

**CONSEQUENCES WHERE A MINOR ENTERS INTO AN
ELECTRONIC CONTRACT WITHOUT THE ASSISTANCE OF A
PARENT OR GUARDIAN**

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LLM

by

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Abstract

This paper essentially aims to deal with the principles regulating a contract entered into with a minor without the consent or assistance of his parent or guardian, specifically in the form of an electronic contract concluded online. Since no legislation exists in this regard, it is necessary to fall back on the common law which regulates a contract concluded with a minor. When a minor enters into a contract without the assistance of his parent or guardian, the contract becomes fully binding on the contracting party but not the minor unless it is ratified by his parent or guardian, or the minor himself upon attaining majority. The reason for this is that the minor should be protected against his own immaturity. But it is also important to keep in mind the interests of the other party to the contract. The current position seems to favour a minor's interest in the contract above that of the other party to the contract. It also becomes more difficult to regulate these types of contracts when it has been concluded online. This paper thus investigates the nature of contracts concluded with minors and whether it is necessary that the current law be reconsidered.

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Chapter 1: Introduction

A legally binding and valid contract requires the elements of consensus, capacity, lawfulness and physical possibility to be present.¹ Certain formalities may also be included in certain instances.² A valid electronic contract entails a combination of the common law principles of contract as well as the more recent information and telecommunications legislation and international Model Laws and Conventions.³ The Electronic Communications and Transactions Act (hereinafter referred to as the ECT Act)⁴ was created to reduce legal uncertainty regarding electronic contracting in South Africa. This Act came into force in August 2002 with one of its main aims being to provide for the facilitation and regulation of electronic communications and transactions.⁵

The most common ways of concluding contracts electronically include contracting via e-mail, via the internet, trading under the framework of an electronic data interchange (EDI) agreement and contracting via a cellular phone or handheld device by using their device account to access a Value Added Service (VAS).⁶ This paper will mainly deal with the issues surrounding those contracts concluded over the internet. This would be the case where one party advertises goods and/or services on a website and a prospective client then completes an online form whereby he orders goods or services from the seller.⁷ These types of transactions use a 'click-wrap' method to conclude a binding contract.⁸

One of the requirements for a valid contract is that the relevant parties have the necessary capacity to contract.⁹ A minor, who is a person between the age of 7 and 18 years,¹⁰ only has limited contractual capacity in terms of South African Law which means that the assistance of his or her parent or guardian is required to incur obligations under a contract.¹¹ In terms of section 18(3)(b) of the Children's Act,¹² 'a

¹ Hutchison D & Pretorius C (2017) 6.

² *Ibid.*

³ Snail S in Papadopoulos S & Snail S (2012) 41.

⁴ 25 of 2002.

⁵ Preamble to Act 25 of 2002.

⁶ Snail S in Papadopoulos S & Snail S (2012) 42.

⁷ *Idem* 43.

⁸ *Ibid.*

⁹ Hutchison D & Pretorius C (2017) 6.

¹⁰ S 1 of the Children's Act 38 of 2005.

¹¹ Hutchison D & Pretorius C (2017) 155.

¹² 38 of 2005.

parent or other person who acts as guardian of a child must assist or represent the child in administrative, contractual and other legal matters'. A similar provision exists in section 39(1)(b) of the Consumer Protection Act (CPA)¹³ which states that:

An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer is voidable at the option of the consumer, if-

- (i) at the time the agreement was made the consumer was an unemancipated minor;
- (ii) the agreement was made without the consent of an adult responsible for that minor; and
- (iii) the agreement has not been ratified by either
 - (aa) an adult responsible for that minor; or
 - (bb) the consumer after being emancipated or becoming an adult.

Where the minor enters into a contract with the assistance of his or her parent or guardian, the contract will be fully enforceable as is the case where the parties are majors.¹⁴ On the other hand, when the minor enters into a contract without the assistance of a parent or guardian, the contract will not be enforceable against the minor.¹⁵ The contract is not however void as it can still be enforced by the other party, provided the minor fulfils his or her obligations.¹⁶

With the advancement of technology in society today, it is almost impossible for a minor not to enter into a contract online. According to UNICEF, it is estimated that one third of internet users globally are children.¹⁷ With the development of smartphones and how easy it is to gain access to the internet nowadays it could be said that minors are entering into contracts on a daily basis. Whether they are signing up for Whatsapp, Facebook or a Gmail account or downloading an application or game on their cell phone, they will be concluding an agreement with the provider of such a service. While the law may not recognise children to be contractually competent, retailers have not overlooked it.¹⁸ Retailers may have even come to depend on minors for their existence and recognise minors as consumers in their own right.¹⁹ It is therefore necessary to deal with the issue of contracting with a minor online, because although retailers may not see minors as someone who lacks capacity, they are nevertheless forced to deal with the fact that this so called 'minors incapacity doctrine' exists.

¹³ 68 of 2008.

¹⁴ Boezaart T (2016) 66.

¹⁵ *Idem* 70.

¹⁶ Hutchison D & Pretorius C (2017) 156.

¹⁷ Livingston S, Carr J & Byrne J UNICEF Office of Research - Innocenti 'One in Three: Internet Governance and Children's Rights (2016) 16.

¹⁸ Daniel JL (2008) 43 *Gonz L. Rev.* 239 255.

¹⁹ *Ibid.*

The main aim of this paper is to investigate the principles relating to a contract entered into by a minor in South African law. Two conflicting principles exist where a minor enters into a contract without the necessary assistance. On the one hand, a minor needs to be protected from his or her immature judgment and lack of experience, whereas on the other, the interests of the other party also ought to be protected.²⁰ What complicates matters further is the situation where a minor enters into an electronic contract without the required assistance. If the minor fraudulently misrepresents himself as having capacity to act, a minor will be liable in terms of the general principles of the law of contract.²¹ The CPA also makes provision for the situation where a minor enters into a fraudulent contract.²² The condition of a minor's liability in such a case requires that the minor should have the appearance of a major, otherwise one cannot claim misrepresentation.²³ An electronic contract is not concluded face-to-face so would this mean that a minor will always be liable to the contract where he or she fraudulently entered into a contract online? How will this differ where a minor did not fraudulently misrepresent himself but still enters into an agreement without the assistance of a parent or guardian? The general rule is that the contract will not be binding on the minor in this case, but it does not mean that the contract is void.²⁴ Taking into account all these scenarios, this paper aims to deal with the consequences surrounding these issues for the minor as well as the supplier or contracting party. It also aims to deal with the drafting of an online contract as this will reflect the agreement between the parties. It is important to consider what safeguards can be put in place to ensure the minor as well as the contracting party are protected in such circumstances.

²⁰ Boezaart T (2016) 83.

²¹ *Ibid.*

²² S 39(2) of Act 68 of 2008.

²³ *Pleat v Van Staden* 1921 OPD 91 at 98-100 and 104-5.

²⁴ Hutchison D & Pretorius C (2017) 156.

Chapter 2: The nature and development of a minor's contractual liability

2.1 Introduction

A contract can be defined as an agreement, which is entered into by two or more persons, with the intention of creating a legally binding obligation.²⁵ In order for the contract to be valid and binding, the agreement must be satisfied by five requirements.²⁶ The basis of a contract is that the agreement must be based on consensus between the parties, meaning the parties should have the corresponding intention to contract.²⁷ The agreement must be lawful and therefore may not be prohibited by statute or common law, or contrary to public policy and good morals.²⁸ The obligations of the agreement must be physically possible, that is, capable of performance when entered into and the contents of the agreement must be determined with certainty.²⁹ The contract must also comply with certain formalities which are prescribed by legislation or the parties themselves.³⁰ Finally, the parties must have the necessary capacity to enter into a contract.³¹ This section specifically deals with a minor's capacity to enter into agreements. For a proper understanding of how the South African law deals with minor contracts, a brief historical background is necessary as the principles of contractual capacity in our law is derived from the Roman and Roman-Dutch law. The position regarding capacity in the South African law will be discussed thereafter.

2.2 Overview of the Roman law and Roman-Dutch law

Many of the principles regarding the capacity of minors, in the South African law of contract, exist today because of the Roman law.³² In terms of Roman law, there was a distinction between members of a family being subject to the head of the households', or the *paterfamilias*', power (*alieni juris*) and those who were independent (*sui juris*).³³ They also divided young persons and children into three age groups. Children who were too young to speak (*infantes*), had no contractual capacity as Justinian believed that a child of such an age lacked the intelligence to

²⁵ Hutchison D & Pretorius C (2017) 5.

²⁶ *Ibid.*

²⁷ Nagel CJ (2015) 41.

²⁸ *Ibid.*

²⁹ Hutchison D & Pretorius C (2017) 5.

³⁰ Nagel CJ (2015) 41.

³¹ Hutchison D & Pretorius C (2017) 5.

³² Wessels JW (1951) 243.

³³ Cockrell A in Van Heerden B *et al* (1999) 757.

express the required consent.³⁴ A presumption thus existed that a child under the age of seven could not give consent although he could acquire rights where his guardian acted on his behalf or where he received a donation.³⁵ A child over the age of seven but less than fourteen years old (*impuberes*) enjoyed a limited capacity to act in that he could acquire rights without the assistance of his guardian if he did not incur any obligations.³⁶ Therefore, if rights and obligations were received where a minor entered into a contract, the assistance of the guardian was necessary.³⁷ The nature of a young person, who was between the ages of fourteen and twenty-five years (*minores*), capacity to contract was controversial. In early Roman law times, a child could bind himself to a contract when he reached the age of puberty.³⁸ This was however subject to the authority of the *paterfamilias*. If the child had not become *sui juris* at that time, any contractual rights that he acquired vested in his *paterfamilias* while the liabilities remained with the youth *alieni juris*.³⁹ In 200 BC the *Lex Plaetoria* was passed to protect the child if he had been wronged.⁴⁰ If this happened, it allowed him to take his grievance on appeal to the Praetor.⁴¹ The law also provided that a minor could request the assistance of the curator with regard to certain transactions.⁴² The Praetor also later introduced a further provision to protect children who entered into contracts allowing them to obtain a *restitutio in integrum* after all the circumstances were heard.⁴³ Roman law is therefore important in this discussion as some of these concepts, such as the categories of capacity and the remedy *restitutio in integrum*, in South African law was derived from the Roman law.

Roman-Dutch law, on the other hand, only distinguished between two different age groups, namely *infantes* and minors.⁴⁴ *Infantes*, who were children under the age of seven, had no capacity to act whereas minors above the age of seven only had the capacity to enter into a contract with the consent of their guardians.⁴⁵ A guardian

³⁴ *Inst* 3.19.10.

³⁵ D.26.7.9.

³⁶ *Gaius Inst* 1.196; 3.107; 2.83; 2.84.

³⁷ Wessels JW (1951) 244.

³⁸ *Ibid.*

³⁹ Cockrell A in Van Heerden B *et al* (1999) 758.

⁴⁰ *Ibid.*

⁴¹ D.4.4.1.

⁴² Wessels JW (1951) 244.

⁴³ D.4.4.6; 4.4.7.3.

⁴⁴ Cockrell A in Van Heerden B *et al* (1999) 764.

⁴⁵ *Idem* 765.

could also contract on behalf of the *infantes* or minor.⁴⁶ If a minor entered into a contract that was prejudicial to him, with the consent of a guardian, he could be relieved of the terms by *restitutio in integrum*.⁴⁷ When a minor contracted without the assistance of his guardian, it could still be enforced or repudiated at his option.⁴⁸ The minor could not however compel the other party to perform without performing his own obligations.⁴⁹ In the case where a minor was unwilling to reciprocate, the other party could recover a performance already made on the basis of unjust enrichment.⁵⁰

2.3 A minor's capacity to act in terms of South African law

South African law is similar to the Roman-Dutch law in that it only distinguishes between *infans* and minors.⁵¹ An *infans* comes into existence at birth and thereafter becomes a minor from the age of seven.⁵² The minor then becomes a major when he reaches the age of eighteen and the limitations on his capacity to act will then fall away.⁵³

2.3.1 No capacity to act

An *infans* has absolutely no capacity to act and therefore cannot enter into any agreements whatsoever, including those where he only receives rights and no obligations.⁵⁴ The *infans* cannot even conclude an agreement with the assistance of a parent or guardian, but the parent or guardian may act on behalf of the *infans*.⁵⁵ The Children's Act provides for this by providing that 'a guardian must safeguard a child's property and property interests and assist or represent the child in administrative, contractual or legal matters'.⁵⁶ The contract will not, however, exist between the parent or guardian and the other party, but rather between the *infans* and the other party, as the parent is merely acting on behalf of the *infans*.⁵⁷ This

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Idem* 767.

⁴⁹ Cockrell A in Van Heerden B *et al* (1999) 768.

⁵⁰ *Ibid.*

⁵¹ Boezaart T (2017) 19.

⁵² *Idem* 20.

⁵³ *Ibid.*

⁵⁴ *Weber v Santam Versekeringsmaatskapy Bpk* 1983 (1) SA 381 (A) 403. See also Boezaart T (2017) 20. Daily transactions such as the purchasing of sweets etc should be void, but the law does not concern itself with trivialities (*de minimus non curat lex*) and would therefore not be declared void.

⁵⁵ Boezaart T (2017) 21.

⁵⁶ S 18(3) of Act 38 of 2005.

⁵⁷ Boezaart T (2017) 21.

means that the rights and obligations arising from the agreement will be the *infans* and not his parents or guardians and is therefore enforceable against the *infans*.⁵⁸ Where one of the parties, that is the *infans* and other party, fail to fulfil his part of the agreement, the prejudiced party can either claim specific performance, cancel the contract on the grounds of breach of contract or claim damages to put that party in the position that he would have been in had the agreement been properly fulfilled.⁵⁹ There are also certain agreements, such as a service contract, in which an *infans* cannot enter into at all.⁶⁰ An *infans* cannot be bound by such an agreement and it will be void if entered into.⁶¹

A minor generally has limited capacity to act but certain agreements cannot be entered into by a minor at all, even with the assistance of a parent or guardian.⁶²

2.3.2 Limited capacity to act

As mentioned above, a minor's capacity to act is limited in most cases meaning that he can only enter into agreements with the assistance or consent of his parent or guardian.⁶³ The reason their capacity to act is limited is to protect them from their own inability to make a mature assessment of a situation.⁶⁴ The assistance of the child's parent or guardian is therefore necessary to make up for their lack of experience.⁶⁵ An agreement can be concluded between a minor and another party where the parent or guardian of the minor acts on his behalf.⁶⁶ The parent or guardian cannot, however, enter into an agreement on behalf of the minor where the agreement will only come into effect after the minor reaches the age of majority.⁶⁷

⁵⁸ *Ibid.*

⁵⁹ Boezaart T (2017) 21.

⁶⁰ *Idem* 22.

⁶¹ *Ibid.*

⁶² Boezaart T (2017) 31. In terms of the common law, for example, a minor may not enter into an engagement contract before he has reached the age of puberty. There are also several statutory provisions which deny a minor's capacity. In terms of s 43(1)(a) of the Conditions of Employment Act 75 of 1997 and s 3(1) of the Schools Act 84 of 1996, a minor may not conclude a service contract if he is under the age of fifteen.

⁶³ Boezaart T (2017) 23.

⁶⁴ *Du Toit v Lotriet* 1918 OPD 1918 99 112; *Edelstein v Edelstein* 1952 (3) SA 1 (A); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224 and Boezaart T (2017) 24.

⁶⁵ *Du Toit v Lotriet* 1918 OPD 1918 99 112. See also Boezaart T (2017) 24.

⁶⁶ *Ten Brink NO v Motala* 2001 (1) SA 1011 (D); Boezaart T (2017) 24.

⁶⁷ *Du Toit v Lotriet* 1918 OPD 99.

A minor can also enter into an agreement personally, but the consent of his parent or guardian will then be required.⁶⁸ Consent can be implied or expressed.⁶⁹ It is also not necessary for the child's guardian to know every provision of the agreement, as long as he is aware of the nature thereof and its essential terms.⁷⁰ An agreement may also be ratified by the minor's parent or guardian if the minor entered into the contract without the required assistance.⁷¹ The ratification then results in the rectification of the contract with retrospective effect and the contract will be fully valid and enforceable.⁷² If the minor has entered into the contract with the necessary consent or assistance, he will be bound to the agreement as a major party would be.⁷³ If, however, the child did not receive the required consent or assistance, he will not be liable to the terms of the contract.⁷⁴

2.3.3 Full capacity to act

In certain cases, a minor will acquire the full capacity to act either by statute or by the common law and can thus enter into certain transactions without the consent or assistance of his parent or guardian. In terms of the Banks Act⁷⁵ and the Mutual Banks Act,⁷⁶ a minor above the age of sixteen may be a depositor with a bank and may, without the consent or assistance of his parent or guardian, enjoy all the privileges and be liable to obligations which attach to members or depositors of a bank (except that a minor cannot hold office).⁷⁷ A minor can thus invest or withdraw money from the bank without the assistance of his parent.⁷⁸ A minor may, in terms of the Friendly Societies Act, become a member and can also execute all necessary documents without the consent or assistance of his parent or guardian if he is at the

⁶⁸ *Marshall v National Wool Industries Ltd* 1924 OPD 238 248 and *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 413. See also Boezaart T (2017) 25.

⁶⁹ *De Beer v Estate de Beer* 1916 CPD 125 127.

⁷⁰ *De Beer v Estate de Beer* 1916 CPD 125; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W); *Ex parte Makkink and Makkink* 1957 (3) SA 161 (N) 162; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37. Compare *Du Toit v Lotriet* 1918 OPD 99 at 107 where the court required that the parent or guardian be fully informed of all the facts and circumstances. See also and Boezaart T (2017) 25.

⁷¹ *Du Toit v Lotriet* 1918 OPD 99 105 107 113; *Perkins v Danford* 1996 (2) SA 128 (C) 132; Boezaart T (2017) 26.

⁷² *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) 70; Boezaart T (2017) 26.

⁷³ Boezaart T (2017) 24.

⁷⁴ *De Beer v Estate de Beer* 1916 CPD 125 127; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11-12; *Ex parte Swart and Swart* 1953 (3) SA 22 (T) 24-25; *Ex parte Du Toit* 1953 (4) SA 130 (O) 131; *Ex parte Makkink and Makkink* 1957 (3) SA 161 (N) 162; Boezaart T (2017) 24 and 30.

⁷⁵ S 87(1) of Act 94 of 1990.

⁷⁶ S 88(1) of Act 124 of 1993.

⁷⁷ S 87(1) of Act 94 of 1990 and s 88(1) of Act 124 of 1993.

⁷⁸ Boezaart T (2017) 24.

age of sixteen or older.⁷⁹ A minor may also, in terms of the Children's Act, consent to his own medical treatment without any assistance from his parent or guardian if he is over the age of twelve.⁸⁰ However, the child must have the necessary level of maturity and mental capacity to understand the benefits, risks, social and other implications of the particular treatment.⁸¹

A minor can enter into a marriage once he reaches the age of puberty,⁸² with the consent of both parents in most instances.⁸³ In terms of common law, when a child concludes a valid marriage, it terminates his minority status giving him full capacity to act.⁸⁴ If the marriage is dissolved before the minor reaches the age of eighteen, the minority status of the child will not be revived and the child will still have the full capacity to act.⁸⁵

A minor may also have the necessary capacity to act due to the fact that he has been emancipated.⁸⁶ This is because emancipation allows the minor to independently participate in commercial dealings.⁸⁷ It is also the express or tacit consent given by the minor's parent or guardian to do so.⁸⁸ Whether or not a minor is emancipated is a factual question which must be considered after taking all the circumstances of the case into account.⁸⁹ Factors which should be taken into consideration are whether the minor lives on his own, his relationship with his parents, his age, the nature of his profession and his financial independence.⁹⁰ None of these factors are however decisive on its own.⁹¹ Still, the question of which test should be applied to determine if a minor has in fact been emancipated arose in the case of *Dickens v Daley*.⁹² This judgment brought about some confusion and was

⁷⁹ S 16 of Act 25 of 1956: the minor may not however manage the affairs or be the principle officer of the society.

⁸⁰ S 129(2)(a) of Act 38 of 2005.

⁸¹ S 129(2)(b) of Act 38 of 2005.

⁸² S 12(2)(a) of Act 38 of 2005. 'Puberty' meaning twelve years old for girls and fourteen years old for boys.

⁸³ S 18(3)(c)(i) of Act 38 of 2005.

⁸⁴ *Van Rooyen v Werner* (1892) 9 SC 425 429; *Santam Versekeringmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) 864.

⁸⁵ *Cohen v Sytner* (1897) 14 SC 13 16.

⁸⁶ Nagel CJ (2015) 80.

⁸⁷ *Dickens v Daley* 1956 (2) SA 11 (N) 13; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224A-B; Boezaart T (2016) 79; Boezaart T (2017) 26.

⁸⁸ Boezaart T (2016) 79; Boezaart T (2017) 26.

⁸⁹ Boezaart T (2017) 26.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Dickens v Daley* 1956 (2) SA 11 (N).

thus criticised for the reason that it could lead to the conclusion that a minor was in fact emancipated if there was disinterest on the part of the parent.⁹³ Brokensha JA, in this judgment, held that the minor's parent 'had abandoned 'his' right of control over [him] in regard to [his] mode of life and such operations as he undertook to maintain himself' and therefore decided that the child was emancipated.⁹⁴ The court in the case of *Sesing v Minister of Police*⁹⁵ sought to clear up this confusion by deciding that there *is* a difference in the case where a minor is permitted to manage his own affairs, free from the authority of his parents, and the case where a minor is left to look after himself because of the disinterest shown by his parents.⁹⁶ The court held further that there is no justification for depriving a minor of the protection of the law merely based on the reason that a parent has failed to carry out his parental responsibilities towards the child.⁹⁷ The court thus ruled that the minor will be regarded as being emancipated when his parent or guardian agrees, either expressly or tacitly, that the minor can act as an economically independent person.⁹⁸ There is, however, still some uncertainty as to the effect of emancipation. It seems clear though that it is dependent on the extent of the parental consent which determines whether the minor can act freely, or in a limited sphere, in commercial transactions.⁹⁹ But, no matter to what extent the parent has given his consent, emancipation can never bestow majority status on a minor.¹⁰⁰ A minor can however, in certain circumstances, become a major and acquire full capacity to act by way of a court order.¹⁰¹ This should not, however, be confused with emancipation as the minor will retain his minority in such a case.¹⁰²

In terms of the common law, a minor also has the full capacity to enter into any agreements whereby he only acquires rights but no obligations.¹⁰³ A minor can therefore accept a gift or enter into an agreement where the minor is absolved from

⁹³ Boezaart T (2016) 80.

⁹⁴ *Dickens v Daley* 1956 (2) SA 11 (N) 16.

⁹⁵ *Sesing v Minister of Police* 1978 (4) SA 742 (W).

⁹⁶ *Idem* 745.

⁹⁷ *Ibid.*

⁹⁸ *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745; Boezaart T (2017) 27.

⁹⁹ Boezaart T (2017) 27.

¹⁰⁰ *Ibid.*

¹⁰¹ Nagel CJ (2015) 80.

¹⁰² *Ibid.*

¹⁰³ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 12-13; Boezaart T (2017) 23.

paying any debt, without the assistance or consent of his guardian.¹⁰⁴ If, however, the agreement results in any obligations for the minor, the assistance of his parent or guardian will be necessary.¹⁰⁵ In the past, this common law rule was misunderstood as being the same as a doctrine originating in English law known as the benefit theory.¹⁰⁶ A minor, in this case, would incur liability if he received a benefit from, or was enriched by, an agreement which he entered into without the assistance of his parent or guardian.¹⁰⁷ This doctrine made its way into South African law in the case of *Nel v Divine Hall & Co.*¹⁰⁸ The defendant in this case was a minor girl who purchased clothes from the plaintiff without the necessary assistance.¹⁰⁹ She then gave half of the clothes she had bought to her sister.¹¹⁰ Later, when action was brought against her for the payment of the purchase price, she raised her minority as a defence.¹¹¹ With regards to the validity of a contract where the minor benefits, De Villiers CJ interpreted the phrase of old Roman-Dutch text, 'that she has been enriched' to not merely mean that 'she had the best of the bargain, but that, considering the position in life and the other circumstances of the case, the contract was for her benefit'.¹¹² The court found that the defendant was liable for half of the purchase price as half of the purchase was for her benefit.¹¹³ This judgment was followed in many cases thereafter,¹¹⁴ until its eventual rejection in *Tanne v Foggit*¹¹⁵ and *Edelstein v Edelstein*.¹¹⁶

¹⁰⁴ Boezaart T (2017) 23. See also *Edelstein v Edelstein NO* 1952 3 SA 1 (A) 12.

¹⁰⁵ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 12-13; Boezaart T (2016) 61.

¹⁰⁶ Boezaart T (2017) 23.

¹⁰⁷ Boezaart T (2016) 61.

¹⁰⁸ *Nel v Divine Hall & Co* (1890) 8 SC 16.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Van der Byl & Co v Solomon* 1877 Buch 25; *Auret v Hind* (1884) 4 EDC 283; *JC Vogel & Co v Greentley* (1903) 24 NLR 252; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Silberman v Hodkinson* 1927 TPD 562; *Remley v Lupton* 1946 WLD 353.

¹¹⁵ *Tanne v Foggit* 1938 TPD 43. In this case the parties entered into an executory contract, where the payment of the services (typewriting lessons) was payable in advance at the beginning of every month. The unassisted minor defendant in this case paid the full fees for the first month what was due by him for the lessons. He attended the lessons which he paid for but failed to return after the first month. The plaintiff instituted action to claim the amounts for the following month that which was owed to him. If the decision in *Nel v Divine Hall & Co.* (1890) 8 SC 16 was followed, the minor would not be bound by the agreement as he would only be liable for the lessons which he actually received, and in this case, those lessons were already paid for.

¹¹⁶ *Edelstein v Edelstein* 1952 (3) SA 1(A).

It was decided in *Tanne v Foggit*, by the Transvaal Provincial Division, that a minor will not be bound by a contract merely because he benefits from the contract as a whole.¹¹⁷ Instead, Tindall JP opines that the test to be used is rather 'the extent to which the minor has benefited'.¹¹⁸ The minor shall therefore not be bound by the entire agreement, but will be liable on the grounds of unjustified enrichment.¹¹⁹ The matter was finally resolved in the case of *Edelstein v Edelstein*.¹²⁰ In this case, a minor obtained the consent of her mother and the constructive consent of her father to enter into a marriage with Mr Edelstein.¹²¹ The parties concluded an ante-nuptial contract with the assistance of the appellant's mother and not her father.¹²² When Mr Edelstein passed away, the appellant accepted the assets which were bequeathed to her under the assumption that she and Mr Edelstein were married out of community of property.¹²³ When the validity of her ante-nuptial contract was put in question, she applied for an order declaring that the marriage was in community of property and that the executors award her one half of the net value of the estate by virtue of this marriage.¹²⁴ The Appellate Division ruled that the marriage was in community of property.¹²⁵ Van der Heever JA held that it was never the intention that a minor be bound by a contract where the agreement in general was beneficial to him.¹²⁶ It can therefore be said that a minor cannot be bound to a contract merely based on the fact that he benefited from it in some way, but rather that the minor restore the other party on the basis of undue enrichment.¹²⁷ Van der Heever JA thus rejected the benefit theory in this way by removing the possibility that a minor, who enters into a contract without the required assistance, is bound by the contract because of the mere fact that he benefited from it.

¹¹⁷ *Tanne v Foggit* 1938 TPD 43 49.

¹¹⁸ *Ibid.*

¹¹⁹ Boezaart T (2016) 62.

¹²⁰ 1952 (3) SA 1(A).

¹²¹ *Idem* 7.

¹²² *Ibid.*

¹²³ *Idem* 8.

¹²⁴ *Ibid.*

¹²⁵ *Idem* 16.

¹²⁶ *Edelstein v Edelstein* 1952 (3) SA 1(A) 12. Van der Heever JA, in this judgment, feels that the court in *Nel v Divine Hall & Co.* (1890) 8 SC 16 misinterpreted the meaning of the Latin expression *quantenus locupletior factus est* (as to how far he has been enriched). He went on to say, at p15, that 'the object of the law in regarding the contracts of minors as unenforceable is to protect them against their own immaturity of judgment. This object would be frustrated if a minor were bound by his contract whenever the other contracting party has been astute enough to promise or grant the minor some small immediate advantage'.

¹²⁷ Boezaart T (2016) 62.

2.4 The nature and effect of the minor's assisted contract

A contract will be fully enforceable by and against a minor who has entered into a contract with the assistance of his parent or guardian, or where his parent or guardian has acted on his behalf.¹²⁸ The minor can, however, escape liability in certain instances, where the agreement was prejudicial to him, by relying on the legal remedy *restitutio in integrum*.¹²⁹ Where the minor enters into an agreement with the assistance of his parent or guardian, the parent or guardian will not be personally liable towards the other party.¹³⁰ It therefore depends on the capacity in which the minor acted, when the agreement was concluded, to determine whether the minor or his parent or guardian will be held liable.¹³¹ It is thus necessary to determine what the intention of the parties were at the time the agreement was concluded in order to determine who will be liable.¹³² In the case of *Marshall v National Wool Industries Ltd*,¹³³ a minor and his father each bought shares in a company.¹³⁴ His father was present during the conclusion of the agreement and was aware that these shares were being purchased by his son.¹³⁵ The boy could not however pay the full purchase price of the shares and action was brought against him as a result.¹³⁶ He relied on his minority as a defence as he was still a minor when the contract was concluded.¹³⁷ The company withdrew the action brought against him and instituted action against the father instead.¹³⁸ The appeal court held that the father will not be personally liable for a contract that was entered into by his son purely because the

¹²⁸ *Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412. See also Cockrell A in *Van Heerden B et al* (1999) 795 and Boezaart T (2016) 66.

¹²⁹ Cockrell A in *Van Heerden B et al* (1999) 796. See para 4.2.1 below.

¹³⁰ *Marshall v National Wool Industries Ltd* 1924 OPD 238. The parent or guardian of the minor can however be liable for the debts of the minor in the following circumstances: the debt was incurred for the maintenance of the minor; the parent did not bring to the attention of the other party that he was acting on behalf of the minor; the parent stood surety for the debt of the child and if the minor acted as a representative of his parent or the parent ratified the agreement that it was concluded on his behalf. See Boezaart T (2016) 66.

¹³¹ *Marshall v National Wool Industries Ltd* 1924 OPD 238 248-249; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O) 396.

¹³² *Marshall v National Wool Industries Ltd* 1924 OPD 238 248. See also Boezaart T (2016) 67. If the intention of the parties is not clear, it must be inferred from the circumstances of the case.

¹³³ *Marshall v National Wool Industries Ltd* 1924 OPD 238.

¹³⁴ *Idem* 239.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

father had knowledge of and consented to the conclusion of the contract.¹³⁹ De Villiers JP held that the true intention of the company, the father and the son was that the contract would be concluded between the company and the minor son as an individual and not him as an agent of his father.¹⁴⁰ If the father authorised his son to act on his behalf, only then would the father have been personally liable as a principal of his agent's contract.¹⁴¹

Save for these exceptional circumstances,¹⁴² the parent or guardian will not be liable for his minor child's obligations arising from a contract.¹⁴³ If the minor has no money or property, his guardians cannot be forced to pay for his child's debt,¹⁴⁴ and the other party will get nothing if the minor cannot fulfil his part of the agreement.¹⁴⁵ The remedies available to the minor include the *exceptio non adimpleti contractus* as well as the *restitutio in integrum*.¹⁴⁶

2.5 The nature and effect of the minor's unassisted contract

2.5.1 The effect of a minor's unassisted contract: enforceability, ratification and repudiation

A minor who enters into a contract without the necessary assistance or consent merely concludes a 'limping contract'.¹⁴⁷ This means that a natural obligation will be created on the part of the minor which will only be recognised if the minor chooses to perform.¹⁴⁸ The minor (or his guardian before the minor attains majority) can either choose to repudiate the contract or to enforce it.¹⁴⁹ As far as the other party is concerned, a fully valid and enforceable civil obligation will be created.¹⁵⁰ This will

¹³⁹ *Idem* 250.

¹⁴⁰ *Idem* 248.

¹⁴¹ *Marshall v National Wool Industries Ltd* 1924 OPD 238 243. In certain instances, both the minor and the parent or guardian are liable. For example, where the guardian stood surety for the debt of his child. See para 5.3.2 and Cockrell A in Van Heerden B *et al* (1999) 798.

¹⁴² See para 5.3.2.

¹⁴³ *Marshall v National Wool Industries Ltd* 1924 OPD 238.

¹⁴⁴ *Ibid.*

¹⁴⁵ Boezaart T (2016) 67.

¹⁴⁶ *Van der Byl v Solomon* 1877 Buch 25 27-28; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497 500-502; *Wood v Davies* 1934 CPD 250 258-260; Van Heerden B in Van Heerden B *et al* (1999) 724; Boezaart T (2016) 68. See also 3.2.1 below.

¹⁴⁷ Cockrell A in Van Heerden B *et al* (1999) 799. See also Bhana D & Visser CJ (2014) 77 *THRHR* 177 184.

¹⁴⁸ Cockrell A in Van Heerden B *et al* (1999) 799. In *Opperman and Others v Labuschagne* 1954 (2) SA 150 (E), the court held that the minor's claim lies with his 'special privilege to freely decide not to be bound'.

¹⁴⁹ Cockrell A in Van Heerden B *et al* (1999) 799.

¹⁵⁰ Cockrell A in Van Heerden B *et al* (1999) 799; Kruger H & Skelton A (2010) 122.

result in the minor not being contractually bound by the agreement, while the other party will be.¹⁵¹ Since the unassisted contract only creates a natural obligation on the part of the minor, he cannot be liable for performance in terms of the contract.¹⁵² Where the minor has already performed without any assistance from his parent or guardian, and the contract is repudiated, the minor can recover any property delivered with the *rei vindicatio* (on the basis of ownership).¹⁵³ If the minor wishes to recover money paid, he can do so in terms of a claim for unjustified enrichment (*condictio*).¹⁵⁴

If the minor ratifies the agreement after he attains majority, his natural obligation then becomes a civil one which can be enforced against him.¹⁵⁵ Ratification of the contract can take place either expressly or tacitly.¹⁵⁶ The right of the minor to repudiate the contract and to recover performance will then be extinguished.¹⁵⁷ A person cannot validly ratify an agreement if, in principle, he does not have full knowledge of his rights.¹⁵⁸ This includes the knowledge of the right to repudiate the contract.¹⁵⁹

A minor is entitled to enforce the contract by compelling the other party to render performance, on the grounds of the party's civil, enforceable obligation.¹⁶⁰ If the minor does this, it will also be required of him to fulfil his own part of the contract.¹⁶¹ In a case where the other party has already performed before the minor has decided to repudiate the contract, that party cannot, like the minor, recover performance already made with the *rei vindicatio* or a *condictio*.¹⁶² This is because the unassisted

¹⁵¹ *Edelstein v Edelstein* 1952 (3) SA 1 (A); Boezaart T (2016) 74; Kruger H & Skelton H (2010) 122. See also Cockrell A in Van Heerden B *et al* (1999) 800 fn 130 and 131.

¹⁵² Cockrell A in Van Heerden B *et al* (1999) 800; Kruger H & Skelton A (2010) 122; *Marshall v National Wool Industries Ltd* 1924 OPD 238.

¹⁵³ *Baddeley v Clarke* (1923) 44 NLR 306; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); Cockrell A in Van Heerden B *et al* (1999) 801; Kruger H & Skelton A (2010) 122; Bhana D & Visser CJ (2014) 77 *THRHR* 177 184.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Stuttaford & Co v Oberholzer* 1921 CPD 855; *De Canha v Mitha* 1960 (1) SA 486 (T); Cockrell A in Van Heerden B *et al* (1999) 803.

¹⁵⁶ *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500.

¹⁵⁷ Cockrell A in Van Heerden B *et al* (1999) 803.

¹⁵⁸ Kotzé J in *De Beer v Estate de Beer* 1916 CPD 125 128. See also *Du Toit v Lotriet* 1918 OPD 99 105 107; *Stuttaford & Co v Oberholzer* 1921 CPD 855 857; Cockrell A in Van Heerden B *et al* (1999) 804.

¹⁵⁹ Cockrell A in Van Heerden B *et al* (1999) 805.

¹⁶⁰ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13; Cockrell A in Van Heerden B *et al* (1999) 807; Boezaart T (2016) 73.

¹⁶¹ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13; Cockrell A in Van Heerden B *et al* (1999) 807.

¹⁶² Cockrell A in Van Heerden B *et al* (1999) 809.

minor is entitled to acquire ownership of the property delivered as the performance was due in terms of a legal obligation.¹⁶³

2.5.2 The juristic nature of a minor's unassisted contract

The question in determining whether an agreement, entered into by a minor without the consent or assistance of his parent or guardian, is 'void' or merely 'voidable' has been a controversial one. In Roman law these concepts were unknown,¹⁶⁴ whereas the Roman-Dutch authorities referred to such contracts as being 'void' or 'invalid'.¹⁶⁵ In terms of case law, an agreement entered into by a minor without the necessary assistance is mostly described as being void, although the courts recognise that the other major party to the contract will be held liable in terms of this so-called 'void agreement'.¹⁶⁶ The court in *De Beer v Estate De Beer* referred to the works of Grotius and held that such contracts are invalid.¹⁶⁷ The court also stated in the case of *Edelstein v Edelstein* that as far as the minor's side of the contract is concerned, a contract entered into without the required assistance will be null and void.¹⁶⁸ Modern day writers on the other hand are, however, of the opinion that such an agreement will not be void. Therefore, the suggestion for such a contract to be classified as 'voidable' was made. Spiro supports this classification in saying that a transaction which will not be beneficial for the minor or which is prejudicial towards him, is voidable, either at the instance of his guardian during minority, or the minor himself on attaining majority.¹⁶⁹ Wessels and Turpin are also of the opinion that such a contract is voidable as it is voidable at the instance of the minor.¹⁷⁰ Attempts have thus been made to formulate a more 'sensitive terminology'.¹⁷¹ Wessels suggests that the contract be 'voidable at the minor's option',¹⁷² whereas Donaldson proposes

¹⁶³ Cockrell A in Van Heerden B *et al* (1999) 809. The only available remedy for the other party in this case is to claim compensation from the minor on the grounds of unjust enrichment on a quasi-contractual basis.

¹⁶⁴ Watt I *Consequences of Contracts Concluded by Unassisted Minors: a Comparative Evaluation* (LLM dissertation, Stellenbosch University 2012) 27.

¹⁶⁵ Cockrell A in Van Heerden B *et al* (1999) 830. See par 2.5.1 above where Boberg describes it as a 'limping contract'.

¹⁶⁶ *De Beer v Estate de Beer* 1916 CPD 125 127 ('invalid'); *Du Toit v Lotriet* 1918 OPD 99 105 109 ('null and void'); *Tjollo Altejees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 872 ('*ipso iure* void'); *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12 ('invalid'); *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 274 ('invalid'). See also Boezaart T (2016) 73.

¹⁶⁷ *De Beer v Estate de Beer* 1916 CPD 125 127.

¹⁶⁸ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12.

¹⁶⁹ Spiro E (1952) 69 SALJ 71 76.

¹⁷⁰ Wessels JW (1951) 845; Turpin CC (1955) 72 SALJ 58 69.

¹⁷¹ Honoré AM (1958) 75 SALJ 32 37; Cockrell A in Van Heerden B *et al* (1999) 830.

¹⁷² Wessels JW (1951) 845.

that the contract be 'relatively void'.¹⁷³ Van Heerden JA suggests it be 'null and void in one direction of its operation and valid in another',¹⁷⁴ Honoré suggests it be 'unilaterally void',¹⁷⁵ Spiro is of the opinion that the contract is 'inchoate',¹⁷⁶ and Kahn puts forward that it is 'unilaterally inchoate'.¹⁷⁷ Boberg criticises these suggestions by explaining that a proper formulation is required to distinguish the two, as the legal consequences of a minor's unassisted contract and that of the other party differ.¹⁷⁸ The distinction between 'void', 'voidable' and 'valid' are invalid and it is suggested that the contract be described as 'enforceable at the minor's option'.¹⁷⁹

2.6 The Consumer Protection Act

It also worth noting the Consumer Protection Act in this regard as the Act has created a legal framework to regulate consumer contracts concluded by minors. One of the aims of the Act is to provide protection for minors who enter into consumer contracts and reduce any disadvantages that they may have had in accessing goods or services due to their minority status.¹⁸⁰ Minors are already recognised as a vulnerable group in terms of the common law in so far as their capacity to enter into contracts is limited or they have no capacity to act whatsoever.¹⁸¹ Whereas section 3(1)(b) identifies minors as being part of a vulnerable consumer group, section 39 attempts to regulate the consequences of minor's consumer agreements. Section 39(1)(b) of the CPA states that:

An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer is voidable at the option of the consumer, if-

- (i) at the time the agreement was made the consumer was an unemancipated minor;
- (ii) the agreement was made without the consent of an adult responsible for that minor; and
- (iii) the agreement has not been ratified by either
 - (aa) an adult responsible for that minor; or
 - (bb) the consumer after being emancipated or becoming an adult.

¹⁷³ Donaldson in Donaldson M (1955) 14 states that this means 'void in relation to the minor or unenforceable against the minor'. Donaldson suggests that the difficult process of classification should be done away with and resolved by accepting the contracts to be *sui generis*.

¹⁷⁴ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 10-11.

¹⁷⁵ Honoré AM (1958) 75 SALJ 32 35. This means that the minor is not bound, while the other party is.

¹⁷⁶ Spiro E (1952) 69 SALJ 430 434.

¹⁷⁷ Kahn E (1959) 76 SALJ 343 345.

¹⁷⁸ Cockrell A in Van Heerden B *et al* (1999) 833.

¹⁷⁹ *Idem* 833 and 834.

¹⁸⁰ S 3(1)(b)(iii) of Act 68 of 2008.

¹⁸¹ Bhana D & Visser CJ (2014) 77 THRHR 177 178.

This section purports to regulate contracts concluded with minors in order to resolve any uncertainty in the common law rather than to replace the common law.¹⁸² Section 39(1)(b) differs from the common law in the sense that the minor consumer has a choice of whether or not to uphold or rescind the contract, whereas, in terms of the common law, a natural obligation is created and the contract will be unenforceable against the minor from the beginning.¹⁸³ It is still, however, uncertain whether the phrase ‘voidable at the option of the consumer’ should be interpreted to mean that a minor should be assisted when making such a choice or whether the minor can make the choice himself.¹⁸⁴ Although the CPA inserted provisions to regulate contracts concluded by minors, it seems it has fallen short of its mandate as not much has changed when comparing it to the South African common law and part of the section still remains uncertain. Nevertheless, section 39 should be considered when dealing with a minor who has entered into a consumer contract.

2.7 Conclusion

To summarise the position in terms of South African law, the general rule, is that a minor cannot incur contractual obligations if he did not obtain the required assistance. The consent of the guardian may, however, be given prior to the agreement or thereafter (by means of ratification).¹⁸⁵ There are also certain types of contracts which a minor may conclude without the assistance of his parent or guardian.¹⁸⁶ This is an exception to the general rule that a minor has limited capacity to contract. A minor does not need assistance from his parent to conclude an agreement where he receives only rights but no obligations.¹⁸⁷ The only other available remedy to the party after contracting with an unassisted minor is to provide restitution on the basis of undue enrichment.¹⁸⁸

The minor will be fully liable to the contract where it was entered into with the necessary assistance from a parent or guardian. He can, however, escape liability in certain instances where the agreement was prejudicial to him by relying on the

¹⁸² *Idem* 191.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ See par 2.3.2 above.

¹⁸⁶ See par 2.3.3 and fn 70 above.

¹⁸⁷ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 12-13; *Boezaart T* (2017) 24.

¹⁸⁸ See par 2.5.1 above.

restitutio in integrum.¹⁸⁹ There has been a lot of controversy and criticism regarding the way in which a contract entered into by a minor without the necessary assistance must be classified.¹⁹⁰ The general rule is that a minor will not be contractually liable towards the agreement based on a contract entered into in this way.¹⁹¹ It has been suggested that a minor's obligation is only a natural one which will only become enforceable at the minor's option.¹⁹² The minor can either elect to repudiate the contract or to honour it.¹⁹³ If he ratifies that agreement after he attains the age of majority, the contract will become enforceable against him.¹⁹⁴ In terms of the CPA, when a minor enters into a consumer contract without assistance, the agreement becomes voidable at the minors option.¹⁹⁵

¹⁸⁹ See par 2.4 above.

¹⁹⁰ See par 2.5.2 above.

¹⁹¹ Boezaart T (2017) 30.

¹⁹² Cockrell A in Van Heerden B *et al* (1999) 799 and 833-834.

¹⁹³ *Idem* 799.

¹⁹⁴ *Cockrell A in Van Heerden B et al* (1999) 803; *Stuttaford & Co v Oberholzer* 1921 CPD 855; *De Canha v Mitha* 1960 (1) SA 486 (T).

¹⁹⁵ S 39(1)(b) of Act 68 of 2008.

Chapter 3: The development of electronic contracts in South African law

3.1 Introduction

The advance in technology, specifically the internet has brought about fundamental changes to the world of international commerce.¹⁹⁶ Contracting through cyberspace was never envisaged when the principles of contract law were formed. A valid electronic contract thus entails a combination of the common law principles of contract, as well as the more recent information and telecommunications legislation and international Model Laws and Conventions.¹⁹⁷ With the legal uncertainty surrounding electronic contracting worldwide, the United Nations Commission for International Trade Law (UNCITRAL) drafted the UNCITRAL Model Law on Electronic Commerce in 1996 and the UNCITRAL Model Law on Electronic Signatures in 2001 to assist countries in drafting domestic laws that would facilitate electronic contracting.¹⁹⁸ Although these are not conventions and thus not binding on South Africa, it influenced the drafting of the Electronic Communications and Transactions Act.¹⁹⁹ The ECT Act came into force in August 2002 with one of its main aims being to provide for the facilitation and regulation of electronic communications and transactions.²⁰⁰ When the Model Laws were developed, the principle of 'functional equivalence' was applied in relation to electronic contracts.²⁰¹ This principle determines how the purposes and functions in the law of contract (such as 'writing' and 'signatures') should be given effect to in the electronic environment.²⁰² The requirements in electronic communications should be the same or similar to the normal requirements needed to conclude a contract.²⁰³

¹⁹⁶ Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 568.

¹⁹⁷ Snail S in Papadopoulos S & Snail S (2012) 41.

¹⁹⁸ See UNCITRAL 'Guide to enactment of the UNCITRAL Model Law on Electronic Commerce' par 1-4 [available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf] and Snail S in Papadopoulos S & Snail S (2012) 42.

¹⁹⁹ Snail S in Papadopoulos S & Snail S (2012) 41.

²⁰⁰ Preamble to the Electronic Communications and Transactions Act 25 of 2002.

²⁰¹ UNCITRAL 'Guide to enactment of the UNCITRAL Model Law on Electronic Commerce' par 8 and 24 [available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf].

²⁰² UNCITRAL 'Guide to enactment of the UNCITRAL Model Law on Electronic Commerce' par 8 and 24 [available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf]. Also see Van der Merwe DP (2016) 155.

²⁰³ Van der Merwe DP (2016) 155.

3.2 The common law position on electronic contracts

A legally binding contract requires that certain elements be present.²⁰⁴ If two or more parties conclude an agreement via email or SMS, for example, which can be interpreted as having complied with the formal requirements to conclude a valid contract, it can be inferred that a valid contract has been concluded. If these requirements are not present, the contract will be declared void or voidable.²⁰⁵

3.3 The Electronic Communications and Transactions Act and the conclusion of valid e-contracts

South Africa adopted some of the provisions from the Model Law in drafting the ECT Act.²⁰⁶ South Africa did not have comprehensive legislation dealing specifically with electronic contracting prior to this enactment.²⁰⁷ Chapter 3 of the Act addresses the facilitation of electronic contracting.²⁰⁸ The first part of the chapter, sections 11 to 20, deals with the legal requirements for data messages whereas part two in sections 21 to 26 deals with the communication of data messages.²⁰⁹ Part one creates obligatory requirements, while part two provides default positions which parties are free to vary.²¹⁰ There are various ways of concluding contracts using technology, the most common being a contract concluded via e-mail or over the internet via a webpage.²¹¹

The ECT Act applies to any electronic transaction or data message.²¹² Section 11(1) states that 'information is not without legal force and effect merely on the grounds that is wholly or partly in the form of a data message'.²¹³ Section 22(1) is also important in this regard as it confirms section 11 by stating that 'an agreement is not without legal force and effect merely because it was concluded partly or in whole by

²⁰⁴ See par 2.1 above.

²⁰⁵ Snail S in Papadopoulos S & Snail S (2012) 44.

²⁰⁶ *Idem* 42.

²⁰⁷ Snail S in Papadopoulos S & Snail S (2012) 42. The ECT Act now defines terms such as 'writing', 'signatures' and 'originals' in the electronic environment (see s12, 13 and 14 of Act 25 of 2002).

²⁰⁸ Ch 3 of Act 25 of 2002.

²⁰⁹ Ch 3 of Act 25 of 2002. See also s 21 'Variation by agreement between parties'.

²¹⁰ Snail S in Papadopoulos S & Snail S (2012) 46.

²¹¹ Snail S in Papadopoulos S & Snail S (2012) 42. Other methods include trading under the framework of an electronic data interchange (EDI) agreement or contracting via a cellular phone or handheld device by using their device account to access a Value Added Service (VAS)

²¹² S 4 of Act 25 of 2002.

²¹³ S 11(1) of Act 25 of 2002. See also art 5 of the UNCITRAL Model Law on E-Commerce which is followed by s 11 of the ECT Act [available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf].

means of data messages'.²¹⁴ In the past, legal uncertainty existed as to whether or not a data message formed the basis of a legally valid contract.²¹⁵ In terms of the ECT Act, the recognition of a data message can now be seen as a functional equivalent to messages produced on paper.²¹⁶ Data messages include 'data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction; and a stored record'.²¹⁷

As discussed in chapter 2, the requirements for a valid contract include consensus, contractual capacity, physical possibility, legality and formalities.²¹⁸ Consensus will be reached when the parties to a contract agree to all the material terms of the contract.²¹⁹ This will be established by means of negotiations or discussions which end up in a final offer and acceptance.²²⁰ Once there has been an unqualified acceptance of the offer, consensus will be reached.²²¹ It is thus clear that a contract will be formed, assuming all the other requirements have been met, as soon as the offer is accepted.²²² The general rule is that a contract will be concluded once the offeror has been made aware of the acceptance.²²³ Since the adoption of the ECT Act, a modified reception theory regulates contracts concluded electronically.²²⁴ Previously, the contract would have been concluded if the email was delivered to the inbox of the recipient.²²⁵ Now, in terms of section 22(1) of the ECT Act, a contract will be formed 'at the time when, and place where, the acceptance of the offer was received by the offeror'.²²⁶ The offeror does not, however, need to have knowledge of the fact that the offer has been accepted, all that is required is that the offer must

²¹⁴ S 22(1) of Act 25 of 2002.

²¹⁵ *Snail S in Papadopoulos S & Snail S* (2012) 46.

²¹⁶ See par 112 in *Jafta v Enzemvelo KZN Wildlife* [2008] 10 BLLR 954 975 (LC) where the court held that a valid contract was concluded where the applicant accepted an offer of employment via SMS. The applicant's acceptance was 'not without legal force and effect merely on the grounds that it is in the form of an SMS'. The court recognised an SMS as a data message and an effective form of communication as with an email or a written document.

²¹⁷ S 1 of Act 25 of 2002.

²¹⁸ See par 2.1 above.

²¹⁹ *Hutchison D & Pretorius C* (2017) 48.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Jamieson v Sabingo* 2002 (4) SA 49 (SCA). See also *Snail S in Papadopoulos S & Snail S* (2012) 52 and *Van der Merwe DP* (2016) 157. This is known as the information theory and occurs, for example, once the letter of acceptance has been read by the offeror.

²²⁴ *Hutchison D & Pretorius C* (2017) 61. See also s 22(2) and s 23(b)-(c) of Act 25 of 2002.

²²⁵ *Hutchison D & Pretorius C* (2017) 59.

²²⁶ S 22(2) of Act 25 of 2002. Note that s 22(2) will only be applicable if the parties to the agreement have not expressly agreed to vary these provisions (s 21).

have been received by him. Section 23(b) states that 'a data message must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee'.²²⁷ In certain instances, electronic agreements are concluded by means of an automated system.²²⁸ An electronic agent is then used to automatically respond to data messages without any human interference.²²⁹ Section 20 of the ECT Act allows for the use of an electronic agent,²³⁰ by either party to the contract.²³¹ The party is presumed to be bound to the terms and conditions of the contract if that party decides to use an electronic agent.²³² The other party to the agreement must, however, be capable of reviewing the terms and conditions prior to the conclusion of the agreement in order to be bound by it.²³³ Therefore if the agreement is subject to terms and conditions, there must be a clear reference to those terms which the customer must be able to access online upon conclusion of the contract.²³⁴ Usually a button with a link to the standard terms is present on the website and will be regarded as accepted when a person clicks 'I accept' or 'I agree'.²³⁵ This technique is known as a click-wrap agreement.²³⁶ This type of contract is defined as a contract of adhesion as the possibility of negotiation is excluded and the party must then either accept those terms or go without it.²³⁷ In terms of the general principles of contract, the standard terms and conditions which cannot be negotiated are incorporated by merely referring to them somewhere on the document that you sign. Incorporation by reference also applies to the so called click-wrap agreements when the party clicks 'I accept' on the page providing the terms and conditions. According

²²⁷ S 23(b) of Act 25 of 2002. In terms of s 26, an acknowledgement of receipt of the data message is not required for legal effect to be given to that message. In terms of s 21, however, parties can agree otherwise.

²²⁸ Snail S in Papadopoulos S & Snail S (2012) 55. An 'automated transaction' in s 1 of Act 25 of 2002 means 'an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment'.

²²⁹ Van der Merwe DP (2016) 164. 'Electronic agent' means a 'computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction' (s 1 of Act 25 of 2002).

²³⁰ S 20(a) of Act 25 of 2002.

²³¹ S 20(b) of Act 25 of 2002.

²³² S 20(c) of Act 25 of 2002.

²³³ S 20(d) of Act 25 of 2002. See also Van der Merwe DP (2016) 166.

²³⁴ Van der Merwe DP (2016) 166.

²³⁵ *Ibid.*

²³⁶ *Idem* 167.

²³⁷ Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 569.

to the ECT Act, expressions of intent can be made via data messages without an electronic signature.²³⁸ Section 11(2) of the Act recognises incorporation by reference by maintaining that full legal force and effect can be given to terms and conditions that are only referred to in a data message but are not actually a part of it.²³⁹ It must, however, be obvious to a reasonable person that they are agreeing to the terms and conditions.²⁴⁰ The terms and conditions must also be accessible in a form that can be read, stored and retrieved by the party accepting these terms.²⁴¹

The requirements of contractual capacity, physical possibility and legality in electronic contracts remain the same as the common law. The problem regarding contracts concluded online is that minors can circumvent age requirements to conclude contracts easily over the internet. Establishing whether a minor has the necessary consent to conclude a contract electronically is a stumbling block which has not, however, been tested yet. No clear-cut rules have been established in the ECT Act regarding the legal position of a minor who enters into an online contract without the required assistance. It is thus necessary to fall back on the common law to determine what would happen in such an instance. The consequences of the case where a minor enters into a contract without the necessary assistance, is discussed in greater detail in chapter 4.²⁴²

Finally, it is important to note the differences in the formality requirements in terms of a normal contract compared to one concluded over the internet. The general rule is that no formalities are required for the formation of a valid contract.²⁴³ In certain instances, however, the law may prescribe that parties express their intention in a formal manner, such as requiring the contract to be in writing and signed by the parties thereto.²⁴⁴ The parties themselves may also agree that certain formalities are required for the contract to be binding on them.²⁴⁵ Where the law requires that a document be reduced to writing, in terms of section 12 of the ECT Act, this

²³⁸ S 24 of Act 25 of 2002. See also s 11(5) of Act 25 of 2002.

²³⁹ S 11(2) of Act 25 of 2002. By clicking on a key word associated with an URL that redirects a reader to a different document is an example of this.

²⁴⁰ S 11(3)(a) of Act 25 of 2002 and Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 574. See also *Durban's Water Wonderland (Pty) Ltd v Botha & another* 1999 (1) SA 982 (SCA).

²⁴¹ S 11(3)(b) of Act 25 of 2002.

²⁴² See par 4.2.2 below.

²⁴³ Hutchison D & Pretorius C (2017) 163.

²⁴⁴ See s 2(1) of the Alienation of Land Act 68 of 1981 for an example in this regard.

²⁴⁵ Hutchison D & Pretorius C (2017) 163.

requirement will be met if the document is 'in the form of a data message,'²⁴⁶ and accessible in a manner usable for subsequent reference'.²⁴⁷ Where a signature is required by the parties to the agreement, an ordinary electronic signature is sufficient,²⁴⁸ but where legislation or the common law requires a signature, only an advanced electronic signature will be sufficient.²⁴⁹ This will be discussed in further detail in chapter 5 below.

3.4 Conclusion

It can be seen that electronic contracting is largely based on the common law principles of the law of contract. It has, however, been modernised to keep up to date with the major advancements in technology and the rise of electronic commerce. The ECT Act has therefore brought about some necessary changes in order for a contract to be valid in this medium. The main aim of the Act is to provide for the facilitation and regulation of electronic communications and transactions.²⁵⁰ It also ensures that the principle of 'functional equivalence' is applied in that contracts concluded electronically share equal status to contracts concluded in terms of the general principles of the law of contract. As the ECT Act does not specifically deal with the issue of capacity, it may be necessary to fall back on the common law to deal with the consequences where a minor enters into an unassisted agreement online.

²⁴⁶ S 12(a) of Act 25 of 2002.

²⁴⁷ S 12(b) of Act 25 of 2002.

²⁴⁸ S 13(3)(a) of Act 25 of 2002. See also *Spring Forest Trading v Wilberry* (725/13) [2014] ZASCA 178 where the court decided that by inserting one's name at the end of an email intended to serve as a signature and was thus sufficient to be regarded as an ordinary electronic signature.

²⁴⁹ S 13(1) of Act 25 of 2002. In terms of s 1, an 'advanced electronic signature' is 'an electronic signature which results from a process which has been accredited by the Authority as provided for in s 37'.

²⁵⁰ Preamble to Act 25 of 2002.

Chapter 4: The fraudulent and non-fraudulent minor and the remedies available

4.1 Introduction

When a minor enters into an assisted contract, he may still escape liability with the legal remedy *restitutio in integrum*.²⁵¹ If, however, the contract fails due to a minor entering into a contract without any assistance, he cannot rely on *restitutio in integrum* but can base his claim on unjustified enrichment to reclaim his performance.²⁵² The other party will also have a claim for restitution against the minor if he has been enriched at the minor's expense.²⁵³ These remedies don't give much protection to the party contracting with the minor and leaves him in quite an unfavourable position. This is due to the fact that he may only recover the amount that the minor still has left in his possession at the time the action is brought.²⁵⁴ This will be discussed in further detail below. The other party will also not be in the best position where a minor fraudulently induces the innocent party to enter into a contract with him. Several solutions have been proposed on how a contract of such a nature should be dealt with.²⁵⁵

4.2 Remedies available to the minor party

4.2.1 A minor who entered into a contract with the assistance of a parent or guardian

If a minor enters into a contract, with the assistance of his parent or guardian, or where his parent or guardian acted on his behalf, he will be bound to such an agreement.²⁵⁶ The parent or guardian of the child will not be liable for the obligations incurred by the minor in terms of the contract.²⁵⁷ The minor can, however, escape liability by means of legal remedies available to him. These include the *exceptio non adimpleti contractus* as well as *restitutio in integrum*. The *exceptio non adimpleti contractus* is a defence which can be raised where a party to a reciprocal agreement

²⁵¹ Boezaart T (2017) 30.

²⁵² Visser D (2008) 547.

²⁵³ Eiselen S & Pienaar G (2008) 172.

²⁵⁴ Cockrell A in Van Heerden B *et al* (1999) 815.

²⁵⁵ *Idem* 817.

²⁵⁶ *Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412; Cockrell A in Van Heerden B *et al* (1999) 795 and Boezaart T (2016) 68. See also par 2.4 above.

²⁵⁷ *Marshall v National Wool Industries Ltd* 1924 OPD 238. See also par 2.4 above.

has been called upon to render performance but the other party has not yet done so.²⁵⁸ The remedy thus permits a party to refuse to perform until such time that the party claiming performance has either performed or tendered proper performance in terms of his obligations under the contract.²⁵⁹

A minor will be entitled to *restitutio in integrum* if he entered into a contract which was prejudicial to him at the time it was concluded, although he had the necessary assistance from his parent or guardian.²⁶⁰ If such an order is granted, each party will have to restore to the other what he has received in terms of the agreement.²⁶¹ If the minor entered into the contract without the consent or assistance of his parent or guardian, the minor would not need to make use of the *restitutio in integrum* to escape liability as he would not have been liable to the contract in any case.²⁶² The appropriate remedy in such a case would be a claim based on unjustified enrichment.²⁶³ The court in the case of *De Beer v Estate De Beer* held that ‘minors, who have entered into a contract without the assistance or consent of their parents or guardians, do not first require to be relieved therefrom by the remedy of *restitutio in integrum*’.²⁶⁴ Van der Heever JA in *Edelstein v Edelstein* states that ‘restitution presupposes a binding contract; therefore one concluded by a minor with the assistance of his guardian’.²⁶⁵ Some authors are, however, of the opinion that this remedy can be used in unassisted minor contracts.²⁶⁶ In the case of *Louw v MJ & H Trust (Pty) Ltd*, an unassisted minor had induced the other party to enter into a contract with him, by fraudulently misrepresenting himself to be a major.²⁶⁷ Eloff J held that the contract was void and that the minor did not have the right to claim *restitutio in integrum*.²⁶⁸ This was based on the fact that the minor had fraudulently

²⁵⁸ Hutchison D & Pretorius C (2017) 326; Boezaart T (2016) 67.

²⁵⁹ *Remley v Lupton* 1946 WLD 353 359; *Mörsner v Len* 1992 (3) SA 626 (A) 633J-634B. See also Hutchison D & Pretorius C (2017) 326; Boezaart T (2016) 67.

²⁶⁰ Van Heerden B in Van Heerden B *et al* (1999) 724; Boezaart T (2016) 68; Du Plessis J (2012). See also *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497; *Wood v Davies* (1934) CPD 250.

²⁶¹ Van Heerden B in Van Heerden B *et al* (1999) 727.

²⁶² *Breytenbach v Frankel* 1913 AD 390 398; *De Beer v Estate De Beer* 1916 CPD 125 127; *Du Toit v Lotriet* 1918 OPD 99 109 114; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 872; *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 11. See also Van Heerden B in Van Heerden B *et al* (1999) 727.

²⁶³ See par 4.2.2 below.

²⁶⁴ *De Beer v Estate De Beer* 1916 CPD 125 127.

²⁶⁵ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 11.

²⁶⁶ Scott H (2013) 141-151.

²⁶⁷ *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

²⁶⁸ *Idem* 274.

misrepresented himself and not because the contract was invalid.²⁶⁹ Scott is of the opinion that, had the minor not acted fraudulently by misrepresenting his age, *restitutio in integrum* could have been claimed by the minor.²⁷⁰

4.2.2 A minor who entered into a contract without the assistance of a parent or guardian

A minor who enters into a contract without the assistance of his parent or guardian concludes a 'limping contract' as it merely creates a natural obligation on the part of the minor, but a fully enforceable civil obligation for the other party.²⁷¹ The minor is therefore not bound by the contract, unless the guardian, or the minor upon attaining majority, chooses to repudiate or to enforce the contract.²⁷² In the case where the contract is not enforced, the minor will have a claim based on unjustified enrichment in order to reclaim what he has performed.²⁷³ For a claim based on enrichment to succeed, the minor must prove that he was impoverished, that the other party was in fact enriched and that the enrichment was at the expense of the minor.²⁷⁴ The other party's enrichment must also be *sine causa* or without legal ground.²⁷⁵ If all these general requirements are met, a minor may rely on an enrichment claim to obtain restitution. Modern text-book writers suggest that where a minor seeks to recover property, the appropriate action will be the *rei vindicatio* for the reason that an unassisted minor is incapable of alienating property and therefore remains owner.²⁷⁶ Money cannot, however, be reclaimed with the *rei vindicatio* as it becomes part of the other party's property through *commixtio*.²⁷⁷ The minor can thus rely on a *condictio* instead to claim the amount whereby the other party has been enriched.²⁷⁸ Certain authors are, however, of the opinion that the appropriate action to reclaim payments is by way of a *condictio indebiti*,²⁷⁹ whilst others take the view that an action for a money claim is the *condictio sine causa specialis*.²⁸⁰ They argue that the *condictio indebiti* should not be applicable as it is a claim for a return of payment

²⁶⁹ *Ibid.*

²⁷⁰ Scott H (2013) 148.

²⁷¹ Cockrell A in Van Heerden B *et al* (1999) 799; Kruger H & Skelton A (2010) 122.

²⁷² *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 11-13; Cockrell A in Van Heerden B *et al* (1999) 799.

²⁷³ Visser D (2008) 547.

²⁷⁴ Du Plessis J (2012) 79.

²⁷⁵ *Idem* 80.

²⁷⁶ Fn 132 in Cockrell A in Van Heerden B *et al* (1999) 801; Eiselen S & Pienaar G (2008) 172.

²⁷⁷ Eiselen S & Pienaar G (2008) 172.

²⁷⁸ *Ibid.*

²⁷⁹ Cockrell A in Van Heerden B *et al* (1999) 801 fn 132; Boezaart T (2016) 75.

²⁸⁰ Visser D (2008) 549; Du Plessis J (2012) 80; Eiselen S & Pienaar G (2008) 172.

which was not due.²⁸¹ Where a minor performs in terms of an unassisted contract, his performance is due, although it's not enforceable, at the time it was made.²⁸² It has therefore been submitted that the *condictio sine causa specialis* is the more appropriate remedy because the money was paid in terms of a valid *causa*, but subsequently fell away.²⁸³ The enrichment claim is based on the lesser of the minor's impoverishment and the other party's enrichment.²⁸⁴ If, however, the other party knew or ought to have known that he was contracting with a minor, the minor may be entitled to reclaim the full amount which he had paid, and not merely based on what remains at the commencement of the action.²⁸⁵

4.3 The position of the other party

If the minor chooses not to enforce or rescind the contract, the other party will not be able to enforce or rescind it.²⁸⁶ If the other party has, however, performed in terms of a contract concluded with an unassisted minor, he will have a claim for restitution against the minor based on unjustified enrichment.²⁸⁷ Again, it is uncertain which enrichment action is applicable, although a *condictio* is the suggested classification.²⁸⁸ Eiselen and Pienaar state that the *condictio sine causa specialis* would not be applicable in this case as 'the *causa* for the performance has not fallen away (the contract is still valid, although it is not enforceable by the other party)'.²⁸⁹ Visser states that this remedy is an 'instance of enrichment with its own rules' and is of the opinion that it is the best way of balancing the interests of the minor party to the contract with that of the other party.²⁹⁰ Van den Heever JA in *Edelstein v Edelstein* states that there is an exception to the general rule that a minor cannot assume an obligation and declares that 'a minor is under an obligation to make restitution to the other party to the extent to which he has been enriched'.²⁹¹ The minor need not restore what he has received in terms of the contract, but merely what remains in his possession at the time the other party instituted action or the

²⁸¹ Visser D (2008) 547.

²⁸² Visser D (2008) 547; Eiselen S & Pienaar G (2008) 172.

²⁸³ Du Plessis J (2012) 80; Eiselen S & Pienaar G (2008) 172.

²⁸⁴ Du Plessis J (2012) 80.

²⁸⁵ *Ibid.*

²⁸⁶ Eiselen S & Pienaar G (2008) 172.

²⁸⁷ *Ibid.*

²⁸⁸ Eiselen S & Pienaar G (2008) 172; Du Plessis J (2012) 80.

²⁸⁹ Eiselen S & Pienaar G (2008) 172.

²⁹⁰ Visser D (2008) 551.

²⁹¹ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) 12.

amount by which he has been enriched as a result of the other party's performance.²⁹² If the other party's performance was converted into money or property, the surrogates obtained as a result, which are still in the minor's possession at the time of the action, must be restored.²⁹³ The minor will not be liable if there is no surrogate which has substituted the money or property and the minor has spent or lost whatever he received in terms of the contract.²⁹⁴ There is, however, an exception to this rule.²⁹⁵ If the minor received money and spent it on the necessities of life, which he would have had to buy or pay for in any event, he remains enriched.²⁹⁶ If the minor is not self-supporting, his parents or guardians may be liable as it constitutes enrichment by saved expenses.²⁹⁷ Another remedy, distinct from unjustified enrichment, is also available to the other party who wishes to be reimbursed for expenses which a parent saved.²⁹⁸ The claim based on *negotiorum gestio* or the management of another's affairs provides the plaintiff with the full value of what he had transferred and not merely the value remaining with the enriched, like with an enrichment claim.²⁹⁹

The other party is clearly left in quite an unfavourable position here as the claim based on unjustified enrichment is limited due to the fact that he will only be able to recover what the minor still has left in his possession, at the time of the action, except money which was spent on necessities. The party may, however, have a claim against the minor in delict.³⁰⁰ This may be possible if the damage was caused due to the minor's negligence as minority is not *per se* a defence in this case.³⁰¹ A delictual claim can only, however, arise if the damage was caused outside the ambit of the contract.³⁰²

²⁹² *Edelstein v Edelstein NO 1952 (3) SA 1 (A) 12*; Eiselen S & Pienaar G (2008) 172.

²⁹³ *Edelstein v Edelstein NO 1952 (3) SA 1 (A) 12*; Eiselen S & Pienaar G (2008) 173; Du Plessis J (2012) 81.

²⁹⁴ Eiselen S & Pienaar G (2008) 173.

²⁹⁵ *Ibid.*

²⁹⁶ Eiselen S & Pienaar G (2008) 173; Du Plessis J (2012) 81.

²⁹⁷ Cockrell A in Van Heerden B *et al* (1999) 814.

²⁹⁸ Cockrell A in Van Heerden B *et al* (1999) 798, 813-814; Du Plessis J (2012) 82.

²⁹⁹ *Ibid.*

³⁰⁰ Cockrell A in Van Heerden B *et al* (1999) 815.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

4.4 The fraudulent minor

If a minor induces another person to enter into a contract with him, by fraudulently representing himself to have the capacity to contract, such a contract can still be enforced.³⁰³ However, the rules which apply with regard to the liability of fraudulent minors, where the contract fails, and those which apply to unassisted contracts differ.³⁰⁴ Several solutions which have been proposed include binding the minor to the contract, not binding him to the contract, limiting his restitutionary remedies and holding the minor liable for delictual damages.³⁰⁵

4.4.1 The minor is bound to the contract

The first possibility suggests that a fraudulent misrepresentation by a minor will be completely enforceable against him.³⁰⁶ The basis of this suggestion is found in Roman-Dutch texts which deny the remedy of *restitutio in integrum* in the case of fraudulent minors.³⁰⁷ It is argued that if restitution cannot be claimed, they must therefore be bound by the contract induced by fraud.³⁰⁸ The consequences in such a case would thus be the same as if the minor was a major.³⁰⁹ This view is flawed as a minor would then ultimately have the ability to change his legal status if he were to be held bound to a contract concluded fraudulently.³¹⁰ This would mean that the purpose of limiting a minor's contractual capacity in the first place, would be defeated.³¹¹

Another suggestion is where the minor will be contractually liable on the basis of estoppel.³¹² It is argued that contracts concluded by fraudulent minors will be binding on them because in deliberately misrepresenting themselves to be of full age to contract, they induced the other party to believe this.³¹³ They are thus estopped, or precluded, from relying on the truth that they do not possess contractual capacity as

³⁰³ *Idem* 829.

³⁰⁴ *Idem* 817.

³⁰⁵ *Ibid.*

³⁰⁶ Boezaart T (2016) 84.

³⁰⁷ Voet 4.4.43; Cockrell A in Van Heerden B *et al* (1999) 818.

³⁰⁸ *J C Vogel & Co v Greentley* 1903 24 NLR 252 254.

³⁰⁹ Boezaart T (2017) 84.

³¹⁰ Cockrell A in Van Heerden B *et al* (1999) 826.

³¹¹ Boezaart T (2016) 84.

³¹² Cockrell A in Van Heerden B *et al* (1999) 818. Although estoppel has not been directly considered by our courts, the court in *J C Vogel & Co v Greentley* (1903) 24 NLR 252 254 probably had estoppel in mind when it stated that the minor who fraudulently misrepresented himself to be of age 'is generally bound by that representation'.

³¹³ Cockrell A in Van Heerden B *et al* (1999) 823.

this would be detrimental to the other party.³¹⁴ This approach has the same effect as the first suggestion in that the minor will be bound by the contract.³¹⁵ The estoppel approach will therefore be open to the same criticism as the first solution that minors can bypass the capacity requirement and elevate themselves to majority status if they acted fraudulently.³¹⁶

4.4.2 The minor is not bound to the contract

The third suggested solution for dealing with a fraudulent minor is that the minor will not be liable on the contract and will be barred from reclaiming his performance with *restitutio in integrum*. Eloff J in *Louw v MJ & H Trust (Pty) Ltd* held that the minor will be barred from relying on *restitutio in integrum* due to his fraudulent misrepresentation, but that he would still not be bound to the contract and could not be sued for further performance.³¹⁷ This judgment has been criticised due to the fact that *restitutio in integrum* is an extraordinary legal remedy which is at the minor's disposal in the case of a prejudicial contract that he concluded with the necessary assistance.³¹⁸ The reasoning behind this is that if a minor is not liable on the contract, there would be no need for *restitutio in integrum* as the appropriate remedy in this case, to reclaim performance, would be with a *condictio* or with the *rei vindicatio*.³¹⁹ This view is also flawed as a separate requirement for a claim based on unjustified enrichment is that no other rule of law which denies a claim for restitution to the impoverished person must exist, although the other requirements may be present.³²⁰ In accordance with the *bonis mores*, a person who acts in bad faith or with the intent to deceive, such as a minor who fraudulently misrepresents his contractual capacity, shouldn't be allowed to benefit from his fraud and a claim in enrichment should not be accommodated. Courts have held that in the case of a plaintiff being *mala fide*, a claim based on unjustified enrichment is not founded and

³¹⁴ Cockrell A in Van Heerden B *et al* (1999) 823. In terms of Hutchison D & Pretorius C (2017) 96, this doctrine is applied 'where one party (the estoppel raiser) has a reasonable belief in a misrepresentation made by the other party (the estoppel denier) and relies thereon to his or her own detriment, the estoppel raiser may hold the estoppel denier from relying on the true state of affairs'.

³¹⁵ Cockrell A in Van Heerden B *et al* (1999) 823.

³¹⁶ *Idem* 824.

³¹⁷ *Louw v MJ & Trust (Pty) Ltd* 1975 4 SA 268 (T) 272.

³¹⁸ Boezaart T (2016) 84; Cockrell A in Van Heerden B *et al* (1999) 821.

³¹⁹ *Ibid.*

³²⁰ See par 3.2.2 above and Sonnekus JC (2008) 93.

the defendants' retention of the enrichment is just.³²¹ The most appropriate solution, in my opinion, is therefore the final solution that is proposed and that is to hold the minor liable for delictual damages.

4.4.3 The minor is liable for delictual damages

The final solution proposed by Boberg is that the minor will be liable in delict to the other party, who suffered loss, due to the minor misrepresenting his age.³²² This is because the minor's capacity in delict does not necessarily correspond with his capacity to contract and merely depends on the minor's level of maturity.³²³ A minor who is old enough to convince another that he is a major would also be old enough to incur liability in delict for his fraud.³²⁴ In order to succeed on the basis of fraud the plaintiff must show that the minor was old enough to form the intention to defraud; that the plaintiff had entered into the agreement based on the misrepresentation; and that the plaintiff suffered loss as a result.³²⁵ A condition of the minor's liability in such a case also requires the minor to at least have the appearance of a major, otherwise the other party cannot claim that the minor misrepresented himself.³²⁶ The party contracting with the minor need not investigate a minor's statement claiming that he is a major, unless a good reason exists that such statement is not true.³²⁷

Where a minor enters into a fraudulent contract with another, there are two conflicting legal principles which exist. The first being that a minor should be protected against his inability to make a mature judgment and secondly, that the interests of the innocent party should also be protected if damages were incurred by him as a result of the minor's conduct.³²⁸ I would have to agree with Boberg in saying that the fourth solution seems to be the most appropriate solution as it provides a balance between the conflicting principles.³²⁹ To hold the minor bound to the contract, is to empower him to change his own legal status.³³⁰ The purpose of limiting his capacity to protect him from his own immature judgment would be

³²¹ Sonnekus JC (2008) 94.

³²² *Idem* 825.

³²³ *Ibid.*

³²⁴ *Idem* 826.

³²⁵ *Idem* 827.

³²⁶ *Pleat v Van Staden* 1921 OPD 91 98-100 and 104-105.

³²⁷ *Pleat v Van Staden* 1921 OPD 91; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 270.

³²⁸ Boezaart T (2016) 83.

³²⁹ Cockrell A in Van Heerden B *et al* (1999) 826.

³³⁰ *Ibid.*

useless. By holding him delictually accountable, his contractual immunity would be preserved and the protection offered by the law will remain. He will not, however, be completely released from liability as the other party would then be able to recover such losses via a delictual claim.³³¹

4.5 The Consumer Protection Act

Section 39(2) of the Consumer Protection Act provides a legislative framework in the case of a fraudulent minor.³³² It states the following:

Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission

- (a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or
- (b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract.

As mentioned in chapter 2,³³³ section 39(1) allows a minor who entered into a consumer contract, without the necessary assistance, the option of enforcing or repudiating the contract.³³⁴ Section 39(2) implies that such a minor will be bound to the contract if the minor induces the other party to believe that he has the legal capacity to contract or concealed the fact that he did not.³³⁵ The reason for this is that section 39(1), which creates a voidable contract, will not apply to a contract concluded fraudulently.³³⁶ This section purports to clear up confusion surrounding the issue of fraudulent minors but, in attempting to do so, has only created more confusion.³³⁷ Firstly, it is unclear whether the intention of the legislature was to hold the minor consumer liable in contract or delict.³³⁸ It also does not expressly state that the minor is bound by the contract as it only states that subsection 1 'does not apply'.³³⁹ This could therefore also mean that the contract is valid or that the common law should apply instead.³⁴⁰ Section 39(2) would, however, be pointless if the common law were to apply.³⁴¹ In attempting to regulate unassisted minor

³³¹ *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 237.

³³² S 39(2) of Act 68 of 2008.

³³³ Par 2.6 above.

³³⁴ Due to the fact that it is voidable. See s 39(1) of Act 68 of 2008 and par 2.6 above.

³³⁵ S 39(2)(a) and (b) of Act 68 of 2008.

³³⁶ S 39(2) of Act 68 of 2008.

³³⁷ Bhana D & Visser CJ (2014) 77 *THRHR* 177 192.

³³⁸ *Idem* 193.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

contracts, the legislature has produced a section which is vague and ambiguous and has thus failed to resolve any uncertainty that exists in the common law.³⁴²

4.6 Conclusion

When a minor enters into an unassisted contract with another party, two conflicting principles exist. On the one hand, the minor should be protected against his immaturity and lack of experience, and on the other, the innocent party's interests also need to be protected.³⁴³ From the discussion above, it is clear to see that the minor is in better position while the innocent party is left in quite an unfavourable one. The CPA inserted specific provisions regarding the position where an unassisted contract is concluded.³⁴⁴ It also attempted to deal with the position regarding a contract concluded with a minor who fraudulently misrepresents himself.³⁴⁵ It has not, however, provided any further clarity on the matter when comparing it to the common law position and requires something more to reach a proper balance between the interests of the different parties. It therefore seems as the best solution would be to hold a fraudulent minor liable in delict as the minor's contractual protection would be maintained while the other party would not have to suffer loss as a result of the minor's fraudulent misrepresentation.

³⁴² *Ibid.*

³⁴³ Boezaart T (2016) 83.

³⁴⁴ See par 2.6 above.

³⁴⁵ See par 4.5 above.

Chapter 5: Drafting an electronic contract to safeguard the minor as well as the other party

5.1 General

'A contract is an agreement (based on consensus between legal subjects who have contractual capacity to do so, and which is lawful, physically possible and complies with the prescribed formalities) reached with the intention of creating a legal obligation with resulting rights and duties'.³⁴⁶ It is thus not required that a contract be concluded in writing but the written instrument will reflect the agreement between the parties and therefore serves as evidence to enforce contractual rights.³⁴⁷ When drafting a contract it is necessary for the drafter to keep the above definition in mind as to ensure that the contract is always valid and compatible with the substantive law of contract. It therefore entails a practical and theoretical element.

Drafting is a special writing skill. The drafter cannot write as he would in an everyday letter or opinion. Every word matters, the words must be chosen with care, phrases must be apt and sentences should be perfectly structured.³⁴⁸ When drafting a document it is important to bear in mind the purpose which the document is to serve, exactly what is to be said, for whose benefit it is being written and the consequences one seeks to avoid.³⁴⁹ The contract must be clear, precise, unambiguous, comprehensible and complete.³⁵⁰ The aim of the drafter is thus to convey exactly what needs to be said, as clear, concise and complete as possible, all within a logical structure.³⁵¹

When drafting a contract, the parties to the contract, as well as their respective rights and duties, should be identified. The drafter must ensure that the written contract clearly and accurately reflects the obligations arising out of the rights and duties created. The contract must also contain the necessary clauses such as time frames, method of payments as well as what should happen in the case of a breach of contract, to name a few.³⁵²

³⁴⁶ Nagel CJ (2015) 40.

³⁴⁷ Hutchison D & Pretorius C (2017) 408.

³⁴⁸ Inns of Court School of Law and Institute of Law, City University, London (2003) 1.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² Pillay MM (2015) 34.

In looking at the definition above, it is clear to see that the requirements for the conclusion of a valid contract is contractual capacity, consensus, legality, physical possibility and formalities. This relates to the substantive law of contract and is therefore necessary to consider when a contract is drafted.³⁵³ As far as the element of capacity is concerned, the drafter will often attempt to establish capacity through the use of various mechanisms, such as the way in which the parties to the contract are described. It is essential in the drafting of a contract that the parties are clearly identified.

5.2 Identifying the parties in a contract

When drafting a contract, the drafter will often attempt to establish the capacity of the contracting parties by, for example, looking at the manner in which the parties are described or whether any representations have been made in respect of a party's capacity.³⁵⁴ It is therefore necessary to first consider the parties to a contract before looking at their status and capacity. As a contract cannot come into existence without any parties, the first step in drafting is to identify and describe the parties to a contract in order to avoid uncertainty in the future.³⁵⁵ The way in which it is drafted is also intended to confirm which of the parties have achieved consensus.³⁵⁶

When a contract is drafted, the drafter must ensure that the parties to the contract are clearly identified.³⁵⁷ It is therefore good practice to include as much information as possible in order for the parties to be accurately identified. This entails having each party's full names, identity numbers as well as the status of the person in such a clause.³⁵⁸ It is good practice to identify and describe the parties in the first clause of the contract. When a party concludes a contract, it is presumed that the contracting parties have the legal capacity to act.³⁵⁹ Since it is presumed that parties to a contract have the necessary capacity to act, it is not technically necessary for the status of the parties to be specified in this clause or to specify any other information from which capacity can be deduced, such as age for example. This presumption also implies that a person, who has limited contractual capacity,

³⁵³ See ch 2 above.

³⁵⁴ Van Eck (2015) 126.

³⁵⁵ Hutchison D & Pretorius C (2017) 408.

³⁵⁶ Van Eck (2015) 127.

³⁵⁷ Hutchison D & Pretorius C (2017) 408.

³⁵⁸ *Idem* 410.

³⁵⁹ Cornelius SJ (2016) 103.

concludes a contract with the necessary consent or assistance.³⁶⁰ Therefore, in order to avoid the possibility of future disputes regarding consent, there should be a clear indication that a minor acts with the assistance of his parent or guardian.³⁶¹ Where a parent or guardian assists his minor child in concluding a contract, the full details of the parent or guardian must appear, as well as the fact that the minor has been assisted by his parent or guardian.³⁶² As mentioned previously, a person under the age of seven years has no contractual capacity and the parent or guardian of the minor must act on his behalf. In such a case, the minor can be described in the following way:

John Green and Lilly Green
Parents and natural guardians of
Skye Green
Identity number 1234567891011
A minor

A minor who is between the age of seven and eighteen, on the other hand, has limited contractual capacity and must be assisted by his parents or guardians when entering into a contract. The minor can be described as follows in such a case:

Skye Green
Identity number 1234567891011
Unmarried minor
Assisted by her parents and natural guardians John Green and Lilly Green

Sometimes contracts include certain words to confirm or establish the contractual capacity of the parties to the agreement.³⁶³ The drafter will, for example, use words such as 'in full sound mind' or 'fully comprehends the content of the document' to show that the signatory understands the contract. Where a person has no capacity to contract, these statements are useless as it cannot be used to confirm their capacity or create any duties.³⁶⁴ This therefore serves no purpose and is meaningless as

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² Hutchison D & Pretorius C (2017) 410.

³⁶³ Van Eck (2015) 142.

³⁶⁴ *Idem* 136.

such words cannot create contractual capacity. The same principle applies to the inclusion of a person's status when describing the parties to a contract.³⁶⁵ It is therefore not necessary to refer to a person's status at all as it does not achieve any purpose nor does it change the actual facts.³⁶⁶ If a person enters into a contract without the contractual capacity to do so, the contract will be void.³⁶⁷ Contract drafters add these kinds of statements to create certainty, but if the statements inserted in the contract are wrong, then having recorded this will not change the factual reality.³⁶⁸

5.3 Specifying capacity in terms of an electronic contract

Since the topic deals with electronic contracts, it is also necessary to determine how capacity, in terms of an online contract, will be established. To determine how a clause dealing with capacity should be included in an electronic contract, it is first necessary to look at online contracts in general.

As discussed in chapter 3, concluding an online contract is essentially the same as contracting off-line.³⁶⁹ The same requirements need to be fulfilled for the contract to be legally binding.³⁷⁰ The overall aim of the ECT Act is to enable and facilitate electronic transactions. This entails the removal of legal barriers to e-commerce in South Africa by providing functional equivalent rules for electronic contracts.³⁷¹ One of the main forms of concluding a contract over the internet is to do so via a webpage. Here, a merchant maintains a website where, for example, he advertises goods and/or services and the prospective client can then order goods or services from the seller's webpage by completing an electronic form.³⁷² This type of contract has been developed for e-commerce and is known as a click-wrap agreement.³⁷³ The terms of the contract will be displayed on a screen on the seller's website. If the online consumer then wishes to purchase any products through this 'electronic

³⁶⁵ *Idem* 148.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ Out-Law.com 'Online contract formation' <http://www.out-law.com/page-394> (accessed 27 May 2017).

³⁷⁰ See ch 3 above.

³⁷¹ Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 569.

³⁷² Snail S in Papadopoulos S & Snail S (2012) 43.

³⁷³ Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 569.

store', he will have to click on certain icons to indicate that he accepts the terms.³⁷⁴ This type of agreement is an example of a contract of adhesion. The negotiation of the terms of the contract are excluded as the consumer party unilaterally declares acceptance or simply goes without it.³⁷⁵ The terms of the electronic contract must thus be agreed to by both parties and incorporated into the agreement.³⁷⁶ To be contractually bound by the agreement the parties must therefore agree to the terms, as merely placing them on the website is not enough to incorporate it into the contract.³⁷⁷

5.3.1 Drafting click-wrap agreements

The best practice in drafting a click-wrap agreement is to include the terms as a separate page in the process. A specific mechanism should also be put in place which requires the customer to acknowledge that he has read and agreed to the terms of the contract before proceeding to place an order.³⁷⁸ The drafter will insert an 'agree' button, for example, that the consumer can then click to show that he accepts the terms.³⁷⁹ Some websites use a different process in order to reduce the amount of pages in the purchasing process. During the purchase process, the buyer will have to click on a link which will direct him to a page containing terms and conditions where he will then be required to tick a checkbox to confirm that he accepts the terms.³⁸⁰ If he does not tick the box, he should not be allowed or able to proceed with the purchase. The drafter should, however, take care and avoid using words such as 'I have read, understand and accept the terms and conditions' next to the checkbox and use the words 'I accept the terms' instead.³⁸¹ This is to ensure that you are not encouraging purchasers to make an undertaking that could be untrue, as users can check the box without actually reading or understanding the terms. The drafter should rather place a notice above the checkbox warning users of the importance of reading the terms before placing their orders and using 'I accept' next to the

³⁷⁴ Pistorius T (2004) *S. Afr. Mercantile L.J.* 568 569; Snail S in Papadopoulos S & Snail S (2012) 54.

³⁷⁵ *Ibid.*

³⁷⁶ Out-Law.com 'Online contract formation' <http://www.out-law.com/page-394> (accessed 27 May 2017).

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

checkbox.³⁸² Once the checkbox has been ticked, the purchaser will then be able to continue with the purchase. At the bottom of the ‘terms and conditions’ linked page should be another link which takes the purchaser back to the purchasing process.³⁸³ To proceed with the purchase, the user should be offered buttons to click on which will enable him to complete the purchase. These buttons will contain words such as ‘purchase’ or ‘buy now’ that the user can click on to complete the purchase. Alongside these buttons, however, must be a button, such as ‘cancel’ for example, which allows the purchaser to withdraw from the sale.³⁸⁴

5.3.2 Terms

A clause dealing with capacity should be inserted in the click-wrap agreement to show that a party who enters into a contract with a minor did so with the consent or assistance of his parent or guardian. Such a term could read as follows:

Children under the age of majority should review this Agreement with their parent or guardian to ensure that the child and parent or legal guardian understand it.³⁸⁵

Similarly, the clause could state:

By using the Website you warrant that you are 18 (eighteen) years of age or older and of full legal capacity. If you are under the age of 18 (eighteen) or if you are not legally permitted to enter into a binding agreement, then you may use the Website only with the involvement and supervision of your parent or legal guardian. If your parent or legal guardian supervises you and gives his/her consent, then such person agrees to be bound to these Terms and Conditions and to be liable and responsible for you and all your obligations under these Terms and Conditions.³⁸⁶

Since the presumption exists that parties to a contract have the capacity to act, it is not necessary for the drafter in this instance to specify that a person should be of a certain age or that they have the legal capacity to enter into the agreement,³⁸⁷ as they did in the first sentence of the clause above. The use of these words serves no purpose to establish capacity because if a person with no, or limited contractual capacity agrees to it, the words are meaningless as such a person cannot create

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ <https://www.apple.com/legal/internet-services/itunes/us/terms.html>.

³⁸⁶ <https://www.takealot.com/help/terms-and-conditions>.

³⁸⁷ Cornelius SJ (2016) 103.

duties.³⁸⁸ However, since the clause states that a person warrants that he is over the age of eighteen and has full legal capacity, this may suggest that a minor who enters into the agreement can be held liable in delict for misrepresentation, although he cannot be liable on the basis of contract. This is because the other party to the contract might have suffered patrimonial loss due to the minor misrepresenting his age. As will be discussed below,³⁸⁹ a minor's capacity to be held liable for a delict depends on the minor's level of maturity and does not necessarily correspond with his capacity to enter into a contract.³⁹⁰

The presumption that the parties to a contract have the capacity to act also implies that a person with limited contractual capacity who enters into a contract did so with the necessary consent.³⁹¹ It is however good drafting practice to clearly indicate that such a party acted with the assistance of his parent or guardian and, generally speaking, room should also be provided for the parent or guardian to counter-sign the agreement.³⁹² The clauses above are clearly drafted in a way to show that a person under the age of eighteen years may only conclude such a contract with the assistance of his parent or guardian. The nature of a contract entered into by a minor who has obtained the consent or assistance of his parent or guardian is that the contract will be fully enforceable by and against the minor.³⁹³ This means that the minor will be personally liable for his debt, unless the agreement was prejudicial to him,³⁹⁴ and the parent or guardian will not be liable.³⁹⁵ It will therefore depend on the capacity in which the minor acted in order to determine whether the minor himself, or his parent or guardian will be held liable.³⁹⁶ The intention of the parties at the time of conclusion of the contract will determine who bears the liability.³⁹⁷ The parent or guardian of the minor will be liable for the minor's debts where the debt was incurred for the maintenance of the minor, the parent did not bring to the attention of the other

³⁸⁸ Van Eck (2015) 142.

³⁸⁹ See par 5.4.

³⁹⁰ Cockrell A in Van Heerden B *et al* (1999) 825. See also par 4.4.3 above.

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412. See also Cockrell A in Van Heerden B *et al* (1999) 795 and Boezaart T (2016) 66. See par 2.4 above.

³⁹⁴ See par 2.4 above.

³⁹⁵ *Marshall v National Wool Industries Ltd* 1924 OPD 238.

³⁹⁶ *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O) 396.

³⁹⁷ *Marshall v National Wool Industries Ltd* 1924 OPD 238.

party that he was acting on behalf of the minor, the parent stood surety for the debt of the child, the minor acted as a representative of his parent or the parent ratified the agreement that it was concluded on his behalf.³⁹⁸ The drafter, in the second clause above, included a safeguard when drafting the clause dealing with the case when a minor enters into the contract with the assistance of his parent or guardian. The clause states that 'if your parent or legal guardian supervises you and gives his/her consent, then such person agrees to be bound to these Terms and Conditions and to be liable and responsible for you and all your obligations under these Terms and Conditions'.³⁹⁹ In terms of this clause, if a minor enters into a contract with the assistance of his parent or guardian, the parent or guardian, and not the minor, will be liable for the debts. This shows that, if the minor did in fact receive assistance from his parent or guardian to conclude the agreement in such a case, that the parent or guardian agreed to stand surety for the minor's debt. If the minor did acquire the necessary assistance, he cannot be held liable as the clause shifts the responsibility from the minor to the parent and this will be regarded as an exception to the rule that a minor is personally liable for his debts. It could thus be good practice for a drafter to insert a clause, similar to the example mentioned above, to protect the online supplier when concluding an agreement with a minor. As mentioned above, however, the position will be different if a minor entered into the contract without the assistance of his parent or guardian. The supplier will not be able to hold the minor or his parent or guardian liable on the basis of contract, but may, however, be able to institute a delictual claim against the minor.

5.4 Misrepresentation

If a minor agrees to a contract which contains a clause where he warrants that he is over the age of eighteen years, it is unlikely that he will be held bound to the contract because generally his capacity to enter into a contract is limited.⁴⁰⁰ The minor may however be liable for delictual damages on the grounds of misrepresentation. In terms of the law of delict, a person is accountable if he has the capacity or mental ability to distinguish between right and wrong and can act in accordance with such

³⁹⁸ Boezaart T (2016) 67.

³⁹⁹ <https://www.takealot.com/help/terms-and-conditions>.

⁴⁰⁰ See ch 4 above.

appreciation.⁴⁰¹ If a person lacks accountability, there will be no fault on his part and blame cannot be imputed to him.⁴⁰² In terms of the law of delict, there is an irrebuttable presumption that a child under the age of seven years lacks capacity.⁴⁰³ There is a rebuttable presumption that a child between the age of seven and fourteen lacks accountability.⁴⁰⁴ This means that children in this category will be regarded as lacking legal capacity unless the opposite can be proven. Children who are fourteen years of age or older, however, are presumed to have legal capacity and can therefore be held liable for their wrongful conduct, unless proven otherwise.⁴⁰⁵ The capacity a child has to be held accountable in delict thus differs from their capacity to contract.

In order for the other party to succeed on the basis of misrepresentation, the plaintiff must show that the minor was old enough to form the intention to defraud, that the plaintiff had entered into the agreement based on the child's misrepresentation and that the plaintiff had suffered a loss as a result.⁴⁰⁶ The reason a child's capacity to act is limited, is to protect him from his inability to make a mature judgment.⁴⁰⁷ This must be weighed up against the interests of the innocent party to the contract as he should also be protected in the case where damages are incurred as a result of the minor party's conduct.⁴⁰⁸ By holding the minor liable in delict is an appropriate solution as it provides a balance between these two conflicting interests. If the minor were to be held liable in contract, the purpose of limiting his capacity in the first place would be defeated as it would enable him to change his own legal status.⁴⁰⁹ By holding the minor liable in delict would protect him from being contractually accountable and keep the protection in place, but the other party will also be protected as he would still be able to recover his losses with a delictual claim.⁴¹⁰ Section 39(2) of the CPA also contains provisions for the case where a minor

⁴⁰¹ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389 403 410. See also Loubser M & Midgley R (2012) 104; Neethling J & Potgieter JM (2015) 131.

⁴⁰² Loubser M & Midgley R (2012) 105; Neethling J & Potgieter JM (2015) 131.

⁴⁰³ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389. See also Loubser M & Midgley R (2012) 105; Neethling J & Potgieter JM (2015) 131.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Loubser M & Midgley R (2012) 105.

⁴⁰⁶ Cockrell A in Van Heerden B *et al* (1999) 827. See also par 4.4.3 above.

⁴⁰⁷ Boezaart T (2016) 83.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Cockrell A in Van Heerden B *et al* (1999) 826.

⁴¹⁰ *Louw v MJ & H Trust (Pty) Ltd* 1975 4 SA 268 (T) 237.

fraudulently misrepresents himself.⁴¹¹ This section is, however, vague and neglects to resolve the uncertainty which currently exists in the common law.

5.5 Formalities

Generally, no formalities are required for the conclusion of a valid contract.⁴¹² However, the parties to the contract or the law may prescribe certain formalities that must be complied with for a valid contract to come into existence.⁴¹³ The nature of the formalities required will depend on the agreement between the parties or on a specific statutory provision.⁴¹⁴ It may either be required that the contract be in writing and signed by one or both of the parties or that the contract be executed by a notary.⁴¹⁵ In most instances, the purpose of reducing a contract to writing is to facilitate proof of the agreement. Sometimes the parties or the law may require certain formalities in order for the contract to be valid.⁴¹⁶ The contract will thus be void if the parties fail to adhere to the prescribed formalities in cases where it is required and not merely where it is used to facilitate proof thereof.⁴¹⁷

5.5.1 Writing and signature

Traditionally, writing includes written or typed words or any other way of producing words in a written form.⁴¹⁸ As far as an electronic contract is concerned, the writing requirement will be met if the document is in the form of a data message and is accessible.⁴¹⁹ The principles of drafting a contract will remain the same whether the contract appears on paper or is contained in an electronic format.⁴²⁰ Some of the general principles of the writing requirement is that the material terms must be in writing in the agreement whereas the non-material terms need not be,⁴²¹ all the terms need not be contained in one document and can be incorporated by

⁴¹¹ See par 4.5 above.

⁴¹² Hutchison D & Pretorius C (2017) 163.

⁴¹³ *Ibid.*

⁴¹⁴ Eg in the case of alienation of land (s 2(1) of the Alienation of Land Act 68 of 1981).

⁴¹⁵ Eg contracts of lease in respect of mineral rights (s 3 of the General Law Amendment Act 50 of 1956).

⁴¹⁶ Hutchison D & Pretorius C (2017) 165.

⁴¹⁷ *Ibid.*

⁴¹⁸ Sharrock R (2011) 120.

⁴¹⁹ S 12(b) of Act 25 of 2002.

⁴²⁰ Van Eck (2015) 153.

⁴²¹ *Johnson v Leal* 1980 (3) SA 927 (A) 937-938.

reference,⁴²² the variation of material terms should generally be in writing,⁴²³ and the written document should be sufficiently precise and detailed.⁴²⁴

It has also become customary for written contracts to contain signatures. In terms of common law, a signature is the handwritten symbol appended to a document which identifies the person who signs it.⁴²⁵ As the signature confirms the parties' acceptance of the terms of the contract, it is a symbol showing that the parties have reached consensus.⁴²⁶ Signing is the physical act of signing a document and can include making a mark, a cross, initialling or even a thumb print. Section 13 of the ECT Act makes provision for the signing of an electronic contract. Where a signature is required by the parties to the agreement, an ordinary electronic signature will suffice. However, a method which identifies the party and which serves as an indication that such a person approves of the information communicated, must be used.⁴²⁷ It has been decided that a person's name appearing at the end of an email constitutes an ordinary electronic signature.⁴²⁸ Where a signature is required by law, only an advanced electronic signature will be sufficient.⁴²⁹ There are also certain agreements, however, where an electronic signature will not be enough to conclude a contract.⁴³⁰ The Act has also made provision for the case where no signature is used, but the parties to the contract have nevertheless expressed their intent, in some way, to be bound to the agreement.⁴³¹ If the parties have not agreed to the type of electronic signature to be used, the signature requirement will still be met if a method, which is reliable,⁴³² and clearly identifies the party and indicates his approval of information communicated, is used.⁴³³ Section 24(b) of the ECT Act confirms this as it states that 'an expression of intent or other statement is not

⁴²² *Johnson v Leal* 1980 (3) SA 927 (A) 938; *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) 18; s 1 of the Alienation of Land Act 68 of 1981.

⁴²³ *Neethling v Klopper* 1967 (4) SA (A) 465; *Ferreira and Another v SADPC (Trading) Ltd* 1983 (1) SA 235 (A).

⁴²⁴ Van Eck (2015) 154.

⁴²⁵ Van der Merwe DP (2016) 176. See also par 3.3 above.

⁴²⁶ Van Eck (2015) 154.

⁴²⁷ S 13(3)(a) of Act 25 of 2002.

⁴²⁸ *Spring Forest Trading v Wilberry* (725/13) [2014] ZASCA 178.

⁴²⁹ S 13(1) of Act 25 of 2002. See also fn 249 above.

⁴³⁰ An electronic signature may not be used in an agreement for the alienation of immovable property (Alienation of Land Act 68 of 1981), a long-term lease agreement (Act 68 of 1981), the execution of a bill of exchange (Bills of Exchange Act 7 of 1953) and the execution, retention and presentation of a will or codicil (Wills Act 34 of 1964) [s 4(4) of Act 25 of 2002].

⁴³¹ S 13(3) of Act 25 of 2002.

⁴³² S 13(3)(b) of Act 25 of 2002.

⁴³³ *Ibid.*

without legal force and effect merely on the grounds that it is not evidenced by an electronic contract but by other means from which such person's intent or other statement can be inferred'.⁴³⁴ An example of an agreement where the party intends to be bound by the agreement but does not actually sign it is a click-wrap agreement. This is because the party, in this case, need not actually sign the document but still accepts the terms by clicking a specific icon or area of the screen to show his intention to be bound to the contract.⁴³⁵

5.5.2 Automated transactions

It is also important to bear in mind that certain contracts concluded online may be automated. An automated transaction is an electronic transaction which is performed, by means of a data message, in which the conduct or data messages of one or both parties are used without human interaction to form a contract.⁴³⁶ In terms of the ECT Act, an agreement may be formed where an electronic agent performs an action, on behalf of the contracting party, where such action is required by law for the formation of an agreement.⁴³⁷ Either one or all the parties to an agreement can make use of an electronic agent.⁴³⁸ A party who uses an electronic agent is bound to the terms of the agreement, irrespective if he reviewed the terms,⁴³⁹ but the party interacting with the electronic agent is only bound by the terms if they are capable of being reviewed prior to the formation of the agreement.⁴⁴⁰ If a material error is made, during the creation of a data message, by the party interacting with the electronic agent, no agreement is formed if:⁴⁴¹ the electronic agent did not provide the party with opportunity to correct the error,⁴⁴² that party notifies the other party of the error as soon as practicable after he has learned of it,⁴⁴³ that person takes reasonable steps to return any performance received,⁴⁴⁴ and that person has not received any benefit from the performance received.⁴⁴⁵

⁴³⁴ S 24(b) of Act 25 of 2002.

⁴³⁵ Snail S in Papadopoulos S & Snail S (2012) 50.

⁴³⁶ S 1 of Act 25 of 2002.

⁴³⁷ S 20(a) of Act 25 of 2002.

⁴³⁸ S 20(b) of Act 25 of 2002.

⁴³⁹ S 20(c) of Act 25 of 2002.

⁴⁴⁰ S 20(d) of Act 25 of 2002.

⁴⁴¹ S 20(e) of Act 25 of 2002.

⁴⁴² S 20(e)(i) of Act 25 of 2002.

⁴⁴³ S 20(e)(ii) of Act 25 of 2002.

⁴⁴⁴ S 20(e)(iii) of Act 25 of 2002.

⁴⁴⁵ S 20(e)(iv) of Act 25 of 2002.

5.6 Putative contract

When it comes to online contracts, especially those concluded with minors, there is no way of knowing for sure that a contract has been concluded with a minor, except in the case of breach. There is no way that the other party can administer and oversee that the contract has met the requirement of capacity because there is no way of identifying that the party on the other end actually has the capacity to conclude the contract even if he clicks a button to say that he does. The minor can, for example, purchase something, without the assistance of his parent or guardian, on a website from a supplier, click on icon that says that he accepts the terms and pay for it without the supplier ever knowing that he concluded a contract with a minor who did not have the capacity to contract. A minor may also have clicked the icon saying he wishes to make the purchase and that he has read the terms, not knowing that he needed consent from his parents to enter into the contract.

Therefore, it may be a good idea to treat a contract of such a nature the same as you would treat a putative marriage. Briefly, 'a marriage is putative if one or both of the parties were ignorant at the time of contracting the marriage of the impediment to the marriage and thus believed in good faith that they were married'.⁴⁴⁶ A void marriage will therefore have limited legal consequences despite it being invalid, provided that at least one of the parties, in good faith, considered themselves to be married.⁴⁴⁷ If the invalid marriage meets the requirements of a putative marriage, children born of that marriage are considered legitimate or rather regarded as being 'born of married parent's'.⁴⁴⁸ The patrimonial consequences of a putative marriage are generally interpreted to favour the *bona fide* spouse, whereas if both the parties were *bona fide*, the proprietary consequences that they had intended to apply to their marriage will be put into effect.⁴⁴⁹ Where the spouses concluded an antenuptial contract promising any benefit in terms thereof, the *bona fide* spouse will be entitled to enforce the promise of the benefit, while the *mala fide* spouse must forfeit such benefit.⁴⁵⁰ If both the spouses acted in good faith, both the parties will be bound to the contract.⁴⁵¹ The same principles could apply to a contract concluded online with

⁴⁴⁶ Van Heerden B in Van Heerden B *et al* (1999) 328.

⁴⁴⁷ Smith BS (2010) *Int'l J.L. Pol'y & Fam* 267 269.

⁴⁴⁸ *Moola v Auselbrook* NO 1983 (1) SA 687 (N) 690; Smith BS (2010) *Int'l J.L. Pol'y & Fam* 267 270.

⁴⁴⁹ Smith BS (2010) *Int'l J.L. Pol'y & Fam* 267 270.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

a party who is a minor. If the parties concluded the contract in good faith, they should be held liable to the contract as that was the intention of both the parties. This would however defeat the purpose of limiting a minor's capacity to contract in the first place as the minor would now be able to enter into a contract without the consent or assistance of his parent or guardian without any consequences.

5.7 Conclusion

A contract is based on five requirements: consensus, capacity, legality, physical possibility and formalities. The document itself merely serves as proof of the agreement between the parties. The contract should thus be written in a manner which is clear and precise in order for the recipient to fully understand the message that the drafter intended to convey. The element of capacity is generally established in the description clause of the contract. The first step in drafting is to identify and describe the parties to the contract. The parties must be clearly described in order to ensure that uncertainty, in the future, will be avoided. Although there is a trend in drafting that a person's status or capacity be included in the written contract, it is not necessary or required, and the description will be sufficient as long as the parties to the contract are identifiable. Therefore, although it is only necessary to identify the parties to the contract, it is good practice to clearly indicate when a parent or guardian has assisted his child in concluding a contract in order to avoid the possibility of future disputes. Also, words that are used to confirm a person's contractual capacity in a contract are useless as it cannot be used to create any duties. If a person with no contractual capacity concludes a contract, the contract will be void. By inserting a clause that creates or confirms contractual capacity will only cause more confusion and an incorrect statement can never change the actual facts.

As far as electronic contracts are concerned, the same requirements which apply in terms of the law of contract will apply to a contract concluded online. This is because of the ECT Act which facilitates and provides rules for functional equivalence relating to online contracts. As discussed above, a click-wrap agreement is commonly used to conclude a contract over the internet. Here, a person does not actually sign the contract but will show his acceptance by clicking on a specific icon on the screen.

The nature of a contract concluded with a minor who has obtained the necessary assistance, is that the contract will be fully enforceable against the minor and he will

be personally liable for his own debts. It may therefore be useful for the drafter to insert a clause that safeguards the other party to the contract by holding the parents or guardians of the minor liable for his debt. This safeguard will not apply in the case where the minor enters into the contract without the assistance of his parent or guardian as the minor, in this case, will not be bound by the contract because of his limited capacity to act. The other contracting party may, however, be able to hold the minor liable on the grounds of misrepresentation in terms of the law of delict. The contract could also perhaps be drafted in a way to make provision for a putative agreement. This would mean that the contract between the parties will be valid if they believed in good faith that they had met the requirements for a valid contract, although one of the parties did not have the full capacity to contract.

Chapter 6: Conclusion and recommendations

The reason that a minor does not have the full capacity to contract is that they lack the experience and judgment to protect themselves. This notion may, however, be outdated and obsolete. Minors these days have the know-how and are skilled in the use of computers, the internet and navigating cyberspace.⁴⁵² A good illustration of this is child prodigy Muhammad Hamza Shahzad, who has become the world's youngest computer programmer at the tender age of seven years old.⁴⁵³ He was the world's youngest Microsoft Office Professional at the age of six and is now proficient in Software Development Fundamentals, MS Word, MS PowerPoint and MS Excel.⁴⁵⁴ He also enjoys developing simple console based game applications.⁴⁵⁵ This shows how much more mature minors have become in the digital world and in electronic contracting and that they can be just as sophisticated as suppliers or retailers in operating the course of cyberspace. As minors engage in concluding contracts over the internet, the traditional views and laws surrounding their capacity allow them to have a safeguard of no accountability, meaning they can cause havoc with little or no legal consequences.⁴⁵⁶ There is thus a need to re-evaluate the consequences regarding a minor's contractual capacity, especially in the context of online adhesion contracts.

The capacity of a minor in the law of contract overlaps with the treatment of minors in other areas of the law in South Africa. For example, in terms of the Child Justice Act, a child under the age of ten years old who commits an offence has no criminal capacity.⁴⁵⁷ A child who is ten years or older on the other hand, is presumed to lack criminal capacity unless the state can prove beyond a reasonable doubt that he did have capacity at the time of commission of the alleged offence.⁴⁵⁸ A child above the age of fourteen years has full criminal capacity and will be treated as an adult if he commits an offence.

⁴⁵² Daniel JL (2008) 43 *Gonz. L. Rev.* 239 241.

⁴⁵³ Lockley M (2016) Child genius becomes world's youngest computer programmer – aged seven! <https://www.birminghammail.co.uk/news/midlands-news/child-genius-becomes-worlds-youngest-11859410> (accessed 22 March 2018).

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Daniel JL (2008) 43 *Gonz. L. Rev.* 239 241.

⁴⁵⁷ S 7(1) of Act 75 of 2008.

⁴⁵⁸ S 7(2) of Act 75 of 2008.

In the law of delict, the court will determine whether a person has the mental ability to distinguish between right and wrong to hold him accountable.⁴⁵⁹ He must also be able to act in accordance with such appreciation.⁴⁶⁰ The age of the child will also be taken into consideration in determining liability. There is an irrebuttable presumption that a child under the age of seven years lacks capacity and a rebuttable presumption that a child between the age of seven and fourteen lacks capacity.⁴⁶¹ Children who are fourteen years of age or older, however, are presumed to have legal capacity and can therefore be held liable for their wrongful conduct, unless proven otherwise.⁴⁶²

The interaction between these areas of law can create some confusion. While a minor cannot be held liable for conduct arising out of the contract, he may, for example, be held liable in delict if he induces another to enter into a contract with him by misrepresenting his age. Courts should treat minors consistently with regard to their competency and capacity regardless of whether they are being accused of a crime or breaching a contract.⁴⁶³ No rational basis exists for dealing with minors differently depending on the area of law under which they are being tried.⁴⁶⁴

There are also other areas of law in which a minor has full capacity. A minor can, from the age of twelve, receive medical treatment without consent from his parent or guardian.⁴⁶⁵ However, the child must have the necessary level of maturity and mental capacity to understand the benefits, risks, social and other implications of the particular treatment.⁴⁶⁶ A minor also has the capacity to be a witness to a will at the age of fourteen⁴⁶⁷ and can execute one at the age of sixteen.⁴⁶⁸ From the age of sixteen a minor can, without the assistance of his parent or guardian, become a member or depositor at a financial institution.⁴⁶⁹

⁴⁵⁹ Neethling J & Potgieter JM (2015) 131.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389. See also Loubser M & Midgley R (2012) 105; Neethling J & Potgieter JM (2015) 131.

⁴⁶² Loubser M & Midgley R (2012) 105.

⁴⁶³ Shiffman KA (2012) 34 *Whittier L. Rev.* 141 150.

⁴⁶⁴ Daniel JL (2008) *Gonz. L. Rev.* 263.

⁴⁶⁵ S 129(2)(a) of Act 38 of 2005.

⁴⁶⁶ S 129(2)(b) of Act 38 of 2005.

⁴⁶⁷ S 1 of the Wills Act 7 of 1953.

⁴⁶⁸ S 4 of Act 7 of 1953.

⁴⁶⁹ S 88 of the Mutual Banks Act 124 of 1993 and s 87(1) of the Banks Act 94 of 1990.

The best approach in dealing with a minor who enters into an electronic contract would be to treat them the same as one would in terms of criminal law and the law of delict. Perhaps the dividing line between childhood and adulthood in the law of contract should be done away with as it does not correspond with a minor's intellectual ability to reason and think the way an adult does as he ages.⁴⁷⁰ Jean Piaget, a Swiss psychologist known for his theories of cognitive development throughout infancy, childhood and adolescence believed that children go through four stages in cognitive development.⁴⁷¹ The concrete operational stage, which is the third level and approximately develops in children aged seven to eleven years old, is when children begin thinking logically but abstract thinking is still largely absent.⁴⁷² The final stage or the formal operational stage, which develops in a child from the age of twelve and older, the adolescent or adult can think abstractly, will speculate on hypothetical situations and reasons deductively about what might be possible.⁴⁷³ Adolescents thus possess the mental and cognitive abilities to think and reason the way adults do from around the age of thirteen or fourteen and should therefore be given the same contractual responsibility as an adult would when entering into a contract online.⁴⁷⁴ With specific regard to electronic contracts, the more logical approach for contract law would therefore be to treat minors in accordance with their intellectual capacity rather than their age.⁴⁷⁵ It is time to modernise the approach regarding a minor's capacity in contract law to reflect the change in times and in technology. With the accessibility minors have to the internet today and the way in which they form contracts on a daily basis, a new approach may become necessary. Many contracts, in the digital age, are no longer formed and negotiated face-to-face, but more often online in the form of an online adhesion contract or click-wrap agreement which is simply accepted by the click of a mouse or button. The best approach would be to treat minors the same as they are treated in other areas of law, where they receive more responsibility and accountability as they age, similar to that of criminal law and the law of delict.

⁴⁷⁰ Shiffman KA (2012) 34 *Whittier L. Rev.* 146 150.

⁴⁷¹ Louw D & Louw A (2014) 25.

⁴⁷² *Idem* 26.

⁴⁷³ *Ibid.*

⁴⁷⁴ Shiffman KA (2012) 34 *Whittier L. Rev.* 155 150.

⁴⁷⁵ *Ibid.*

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