be made to the benefit rule which was introduced by Nel v Divine, Hall & Co¹⁰⁰ as a result of the confusion that existed as regards the unjust enrichment liability.¹ That judgment declared that a minor is bound 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 criticism² but there are those who support it,³ even after the Appellate Division adopted the correct view concerning enrichment liability in Edelstein v Edelstein NO.⁴ It is clear that the benefit rule no longer forms part of our law.⁵

5.16 Our law also protects the opposite party from a minor who fraudulently represented himself as a major by holding him liable to the

98 Boberg Persons 596; Christie Contract 230-231.

99 Boberg Persons 596; Hahlo and Kahn Union of S A 382.

100 (1890) 8 SC 16.

1 Van der Vyver and Joubert Personereg 149; cf Boberg Persons 553; De Wet and Yeats Kontraktereg 57; and Olivier Persons 69-70.

2 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.

3 Caney 1930 SALJ 189-190; Donaldson Minors 17-27; Olivier Persons 74.

4 Supra 13; see also Tanne v Foggitt 1938 TPD 43 49-50.

5 Van Reenen 1956 THRHR 159; Boberg Persons 566; Hosten Inleiding 306; cf De Wet and Yeats Kontraktereg 57 and Lee and Honoré Obligations 15.

deceived opposite party.⁶ There is a divergence of opinion on what the basis for this liability is. On the one hand there are those⁷ who would hold the minor liable ex contractu and on the other hand those⁸ who feel he is liable ex delicto. Of course it is quite possible for both grounds for liability to co-exist.⁹ In Louw v M J & H Trust (Pty) Ltd,¹⁰ 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.¹¹

5.17 Those who would hold the minor liable ex contractu often base their justification for their view on estoppel, namely that through his fraudulent misrepresentation 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.¹² The estoppel approach is criticised with the argument that estoppel cannot create

6 Fouche v Battenhausen & Co 1939 CPD 228; Louw v M J & H Trust (Pty) Ltd supra; Pleat v Van Staden 1921 OPD 91.

7 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 155.

8 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 115; Van Reenen 1956 THRHR 159.

9 Boberg Persons 609; Unisa Personereg 147.

10 Supra.

11 Boberg Persons 605; Christie Contract 232-233; De Wet and Yeats Kontraktereg 59; Van der Vyver and Joubert Personereg 156.

12 Hosten Inleiding 306; Olivier Persons 75; Unisa Personereg 147; Van der Vyver and Joubert Personereg 156; cf Boberg Persons 607.

contractual capacity where it does not exist and should not be applied to cases concerning legal status.¹³

5.18 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.¹⁴ 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.¹⁵ Whichever way one looks at it everyone agrees that the opposite party should be accommodated in some way or other.

5.19 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.¹⁶

UNILATERAL JURISTIC ACTS

5.20 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

13 Boberg Persons 607.

14 Boberg Persons 610; cf Christie Contract 234.

15 De Wet and Yeats Kontraktereg 59; cf Christie Contract 234-235.

16 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 166-167.

assistance but will require the assistance of his parent or guardian to renounce ownership by derelictio.

MARRIAGE

5.21 Once again the law looks after the interest 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.¹⁷ 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.

Persons who must consent

5.22 Where one parent has been deprived of his guardianship the consent of the other parent is sufficient.¹⁸ 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.¹⁹ In such a case the consent of the nominated guardian, if appointed, will be sufficient.²⁰ A father who does not have sole guardianship over his child may however only nominate someone as guardian over his minor child to act jointly with the

17 Boberg Persons 617; Hahlö Husband and wife 91; Spiro Parent and child 181.

18 Sec 5(4) of the Matrimonial Affairs Act 37 of 1953 and sec 60(1) of the Childrens' Act 33 of 1960.

19 Sec 5(3)(a) of the Matrimonial Affairs Act 37 of 1953.

20 Sec 5(5) of the Matrimonial Affairs Act 37 of 1953.

mother.²¹ In that case that guardian's consent will also have to be obtained.²²

5.23 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 penalties²³ of the Perpetual Edict to the other marriage partner.²⁴ The marriage was however unassailable.²⁵ 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.²⁶

5.24 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.²⁷

5.25 Should the parent, guardian or commissioner of child welfare refuse consent without adequate reason and contrary to the interests of the

21 Sec 5(3)(b) of the Matrimonial Affairs Act 37 of 1953.

22 Van der Vyver and Joubert Personereg 502-503; cf the provisions of section 24A of the Marriage Act 25 of 1961.

23 See par 5.28.

24 Boberg Persons 619; Van der Vyver and Joubert Personereg 579.

25 Ex parte Dineen 1955 4 SA 49 (O) 54; cf Ex parte Nortje 1977 3 SA 1058 (T) 1059.

26 Cf sec 24 of the Matrimonial Property Act 88 of 1984.

27 Sec 25(1) of the Marriage Act 25 of 1961; Ex parte Visick 1968 1 SA 151 (D).

minor, a judge of the Supreme Court may grant consent.²⁸ 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.²⁹

5.26 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.³⁰ 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.³¹ 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.³² The Minister's permission is not necessary where the court has consented to the contracting of the marriage.³³

5.27 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

28 Sec 25(4) of the Marriage Act 25 of 1961; Kruger v Fourie 1969 4 SA 469 (O).

29 Boberg Persons 621.

30 Sec 26(1) of the Marriage Act 25 of 1961.

31 Abels v Abels 1961 2 SA 639 (C); Shields v Shields 1959 4 SA 16 (W); Van der Vyver and Joubert Personereg 501.

32 Sec 26(2) of the Marriage Act 25 of 1961.

33 Sec 26(1) of the Marriage Act 25 of 1961.

verbally or even tacitly, the fact that the consent is not in writing will not affect the validity of the marriage.³⁴

Consequences of a marriage contracted without consent

5.28 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.³⁵ Further uncertainty prevailed about the patrimonial consequences of such a marriage should it simply be voidable.³⁶

5.29 These problems received the Commission's attention in the matrimonial property law project.³⁷ The recommendations of the Commission resulted in the Matrimonial Property Act, 1984.³⁸ By this Act section 24A was inserted in the Marriage Act 25 of 1961, making it clear that the marriage is simply voidable. Section 24 of the Matrimonial Property Act 88

34 Boberg Persons 618; Hahlo Husband and wife 92; Van der Vyver and Joubert Personereg 503; contra: Pont 1970 THRHR 90; cf De Vos 1974 AJ 261.

35 Boberg Persons 621-637; Conradie 1947 SALJ 26 et seq; Pont 1959 AJ 60 et seq; Spiro Parent and child 187-188; Van der Vyver and Joubert Personereg 506; Van Rensburg 1969 THRHR 74 et seq.

36 Boberg Persons 637-641; HRH 1954 SALJ 110 et seq; Scholtens 1954 SALJ 359 et seq.

37 S A Law Commission Report 78-79.

38 Act 88 of 1984.

of 1984 empowers the court to make such order with regard to the division of the matrimonial property as it may deem just on dissolving a marriage on the ground of want of consent of the parents or guardian.

Section 17 of the Perpetual Edict of 1540 and sections 3 and 13 of the Political Ordinance of 1580 were also repealed.³⁹

STATUTORY EXCEPTIONS TO THE LIMITATION

5.30 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;⁴⁰ after 10 years a child's consent is required for his adoption;⁴¹ after 14 years a minor may be a witness to a will, provided he is competent to give evidence in a court;⁴² after 16 years a minor may make a will;⁴³ after 16 years a minor may independently invest money in a building society and deal with the money as he thinks fit;⁴⁴ 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;⁴⁵ and after 18 years a

39 Schedule to the Matrimonial Property Act 88 of 1984.

40 Sec 54(a) of the Post Office Act 44 of 1958.

41 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.

42 Definition of "competent witness" in sec 1 of the Wills Act 7 of 1953.

43 Sec 4 of the Wills Act 7 of 1953.

44 Sec 68 of the Building Society Act 24 of 1965.

45 Sec 37 of the Insurance Act 27 of 1943.

minor may consent to an operation upon or to medical treatment of himself.⁴⁶

6. LEGAL CAPACITY OF A MINOR

6.1 Examples of cases where the law limits a minor's legal capacity not necessarily as a consequence of his limited contractual capacity⁴⁷ are the fact that a minor may not be a guardian,⁴⁸ may not be a director of a company,⁴⁹ may not be a director of a building society,⁵⁰ may not be a trustee in an insolvent estate⁵¹ and probably may not be the executor in a deceased estate.⁵²

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

7.1 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

46 Sec 20(8A) of the Childrens' Act 33 of 1960; re-enacted as sec 39(4) of the Child Care Act 74 of 1983.

47 Cf Van der Vyver and Joubert Personereg 168.

48 Dhanabakium v Subramanian supra; Boberg Persons 646; Van der Vyver and Joubert Personereg 168.

49 Sec 218(1)(b) of the Companies Act 61 of 1973.

50 Section 18(1)(a) of the Building Society Act 24 of 1965.

51 Sec 55 of the Insolvency Act 24 of 1936.

52 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 158; and Van der Vyver and Joubert Personereg 169-170.

not obtain a fire-arm licence or possess a fire-arm or ammunition;⁵³ 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;⁵⁴ a South African citizen qualifies at the age of 17 for national service;⁵⁵ subject to certain provisos liquor may not be sold or supplied to a minor under 18 years on licensed premises;⁵⁶ from the age of 18 years a White, a Coloured and an Indian minor may vote.⁵⁷

8. A MINOR'S LOCUS STANDI IN JUDICIO

8.1 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 actions or court applications without the assistance of his parent or guardian.⁵⁸ 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 name⁵⁹ or by litigating on behalf of the

53 - Sec 3(1) and 37 of the Arms and Ammunition Act 75 of 1969.

54 Sec 61(a) of the various provinces' road traffic ordinances - Ord 21 of 1966.

55 Sec 3(1)(b) of the Defence Act 44 of 1957.

56 Sec 60 of the Liquor Act 87 of 1977.

57 Sec 52 of the Constitution of the Republic of South Africa 110 of 1983.

58 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 173-174 and Van der Vyver 1979 THRHR 130.

59 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 and Van Winsen Civil practice 144; Hosten Inleiding 305; Olivier Persons 83; Spiro Parent and child 199; Unisa Personereg 133; Van der Vyver and Joubert Personereg 175-176.

minor in his capacity as parent or guardian.⁶⁰ Incidentally the latter method is the only way in which an infans may be a party to a lawsuit.⁶¹

8.2 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 an order declaring him to be a major⁶² and he may act unassisted in a civil action concerning the results of an election in which he was a candidate.⁶³ A minor may also apply without assistance to the court for leave to marry⁶⁴ 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.⁶⁵

8.3 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,⁶⁶ with the result that the success or failure of the action affects the minor and not the parent or guardian.⁶⁷ Except where the parent or guardian has

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- 60 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 199; Unisa Personereg 133; Van der Vyver and Joubert Personereg 175.
- 61 Boberg Persons 681-682; Unisa Personereg 133; Van der Vyver 1979 THRHR 130-131.
- 62 Boberg Persons 381 and 690; D'Oliviera 1973 SALJ 68; contra: Spiro 1973 SALJ 49.
- 63 Olufsen v Klisser 1959 3 SA 351 (N) 358; Boberg Persons 690; Van der Vyver and Joubert Personereg 174.
- 64 Van der Vyver and Joubert Personereg 174.
- 65 Govender v Amurtham 1979 3 SA 358 (N) 362; Van der Vyver and Joubert Personereg 175.
- 66 Boberg Persons 682; Van der Vyver and Joubert Personereg 180.
- 67 O'Linsky v Prinsloo 1976 4 SA 843 (O) 847; Mokhesi NO v Demas 1951 2 SA 502 (T); Van der Vyver and Joubert Personereg 180.

acted mala fide, unreasonably or negligently, the minor is also the one who is liable for the costs of an unsuccessful action.⁶⁸

8.4 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, the court may appoint a curator ad litem to assist the minor.⁶⁹ 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.⁷⁰

8.5 In Yu Kwam v President Insurance Co Ltd⁷¹ it was argued that proceedings to which a minor without the necessary assistance is a party are a nullity.⁷² Voet's⁷³ view, however, is that where a minor is inadvertently 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

68 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 202 (also see 203); Van der Vyver and Joubert Personereg 181.

69 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 200; Van der Vyver and Joubert Personereg 176-177.

70 Ex parte Goldman 1960 1 SA 89 (D); Boberg Persons 687; Olivier Persons 83; Unisa Personereg 133; Van der Vyver and Joubert Personereg 175.

71 1963 1 SA 66 (T) 69.

72 Cf sources quoted by Spiro Parent and child 201-202.

73 Commentarius 5.1.11.

it.⁷⁴ This view is approved, or taken cognizance of, by the judiciary and by jurists, but a pertinent decision in this connection is still lacking.⁷⁵

9. PARENTAL POWER OVER A MINOR

9.1 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.⁷⁶ 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.⁷⁷ 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.

9.2 In Meyer v Van Niekerk⁷⁸ and Coetzee v Meintjies⁷⁹ 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

74 Cf Voet Commentarius 5.1.11; Boberg Persons 688.

75 Harms v Malherbe 1935 CPD 167 169; Lasersohn v Olivier 1962 1 SA 566 (T) 567; Boberg Persons 688; Van der Vyver 1979 THRHR 141; Van der Vyver and Joubert Personereg 174.

76 Boberg Persons 459.

77 Boberg Persons 460, 463, 464 and 468; Lee an Honoré Family 163; Van der Vyver and Joubert Personereg 609-610; cf Hosten Inleiding 342; Unisa Familiereg 134.

78 1976 1 SA 252 (T).

79 1976 1 SA 257 (T).

Barnard⁸⁰ 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 Niekerk⁸¹ 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 Meintjies⁸² and the Cape decision Gordon v Barnard⁸³ 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 custody in every respect. This view is reinforced by the recent case of H v I⁸⁴ where the premise was that the parent alleging his parental power to have been encroached upon must merely indicate that he still exercises parental power over his minor child. The court obiter indicated that the mere fact that a parent allows a child to go and live elsewhere does not necessarily mean that the parent has forfeited his right to object to his child's choice of associates. Depending on the circumstances of each case the parent would indeed be able to act where the child did not exercise the discretion expected of him by the parent.

10. ATTAINMENT OF MAJORITY

80 1977 1 SA 887 (C).

81 Supra 257.

82 Supra.

83 Supra.

84 1985 3 SA 237 (C).

10.1 Attaining the age of majority is only one of the ways in which a minor can come of age,⁸⁵ that is to say when he attains complete legal capacity, contractual capacity and the capacity to litigate and is released from parental power.⁸⁶

MARRIAGE

10.2 Where a man marries before he is 21 years old, he attains majority.⁸⁷ The same used to apply to a woman under 21 years who contracted a marriage with the exclusion of the marital power.⁸⁸ If one limits the concept of "majority" to the limitations imposed on a minor by age⁸⁹ 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.⁹⁰ 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

85 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.

86 Barnard and 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 628.

87 Boberg Persons 377; De Wet and Yeats Kontraktereg 61; Hahlo Husband and wife 128; Hahlo and Kahn Union of S A 362; Olivier Persons 78 (which deals only with capacity to act); Van der Vyver and Joubert Personereg 137.

88 Boberg Persons 378.

89 As is done in this report - cf Barnard and Van Aswegen 1978 THRHR 97.

90 Barnard and Van Aswegen 1978 THRHR 97; Unisa Personereg 161; Van der Vyver and Joubert Personereg 138.

her from her parent's authority over her.⁹¹ 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 limited⁹² 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.

10.3 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.⁹³ Olivier⁹⁴ 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 strength 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 writers⁹⁵ hold that the woman remains competent to act. After all there is no reason to discriminate between men and women.

DECLARATION OF MAJORITY

10.4 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.⁹⁶ It may be

91 Boberg Persons 378; cf Hahlo and Kahn Union of S A 362.

92 S A Law Commission Report 139.

93 Boberg Persons 378; De Wet and Yeats Kontraktereg 61; Van der Vyver and Joubert Personereg 138.

94 Persons 78.

95 Hahlo and Kahn Union of S A 362 and authority quoted in footnote 93 above; cf Barnard and Van Aswegen 1978 THRHR 94 and Wessels Contract 262-263.

96 Sec 2 of the Age of Majority Act 57 of 1972.

inferred⁹⁷ 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 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.⁹⁸ The effect of such a declaration is that thenceforth the minor "shall for all purposes be deemed to have attained the age of majority."⁹⁹ The applicant therefore becomes a major in every respect.¹⁰⁰

VENIA AETATIS AND RELEASE FROM TUTELAGE

10.5 At 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,¹ although it is sometimes contended that after the granting of venia aetatis the minor still requires his parents' consent to marriage.²

97 From sec 3 of the Age of Majority Act 57 of 1972.

98 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.

99 Sec 7 of the Age of Majority Act 57 of 1972.

100 Boberg Persons 383; De Vos 1974 AJ 261; Olivier Persons 80; Spiro 1973 SALJ 54; Unisa Personereg 165; Van der Vyver and Joubert Personereg 139; 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.

1 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 139.

2 Hahlo and Kahn Union of S A 363; Spiro Parent and child 247, Zeffertt 1969 SALJ 410; contra: D'Oliveira 1973 SALJ 58.

10.6 Venia aetatis has probably fallen into desuetude.³ 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.⁴ The courts have consistently held, and rightly so, that venia aetatis is the prerogative of the head of state.⁵

10.7 The Cape courts have developed the practice of granting release from tutelage.⁶ A controversy has developed as to whether the courts are competent to do so.⁷ In Ex Parte Van den Hever⁸ 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.⁹ 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.¹⁰ Once again section 2 of the Age of Majority Act 57 of 1972 should result in the disappearance of release from tutelage in practice.¹¹

3 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.

4 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 138.

5 Boberg Persons 378-379.

6 Ex parte Van den Hever supra; Ex parte estate Van Schalkwyk 1927 CPD 268; Boberg Persons 379; Zeffertt 1969 SALJ 407.

7 De Wet and Yeats Kontraktereg 57; L IGN C 1937 THRHR 194-195; cf Olivier Persons 79 and Zeffertt 1969 SALJ 407 et seq.

8 Supra 99.

9 Boberg Persons 379 and 380.

10 D'Oliveira 1973 SALJ 62-63; cf Hahlo and Kahn Union of S A 363.

11 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 138.

10.8 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.¹² 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 excluded¹³ and if those¹⁴ 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.

EMANCIPATION

10.9 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 be emancipated before the court.¹⁵ This form of emancipation was gradually superseded by venia aetatis.¹⁶ 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.¹⁷ Boberg¹⁸ 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 acts. As happens

12 Boberg Persons 380; Hahlo and Kahn Union of S A 363; Spiro Parent and child 247; Unisa Personereg 162.

13 Boberg Persons 380; Hahlo and Kahn Union of S A 363.

14 Eg Hahlo and Kahn Union of S A 363.

15 Boberg Persons 375; Olivier Persons 80-81; Pauw 1979 SALJ 321; Unisa Personereg 166-167.

16 Boberg Persons 377; Donaldson Minors 73; Olivier Persons 81; Unisa Personereg 167.

17 Boberg Persons 377; Olivier Persons 81; Unisa Personereg 167.

18 Persons 384-392; cf Van der Vyver and Joubert Personereg 150-151.

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

10.10 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,¹⁹ 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.²⁰

10.11 Although some writers²¹ 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 child²² and a method by which a father can arbitrarily relinquish his parental power is not in line with this view.²³

10.12 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.²⁴ If it is regarded as general authority, however, the parent should always be able to revoke the

19 D'Oliveira 1973 SALJ 60; Pauw 1979 SALJ 323; Unisa Personereg 168; Van der Vyver and Joubert Personereg 154.

20 Boberg Persons 384; De Wet and Yeats Kontraktereg 55; Spiro Parent and child 250; cf Ahmed v Coovadia 1944 TPD 364 and Palmer 1968 SALJ 24 et seq.

21 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 Cape LJ 237.

22 Ex parte Van Dam 1973 2 SA 182 (W) 185; Hahlo and Khan Union of S A 367.

23 Boberg Persons 406-407; cf Spiro Parent and child 251.

24 Hahlo 1943 SALJ 298-299.

authority.²⁵ 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.²⁶

10.13 In Le Grange v Mostert²⁷ it was held that a guardian was also entitled to emancipate, but this view has been criticised on the ground that a guardian cannot renounce his duties at will.²⁸ Once again if one regards emancipation merely as general authority to enter into certain transactions there is no reason why a guardian should not be able to grant his ward a certain degree of freedom in this way.²⁹

10.14 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. Boberg³⁰ is of the opinion that the only reason why writers³¹ 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.³²

25 Donaldson Minors 80; Spiro Parent and child 250; Van der Vyver and Joubert Personereg 154.

26 Mahlo and Kahn Union of S A 366; Zeffertt 1969 SALJ 410-411.

27 (1909) 26 SC 321, quoted in Boberg Persons 403.

28 Donaldson Minors 83-84; Van Zyl Steyn 1927 SALJ 323-324.

29 Conradie 1946 SALJ 30; Donaldson Minors 84.

30 Persons 408.

31 Conradie 1946 SALJ 28 and Donaldson Minors 84-85.

32 Cf Boberg Persons 408-409 and Unisa Personereg 169.

REQUIREMENT OF A SPECIFIC AGE

10.15 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,³³ for example on the acquisition or loss of South African citizenship where the South African Citizenship Act³⁴ 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.³⁵ So also it was decided in Santam Versekeringsmaatskappy Bpk v Roux³⁶ 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.³⁷ 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.³⁸

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

11.1 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:

33 Boberg Persons 383; Hahlo and Kahn Union of S A 362; Olivier Persons 79; Spiro 1973 SALJ 54-55.

34 Sec 1 of Act 44 of 1949.

35 Sec 8A(1) of the Births, Marriages and Deaths Registration Act 81 of 1963.

36 1978 2 SA 856(A) 866.

37 Cf Barnard and Van Aswegen 1978 THRHR 95.

38 Cf Spiro 1973 SALJ 55.

(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.

11.2 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.³⁹ 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,⁴⁰ 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.⁴¹

11.3 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 contractual capacity and locus standi in judicio of the Black

39 Olivier Privaatreg van Bantoetaalsprekendes 618.

40 Cf ibid 620 and see par 10.2.

41 Olivier Privaatreg van Bantoetaalsprekendes 620.

person.⁴² 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.⁴³ She will therefore, being unmarried, require her father's assistance and after her marriage the assistance of her husband.⁴⁴ 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 antenuptial contract, and an unmarried woman who has attained majority, a widow or a divorced woman is not subject to guardianship.⁴⁵ 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.

11.4 As far as contracting a marriage is concerned the following applies: If parties who decide to contract a common law marriage 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 not require consent.⁴⁶

11.5 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.

42 Ibid 618.

43 Ibid 620.

44 Cf Seymour Customary law 228 and cf 228-229 for the position in the Cape.

45 Sec 29 of the KwaZulu Act on the Code of Zulu Law 6 of 1981; also see par 11.6.

46 Cf sec 2 of the Laws on Co-operation and Development Amendment Act 91 of 1985 which repeals sec 22 ter of the Black Administration Act 38 of 1927 which provided that a marriage officer may not solemnize a
(Footnote Continued)

11.6 It might not be inappropriate to mention that guardianship of Black women who have reached the age of majority is at present in the melting pot. The Commission's tentative approach in its investigation into the marriages and customary unions of Black persons (Project 51) is that, notwithstanding customary law, no person who has the status of a major at common law should be under the guardianship of another.⁴⁷ In an interim report the Commission recommended that, pending the outcome of the main inquiry, it should be provided that for the purposes of leasehold and related matters Black women shall not be subject to customary law and that such transactions shall be regulated entirely by the common law. These recommendations have since been embodied in legislation.⁴⁸ Regarding the Zulu Law, the KwaZulu Act on the Code of Zulu Law 16 of 1985 will repeal the KwaZulu Act on the Code of Zulu Law 6 of 1981 on coming into operation (which, at the time of writing, has not yet happened). The former Act provides in section 14 that every person shall become a major on marriage or on attaining the age of 21 years. Under section 27(3) a married woman will, in the absence of an antenuptial contract, merely be under the marital power, and not the guardianship, of her husband.⁴⁹

12 ADVANCEMENT OF THE AGE OF MAJORITY

12.1 The policy of the law is to protect the minor against his lack of judicium.⁵⁰ The question to be answered here is whether the average young person in South Africa can today exercise as much discretion at the

(Footnote Continued)

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.

47 S A Law Commission Working Paper 10 180-181 and 205.

48 Sec 1 of the Laws on Co-operation and Development Second Amendment Act 90 of 1985.

49 Cf S A Law Commission Working Paper 10 83.

50 Cf par 3.1.

age of 18 (or 19 or 20) years as at 21 years, so that the protection afforded the age group 18 to 21 years by law may be withdrawn. In practice the question must be answered in the field of contracts and marriage in particular, but the important point that an advancement of the age of majority would deprive a parent of his parental power should not be lost sight of. Since the duty of support is not linked to the parental power and can continue after majority has been attained⁵¹ the maintenance of young persons is not a problem that arises here.

12.2 The ideal would be to establish the degree of maturity of young people at the age of 18 compared with the degree of maturity at the age of 21 years. As was mentioned in paragraph 1.2, Prof Crause was approached in this regard. Initially, and without prior study, Prof Crause thought that a bibliography of all available literature on the subject should be compiled; that a panel of experts (sociologists, psychologists, educationists and social workers) should evaluate the literature, and that a South African study of the degrees of maturity of young people should be undertaken on a scientific basis. However, the investigation took a very different course from what had originally been envisaged. According to Prof Crause it emerged that there were no scientific studies of direct relevance to the present legal question. Education and Psychology being the two disciplines that concern themselves with the possibility of establishing the degree of maturity scientifically, Prof Crause obtained comments from those disciplines. Dr S W H Engelbrecht, executive director of the Institute for Educational Research of the Human Sciences Research Council, is of the opinion that criteria applied by the educationists will present problems for the legislature, since the latter would want to link the concept of maturity to a set age, while educationists regard maturing as an ongoing process not capable of being linked to a set age. Dr Engelbrecht considers a choice between the ages of 18 and 21 to be an arbitrary one at this stage, with advantages and disadvantages attached to both. Dr Engelbrecht also refers to research done at the Rand Afrikaans University which indicates that young men who have already completed their military training display a greater degree of maturity than those who began to further their studies

51 Boberg Persons 264; Spiro Parent and child 402.

directly after school (it is obviously not clear whether this is due to the two-year age advantage or whether the exposure to military training itself also played a role). Dr K F Mauer, executive director of the Institute for Psychological and Edumetric Research of the Human Sciences Research Council, points out that Psychology does have scales to measure different aspects of maturity, but that the problem is that these dimensions are largely independent of one another. He says that the methodological problems of investigating the whole matter would be substantial, with the final decision still having to be arbitrary. Dr E M Madge, chief research specialist of the Institute for Psychological and Edumetric Research of the Human Sciences Research Council, is of the opinion that a psychological investigation into the degree of maturity of persons between 18 and 21 years would not really yield anything new on which to base a decision on the matter. She says that it would appear from existing knowledge that few psychological grounds exist - or would be found - for assuming that the average South African young person under the age of 21 years is sufficiently developed to be able to cope without the present protection afforded by the law. On the contrary, there are more likely to be good grounds (Dr Madge continues) for raising certain age limits in order to eliminate certain anomalies (for example regarding the ages at which a driver's licence or a licence to possess a firearm may be obtained), than for advancing the age of majority. Prof Crause's conclusion is that it is impossible to produce conclusive scientific proof in favour of the advancement of the age of majority.

12.3 Once again one is faced with the problem that a decision on the age at which majority should be attained, is a policy decision⁵² which is to a certain extent an arbitrary one.⁵³ Nevertheless there are arguments for and against the advancement of the age of majority which may be of

52 D'Oliveira 1973 SALJ 64.

53 Ex parte Botes supra 401-402; cf Olivier 1983 AJ 97 and Rosenthal 1971 SALJ 111.

assistance in the decision-making process. The Commission has availed itself freely of the arguments raised by commentators in what follows.⁵⁴

12.4 In the first place the assertion is made that our youth mature earlier nowadays. Interestingly enough one commentator supported this assertion by referring to the development that has taken place in the field of education and to the modern approach to education in South Africa, while others refer to the authoritative structures of the education system and the family to which most minors are subjected, as the very reason why young people can develop judgment only once they have left these structures behind. It is further of interest that less affluent young people were regarded by some as the ones who should be protected against exploitation, while on the other hand the point was made that such young people have to start work earlier and are then exposed to the adult world, so that they are the very ones who need no protection. It may well be that, physically and intellectually, our youth develop earlier nowadays, but judgment is something acquired by experience of life. Many of the youth are still at school up to 18 years, or even older. Normally, when a young person finishes school, he leaves home to work, to do military training or to study. With the age of majority at 21 years, these people have the opportunity to acquire experience of life under the supervision of a parent or a guardian (those who are working probably more so than those who are studying). The Commission is of the opinion that, if the age of majority were to be advanced to 18 years, a young person would be deprived of the opportunity to develop his judgment under protection. The idea was put forward that it is better to expose 18-year-olds to the business world so that they can learn from their mistakes on a small scale, rather than having to learn a lesson later on in situations where the consequences are potentially more detrimental. One should bear in mind, however, that the normal parent should regard his 18-year-old child as adult enough to live his own life and only give him guidance where necessary. The 18-to-20-year-old will therefore not be kept in a vacuum until he turns 21,

54 Listed in Annexure B.

but the period will serve as training for later life. The fact that a young person does not attain majority before he is 21 does not mean that he should be treated as a child between the ages of 18 and 21.

12.5 Those in favour of lowering the age of majority referred to the anomaly created by the fact that the age of (especially) 18 years is in many respects a watershed for the young person, while his civil contractual capacity, for example, is still restricted until the age of 21 years. The question is whether these exceptions are an indication that young people are mature enough at 18 years to be deprived of all legal protection, or whether the exceptions are due to practical considerations.⁵⁵

12.6 The fact that liquor may be served to an 18-year-old on licensed premises represents recognition of the sense of responsibility of a youth of 18 years, but the judgment necessary for deciding when to stop drinking differs somewhat from the judgment under discussion. When it comes to the possession of firearms and ammunition a responsible person, either the Commissioner of the South African Police or the licensed owner, has to decide in each case whether a specific young person may be trusted with the firearm or ammunition.⁵⁶ Life insurance policies are a way of encouraging young people to invest their earnings and other money, and the fact that moneys can be paid to a minor in terms of a life insurance policy, in which case he can do with it as he thinks fit, is probably due to the demands of practice. A young person can prejudice many people by making a will, but not himself. Where he consents to an operation or medical treatment of himself, a medical practitioner is involved who is actually responsible for the decision whether or not the treatment is in his patient's interests. Driving a motor-vehicle merely requires technical skill and normal intelligence.

55 Cf also the view of Dr E M Madge in par 12.2.

56 Cf secs 3(5), 8 and 37 of the Arms and Ammunition Act 75 of 1969.

12.7 A youth may be required to undergo military training at the age of 17 already. However, in the Defence Force a person is subject to strict discipline and he is simply expected to obey orders to carry out certain prescribed actions. Although a youth undoubtedly becomes more mature in certain respects because of experiences while doing national service, this exception cannot be seen as an indication that all young people may be regarded as adults in every respect at 17. Even if a national serviceman becomes an officer with accompanying responsibilities, 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 Defence Force limits his capacities. An 18-year-old member of parliament would also be an exceptionally gifted young person: in fact members of parliament under 21 years of age are a phenomenon which is hardly likely to occur.

12.8 However, granting 18-year-olds the vote suits those who advocate the advancement of the age of majority. Commentators on this aspect range from those who think that this fact is in itself a sufficient ground for advancing the age of majority to 18 years, to those who think that it is irrelevant and that it was not a wise decision in the first place to give 18-year-olds the vote. One commentator wrote:

It is not conceded that the granting of voting rights to eighteen-year old individuals implies mature wisdom on their part. Political persuasion, it is submitted, has as large an emotional content as an intellectual one.

One has to concede that it is a strong point in favour of advancement, but it should be borne in mind that an election is accompanied by political debate from which guidance can be obtained. Furthermore, political parties that have strong enough support to enable them to win elections normally have, at least in the eyes of many adults as well, a well-founded policy. An error of judgment in this area would not easily affect a young person personally as detrimentally as an error of judgment regarding, for example, a contract or marriage.

12.9 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).⁵⁷ Some commentators argued that our youth are no less mature than the youth of such countries. It was also suggested that an attempt should be made by means of an investigation to establish whether there are genuine grounds for accepting that the advancement of the age of majority in those countries has proved to be to the benefit of the community and in particular to the youth in the age group concerned. The premise is therefore that our youth are no different from the youth in other countries. However, there were commentators who alleged that our youth are exposed to life's realities at a later age than overseas because of a distinctive pattern of upbringing and development. Some were of the opinion that we could not be compared with overseas countries because of our heterogeneous population composition. Prof Crause suggests that the problem of the heterogeneous population composition could be overcome by also concentrating in such an investigation on the effect that the advancement of the age of majority overseas has had on immigrant groups, for example the Pakistanis and Africans in England. However, the Commission is not equipped to undertake a sociological investigation of this kind, and the problem remains that to lay the basis for the investigation it would have to be shown that the groups studied are comparable with South African youth as regards maturity.

12.10 One commentator pointed out that problems could be experienced regarding the conflict of laws where a person, a major in his country of domicile, concluded a contract in a country where he would be a minor, and vice versa. The Commission, however, has every confidence that our courts would be able to handle the matter satisfactorily, should it arise.

57 Law Reform Commission of Ireland Working paper 108-116.

12.11 The advancement of the age of majority would probably be to the commercial world's benefit in that extra administration would be done away with, but one commentator posed the question whether the time and costs saved would not simply have to be spent on legal action as a result of contracting with a high-risk group. Another commentator pointed out that it is the dealer's own choice to do business with the youth and that he is therefore not in a position to complain where this entails extra work.

12.12 Regarding marriage it is alleged that in general an 18-year-old is emotionally too immature really to understand and appreciate the complexities of a marriage relationship. The fact that parents approve of a marriage is psychologically of more importance than a mere administrative requirement and non-approval often deters a young person from a rash or an ill-considered decision. On the other hand it is said that parents sometimes withhold their consent for spite or for neurotic reasons - this mostly happens in the case of divorced parents where the father, in particular, may withhold his consent in order to get at his former wife or his child. It should be noted however, that there is a procedure available to render the consent of a parent who refuses consent without adequate reason and contrary to the interests of the minor unnecessary.⁵⁸

12.13 Some commentators allege that the age of majority of 21 years frustrates the youth, that a young person who leaves the parental home at the age of 18 wants to be treated as an adult and that the fact that the age of majority has been advanced overseas, but not here is an insult to our youth. But how do the youth perceive this? A lecturer in law set the present problem as an essay topic for second-year students. Out of 170, fewer than 40 recommended advancement. Two headmasters, who were approached in their personal capacities for their comments, discussed the matter with senior pupils - the pupils thought that the age of 21 years should be retained. A women's organisation says that an opinion poll amongst matrices and other youth (it was not said how comprehensive the

58 See par 5.25.

poll was) indicated that respondents wanted to keep the present protection the law affords them.

12.14 Without attaching any magical significance to the number, it may be mentioned that 21 young people in the age group 17 to 21 years wrote to the Commission. There might have been more, for ages were not always given in letters. Of these commentators, nine are in favour of an advancement to 18 years, one in favour of 19 years, one in favour of 20 years and ten want to retain 21 years.

12.15 Students⁵⁹ of Prof Crause conducted two sociological surveys under his guidance in the Port Elizabeth area. In one case the views on the advancement of the age of majority of 24 White students in the age group 18 to 21 years were tested. All the 18-year-olds and 75 % of the other respondents were not in favour of the advancement of the age of majority to 18 years. In the other survey the views of 20 White workers in the age group 18 to 21 years were tested - 80 % of them were not in favour of the advancement of the age of majority to 18 years. Interestingly enough it was found in both surveys that the majority of the respondents regarded themselves as adults, yet still opposed the advancement of the age of majority.

12.16 The executive committee of the General Youth Commission of the Dutch Reformed Church requested the various ministers involved in work among the youth in the 10 synodical areas of the Dutch Reformed Church each to distribute about 100 questionnaires on the advancement of the age of majority among the youth of the Dutch Reformed Church. The questionnaire put the following choices:

I am in favour of the retention of 21 years as the age of majority because:

59 M Dugmore, C Fisher-Hill (leader of one survey), D Horne, (leader of the other survey), S Koen and C Wiehahn.

it helps me to become more mature and to gain more experience with a view to responsible decision making;

it protects me against possible exploitation and deception since I am assisted in certain transactions;

the present age of 21 years gives me enough scope, with the necessary consent, to participate in all the important aspects of life, for example getting married, opening accounts and concluding contracts;

from the age of 18 years I may in any case vote, possess a driver's licence, etcetera.

I am in favour of the advancement of the age of majority to 18 years because:

I consider that at the age of 18 years I am already quite able to act independently, for example by marrying and concluding contracts and business transactions;

at the age of 18 years I may already vote and obtain a driver's licence and I regard myself as mature enough to act on my own responsibility;

I have enough experience to decide for myself;

I do not consider it necessary for my parents to assist me in anything.

The results were as follows:

In favour of 21 years:

Age group	17-18	19-21	22-30	Total	%
Scholars	253	30	0	283	78,4
Students	33	151	72	256	93,1
Working youth	10	75	122	207	90,0
National service-men	13	145	64	222	84,1
Total (age)	309	401	258	968	85,6

In favour of 18 years:

Scholars	76	2	0	78	21,6
Students	3	9	7	19	9
Working youth	2	9	12	23	10,0
National service men	7	25	10	42	15,9
Total (age)	88	45	29	162	14,4

Total number of forms returned: 1 130

The majority of young people therefore do not appear to see the present age of majority in a negative light.

12.17 How do persons over 21 years feel about an advancement? It is interesting that not one of the eight teachers (mostly headmasters) who responded in a personal capacity to the Commission's invitation to comment, regards 18-year-olds as adult, although one had no objection to an advancement to 19 or 20 years. Two headmasters discussed the matter with colleagues and they felt that 21 years should remain.

12.18 In addition to the commentators mentioned in paragraph 12.14, a further 45 persons wrote to the Commission. Nine were in favour of an advancement to 18 years, 28 wanted to retain 21 years, two took no final stand and six were in favour of a conditional advancement, for example an advancement only for girls, or only for concluding contracts, or subject to an adaptation of syllabuses in schools. Various bodies, individuals on behalf of bodies, and officials commented. Commentators in favour of advancing the age of majority to 18 years were:

Association of General Banks

Association of Trust Companies in South Africa

FAMSA (Durban)

The Master of the Supreme Court (Cape Provincial Division)

The Master of the Supreme Court (OFS Provincial Division)

National Council of Women of South Africa

Dr E Spiro (Cape Bar Council)

Commentators in favour of advancing the age of majority to 19 years were:

The Master of the Supreme Court (Eastern Cape Provincial Division)

Commentators in favour of retaining the status quo were:

Afrikaanse Christelike Vrouevereniging

The Association of Law Societies of the Republic of South Africa

The Baptist Union of Southern Africa

Chief Master of the Supreme Court

Dutch Reformed Church (executive committee of the General Youth Commission)

FAMSA (Family Centre, Johannesburg)

FAMSA (National Council)

FAMSA (Pretoria)

Law Adviser, Armscor

The Law Society of the Orange Free State

Natal Law Society

Oranje-Vrouevereniging

N S Peart (University of Cape Town)

Suid-Afrikaanse Vrouefederasie

Transvaal Chamber of Industries

The Women's Bureau of South Africa

Women's Legal Status Committee

Valuable comments were also received from the General Council of the Bar of South Africa, which regarded the matter as a question of policy and did not wish to take a stand since it might not present a true picture of its members' attitude. The point was made that the advocates' profession was not aware of a need in practice to advance the age of majority.

12.19 Honours students⁶⁰ of Prof Crause conducted a telephone survey under his guidance in the Port Elizabeth area, which may be seen as an indication of the opinions of a selection of social opinion leaders. There were 70 respondents. To the question: "Are you in favour of the lowering of the age of majority?", the responses were the following:

60 C Adams, D Bekker, B Boult, C du Toit (leader), G O'Connell, M Peddie, J Walters.

Occupation

	<u>Yes %</u>	<u>No %</u>
Education	42,0	57,1
Economics	60,0	40,0
Law	100,0	0,0
Medical	75,7	33,3
Religion and Social Work	50,0	50,0
Defence and Police	45,4	54,5
Politics and Municipal	100,0	0,0

White, Black, Coloured and Asian Opinions

	<u>Yes %</u>	<u>No %</u>
White	59,4	40,5
Black	50,0	50,0
Coloured	52,0	48,0
Asian	100,0	0,0

12.20 Even in legal literature one finds a difference of opinion on the matter. Prof E Kahn⁶¹ and Prof J D van der Vyver⁶² feel 18 years to be the appropriate age. The latter says that many theoretical and practical problems in connection with the contractual capacities of minors would to a large extent be obviated by a statutory amendment fixing the age of majority at 18 years. On the other hand Dr P J J Olivier⁶³ says that there is at present no social need for the advancement of the age of majority and

61 1984 SALJ 761.

62 "Kontrakteregtelike kompetensies" 225.

63 1983 AJ 98.

points out that the Legislature has made the necessary provision for exceptions to the general limit of 21 years where necessary.

12.21 A few commentators referred to testators' tendency not to allow heirs to inherit without any restrictions before the age of 25 years. One commentator would even wish to see this made a legal rule where a will does not contain express provisions on the matter. The Ontario Law Reform Commission⁶⁴ mentions the same trend. It says that 21 years and 25 years are particularly popular and that "the lowering of the age of majority to eighteen has actually encouraged testators to think in terms of greater ages".

12.22 Neither Prof Crause nor the Commission would suggest that the views quoted are a comprehensive representative opinion poll, but they do give a good indication of the differences of opinion on the advancement of the age of majority. One can probably assume that a person's views on the advancement of the age of majority may to some extent be influenced by the young people with whom he comes into contact. On that assumption, there are, in view of the great number opposed to advancement, many young people who do not have sufficient judgment to be deprived of the protection of the law.

13. RECOMMENDATION

13.1 From the minor's point of view, an age of majority of 21 years has no disadvantages, except perhaps for the minor inconvenience of having to involve his parents in some of his decisions. The law makes adequate provision for cases where it is undesirable for the minor to be dependent on his parent's decisions. The Commission believes that there is no real need for the advancement of the age of majority and that a young person

64 Report 337.

can only benefit from the protection of the law while he is gaining experience of life. Since the majority of commentators and the majority of young people from whom the Commission has heard in any case oppose the advancement of the age of majority, the Commission recommends that the status quo be retained.

ANNEXURE A

PERSONS AND BODIES TO WHOM THE WORKING PAPER WAS FORWARDED ON THE COMMISSION'S OWN INITIATIVE

Afrikaanse Handelsinstituut

Association of Building Societies of South Africa

Association of Chambers of Commerce of South Africa

Association of General Banks and Finance Houses

Association of Trust Companies in South Africa

Bar Councils (8)

Chief Justice and Judges President (7)

Churches:

Algemene Kommissie vir die Diens van Barmhartigheid

Algemene Kommissie vir Leer en Aktuele Sake Nederduitse
Gereformeerde Kerk

Apostolic Faith Mission of South Africa

Baptist Union of South Africa

Church of the Province of South Africa

Gereformeerde Kerk in Suid-Afrika

Methodist Church of South Africa

Nederduitsch Hervormde Kerk van Afrika

Presbyterian Church of Southern Africa

Southern Africa Catholic Bishops' Conference

Clearing Bankers Association of South Africa

Council for Scientific and Industrial Research

Dr C J Davel

Government departments:

Commerce and Industry
Co-operation and Development
Education and Training
Home Affairs
Justice
National Education
National Health and Population Development

Headmasters and Headmistresses (140)

Human Sciences Research Council

Prof E Kahn

Law Journals (27)

Law Libraries (51)

Law Societies (6)

Magistrates' Association of South Africa

Masters of the Supreme Court (6)

Medical Association of Southern Africa

Merchant Bankers' Association of South Africa

Minister of Justice

Motor Industries Federation

National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry

Prof N J J Olivier

Provincial Administration (Education) (4)

Research Bulletin

Society of Actuaries

South African Commercial Travellers Association

South African Co-ordinating Consumers' Council

South African Federated Chamber of Industries

South African Institute of Chartered Accountants

South African Nursing Association

South African Nursing Council

State Attorneys (6)

Trade Union Council of South Africa

Union Acceptances Ltd

Universities: Department of Psychology (23)

Universities: Department of Sociology (23)

Universities: Faculty of Law (21)

Welfare organisations:

Association of Social Workers of South Africa

Family and Marriage Society of South Africa

National Welfare Council

Pretoria and Northern Transvaal Mental Health Society

Social Workers' Association of South Africa

Social Workers' Association of Southern Africa

South African Black Social Worker's Association

South African National Council for Child Welfare

Women's Organisations:

Action 75

Afrikaanse Christelike Vrouevereniging

Black Sash

Christian Women's Club
Citizen's Advice Bureau
Constantia Damesklub
Defence Force Ladies' Association
Durban Business and Professional Women's Club
Federale Vroueraad
Federale Vroueraad Volksbelang
Girl Guides' Association
Housewives' League of South Africa
Natale Christelike Vrouevereniging
National Council of African Women
National Council of Women of South Africa
National Women's Register
Oranje-Vrouevereniging
Pretoria Women's Club
Pretoria Women's Zionist League
Randburg Business and Professional Women's Club
Soroptimists International: South African Council
South African Association of University Women
South African Catholic Women's League
South African Union of Jewish Women
South African Federation of Business and Professional Women
South African Society of Medical Women
South African Union of Homemakers
South African Women's Agricultural Union
Suid-Afrikaanse Vrouefederasie
Temple Menorah Sisterhood
Tuesday Forum

Unisa Women's Club

Women's Bureau of South Africa

Women in Action

Women's Legal Status Committee

Young Women's Christian Association

ANNEXURE B

PERSONS AND BODIES WHO COMMENTED ON THE WORKING PAPER

Afrikaanse Christelike Vrouevereniging

Anonymous (5)

Association of General Banks

The Association of Law Societies of the Republic of South Africa

The Association of Trust Companies in South Africa

The Baptist Union of Southern Africa

A M Blaney

P Booyesen

F/Cnr E F Botha

E F Chetty

Chief Master of the Supreme Court

J D Cilliers

L F B Cornelius

Miss G da Silva

Mrs M A S de Beer

Mrs L H de Jager

A de Jong

L C de Klerk

Miss M de Klerk

A de Swardt

A P J Dippenaar

Miss G du Piesanie

Mrs A du Plessis

Mrs A du Plessis

Miss B A S du Plessis

Y du Preez

Dutch Reformed Church
J du Toit
Family and Marriage Society of South Africa
General Council of the Bar of South Africa
D E Gray
C J Greyling
Miss M C Grobbelaar
Mrs L Grobler
Miss E Hofmeyr
Mrs A E Horn
L/Cpl M Howard
Mrs A Johnson
J Jonck
Ms P G Juby
J B Kirby
J Kriel
Miss C Lambert
Law Adviser, Armscor
The Law Society of the Orange Free State
Mrs C Leslie
Mrs H C M M Leyenaar
Miss A McCallaghan
Master of the Supreme Court (Cape Provincial Division)
Master of the Supreme Court (Eastern Cape Provincial Division)
Master of the Supreme Court (Orange Free State Provincial Division)
J P Meintjies
P E Mooketsi
Name illegible (2)
Natal Law Society

National Council of Women of South Africa
Mrs C Olivier
Miss V I Olsson
Miss I Oosthuizen
Oranje-Vrouevereniging
N S Peart (University of Cape Town)
Mrs C Pienaar
J H Post
F T Preller
O J Price
Mrs M Prinsloo
H Schulze
B C Senekal
B F Simpson
Miss E Smith
Miss S Smith
Mr and Mrs W J Snyman
Dr E Spiro (Cape Bar Council)
Miss A E Stander
Dr C J Steenkamp
Dr M M Steenkamp
Mrs F Strauss
Suid-Afrikaanse Vrouefederasie
Mrs A S Swart
Transvaal Chamber of Industries
W E van der Merwe
Miss J van der Walt
Miss M van der Westhuizen
H J van Rooyen

Miss A van Wyk

C C van Wyk

P J Venter

I Waja

The Women's Bureau of South Africa

Women's Legal Status Committee



TRANSVAAL EDUCATION DEPARTMENT

(PLEASE COMPLETE IN DUPLICATE)

APPLICATION FOR A FINANCIAL GRANT TO UNDERTAKE A COURSE OF TRAINING AS A TEACHER FOR SECONDARY, PRIMARY OR PRE-PRIMARY SCHOOL AT A UNIVERSITY OR AT A COLLEGE OF EDUCATION SUBJECT TO THE CONCLUSION OF AN AGREEMENT WITH THE TRANSVAAL EDUCATION DEPARTMENT

A. APPLICANT:

1. (1) Surname
(In full, use block letters)

(2) First names
(In full, use block letters)

2. Date of birth 19 ...

3. Identity number

4. Place of birth

5. (a) South African citizen Yes/No*

(b) If "No", do you intend applying for naturalization and if so, when?
.....

6. Sex: Male/Female*

7. (a) Permanent residential address of parents or guardian:
.....
.....
.....

(b) Address to which correspondence should be directed:
.....
.....
.....

* Delete whichever is not applicable

(e) 201 037

8.2.10 (1) Have you applied for a study loan or bursary from another Government department or from an institution subsidized by the Government?

Yes/No*

If "Yes", state the amount and give particulars.

.....
.....

(2) If such an application has been approved, have you already entered into an agreement with the department concerned?

Yes/No*

If "Yes", a copy of the agreement must be attached to this application.

(3) Are you under any obligation to the Transvaal Education Department in terms of a previous agreement for teacher training?

Yes/No*

If "Yes", give particulars:

(4) Are you under any obligation to any other employer in terms of any agreement?

Yes/No*

If "Yes", give particulars :

9. Have you at any time been refused admission to a training course for teachers or has your registration for such a course ever been terminated?

Yes/No*

If "Yes", give particulars.....

10. At which university or college do you intend to study?

.....
.....

*Delete whichever is not applicable

B. FINANCIAL GRANT:

In addition to the basic study grant, I should also like to apply for a merit grant

Yes/No*

These grants will only be made once an agreement has been entered into with the Department.

C. I DECLARE THAT THE PARTICULARS ABOVE ARE TRUE AND CORRECT IN ALL RESPECTS.

..... 19
DATE

.....
SIGNATURE OF STUDENT

Assisted by:

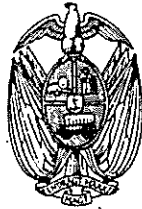
.....
SIGNATURE OF PARENT/GUARDIAN
(Only required in the case of a minor)

WITNESSES:

(1)

(2)

*Delete whichever is not applicable



TRANSVAAL EDUCATION DEPARTMENT

AGREEMENT ENTERED INTO IN RESPECT OF A FINANCIAL GRANT FROM FUNDS PROVIDED BY TREASURY IN TERMS OF SECTION 2 (1) (b) (i) OF ACT 66 OF 1975

A. I (Surname – block letters)
(First names – block letters)
.....
of (Address)

a South African citizen born on the day of
..... in the year 19 do hereby, in consideration of any financial grant made to me (a study grant and/or merit grant) in order to enable me through full-time studies to qualify as a teacher, for the normal duration of my approved teachers' course, undertake

1. to serve the Department in a teaching post after I have successfully complied with all the requirements of my teachers' course as approved by the Director of Education

1.1 wherever my service may be required in schools under the jurisdiction of the Transvaal Education Department, cognisant of the provisions of Section 84 (c) of the Education Ordinance 1953 which reads as follows:

“every teacher shall, subject to such regulations as may from time to time be made by the Minister of Education and Culture (House of Assembly), when requested by the principal of the provincial educational institution to which such teacher is attached, take such part in the organization and supervision of the library, sports, expeditions and cadet corps and other extramural activities of such provincial educational institution as such principal may require of such teacher.”

1.2 from the first day of the school term following the date on which I successfully comply with all the requirements of my approved teachers' course; and

1.3 for such a period as may be necessary to redeem, by actual service in a teaching post, all financial grants made to me, on the basis as set out hereunder, provided that I comply with my obligations within a period which equals one and a half times the period for which I received financial assistance; and

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1 ASAD 7

- 1.3.1 to render one year's service for every year in which the maximum amount for which I qualified for study and merit grants was made to me; or
 - 1.3.2 if I did not take the maximum amount (study and merit grants) for which I qualified, I undertake to render a period of service which will be such that it equals the ratio which exists between the actual amount which I received and the amount which I could have received;
2. to repay to the Department the full amount of the financial grant, study and/or merit grant made to me, in a lump sum, within 30 days of breach of contract, in which case no interest shall be levied, if I
- 2.1 before I have successfully complied with all the requirements of my approved teachers' course
 - 2.1.1 abandon such course by not attending classes; or
 - 2.1.2 without the permission of the Department, change or interrupt such course; or
 - 2.1.3 in the opinion of the Director, do not make satisfactory progress; or
 - 2.1.4 in the opinion of the Director, am guilty of inadmissible conduct; or
 - 2.1.5 in the opinion of the Director, am considered unsuited for the teaching profession; or
 - 2.1.6 fail to comply with an order by the Director to complete such teachers' course within a reasonable time; or
 - 2.1.7 as a woman, marry without continuing and completing my approved teachers' course uninterrupted on a full-time basis and at my own expense; or
 - 2.1.8 interrupt such a course in the case of my being pregnant and then fail to continue and to complete it on a full-time and uninterrupted basis by a date determined by the Director; or
 - 2.1.9 change to a college or a university outside the Transvaal without the prior consent of the Director; or

2.1.10 change from an approved teachers' course for secondary school to a course for primary school or vice versa, without the prior consent of the Director; or

2.1.11 should fail to attend classes or write examinations and/or test when the Rector of a College of Education or the Dean of a University Faculty requires it.

2.2 after I have successfully complied with all the requirements of my approved teachers course for any reason

2.2.1 do not enter into the service of the Department without obtaining the prior permission of the Director; or

2.2.2 after I have entered into the service of the Department, do not serve the Department for the full period referred to in clause A. 1.3.

Should I default by not paying the full outstanding amount as determined in clause A.2, the amount owing will be recovered in monthly instalments to be determined by the Director, including interest at a rate to be determined from time to time by the Treasury and calculated in advance on a monthly basis from the first day of the month in which I have not complied with the preceding provisions of this agreement; provided that such amount shall be reduced in proportion to each full month that I have actually rendered service against the period of service I would otherwise have had to render in terms of clause A. 1.3: provided further that I will be responsible for any tracing and legal expenses incurred by the Department in the recovery of my study debt on breach of contract.

3. to notify the Director of Education immediately if

3.1 I am granted any other financial aid from Government funds or from an institution subsidised by the Government during the period of my training;

3.2 my permanent residential address at the time of my non-compliance with this agreement has changed, and then to furnish my new address;

3.3 my surety should die during the period of my training and then to furnish a new security bond so that I do not receive financial aid which cannot be redeemed through my rendering of service;

3.4 my surety should change his/her address or if he/she should die after I have completed my studies but before my study debt has been fully repaid;

3.5 as a woman, I marry during the period of training so that I will not receive financial aid which cannot be redeemed through my rendering of service but which will be recoverable from me in cash, in a lump sum.

I nominate the following address as domicilium citandi et executandi, at which all communication referring to this matter can be served:

Address:
.....
.....
.....

B. THE DIRECTOR OF EDUCATION MAY

1. exempt a student from the repayment of the full amount as contemplated in clause A2.22 or any portion thereof if he is satisfied that the student has had to abandon his approved teachers' course before the successful completion thereof as a result of circumstances beyond the control of such student;
2. renew an approved financial grant annually for the normal duration of the course if satisfactory progress in the approved teachers' course is reported;
3. renew an approved financial grant for one additional year of study if he is satisfied that the extra year is necessary as a result of circumstances beyond the control of the student;
4. recover the full amount of the financial grant, study and/or merit grant, plus interest due to the Department, in terms of clause A. 2.2.2 from a teacher's pension; with the provision that if such pension is insufficient to cover the debt plus the interest in full, the balance thereof may be recovered from the teacher;
5. absolve the estate of a student or teacher, as well as that of the surety, from the repayment of this study debt if the student or teacher dies before having redeemed his contract;
6. absolve a teacher, as well as the surety, from the repayment of a study debt if the services of the teacher are terminated on medical grounds.

C. Signed at this day of
..... in the year 19

Signature of student

Identity number

WITNESSES: (1) (2)

Assisted by:

(Signature of parent/guardian)
(Required only in the case of a minor)

Identity number:

WITNESSES: (1)

(2)

Signed at this day of
..... in the year 19

.....
For THE TRANSVAAL EDUCATION DEPARTMENT

WITNESSES: (1)

(2)

SECURITY BOND

(Corrections are not permitted on this page).

IN RESPECT OF THIS AGREEMENT ENTERED INTO BETWEEN

AND THE TRANSVAAL EDUCATION DEPARTMENT (name of student)

I as surety (surname - blockletters)

(first names - blockletters)

* a South African citizen /* not a South African citizen, residing at

born on the day of in the year of 19

- ** (a) duly assisted by my husband,
- (b) renouncing all benefits of the judicial exception beneficium ordinis seu excussionis,

with the meaning, force and effect whereof I hereby declare myself fully conversant, do hereby promise and bind myself as surety and co-principal debtor in solidum, for the prompt and due repayment to the Transvaal Education Department of all moneys which become due in terms of the said agreement;

in guarantee whereof I bind my person and all my property according to law.

My relationship to the student is

I nominate the following address as domicilium citandi et executandi, at which all communications referring to this matter can be served.

Residential Address: Postal Address:

.....

.....

SIGNED AT ON THIS DAY OF IN THE YEAR 19...

.....

IDENTITY NUMBER OF SURETY SIGNATURE OF SURETY

Occupation of surety.

Telephone numbers: Business: Home:

Name and address of employer:

.....

.....

* Delete that which is not applicable.

** Delete (a) if the surety is a male, an unmarried woman, a divorcee or a widow

Name and address of a next of kin
who does not live with the surety

.....

.....

.....

WITNESSES (1)

(2)

R10
Revenue
stamp

N.B. This security bond is exempt from stamp duties if it is signed by the parent or guardian of a minor. In all other cases, stamp duties to the value of R10 are required in respect of the security bond in terms of the Stamp Duties Act, 1968.

