

Some comments on the interpretation and application of section 17 of the Children's Act 38 of 2005

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OPSOMMING

'n Paar opmerkings oor die uitleg en toepassing van artikel 17 van die Children's Act 38 van 2005

Artikel 17 van die Children's Act het die meerderjarigheidsouderdom na agtien jaar verlaag. Hiermee is die meerderjarigheidsouderdom in ooreenstemming met die Grondwet en die internasionale dokumente met betrekking tot kinders gebring. Dit het 'n einde gemaak aan 'n situasie waar kinders te jonk was om kontrakte aan te gaan, maar oud genoeg was om in polisie-selle opgesluit te word. As sodanig is die wetswysiging verwelkom. Die formulering van artikel 17 het egter veroorsaak dat 'n letterlike uitleg meebring dat net persone onder agtien jaar ingevolge artikel 17 meerderjarig word. Hierdie uitleg is so vergesog dat dit 'n wetswysiging noodsaak. Daar word aan die hand gedoen dat alle persone wat op 1 Julie 2007 ouer as agtien was maar jonger as een-en-twintig jaar, op daardie dag meerderjarig geword het. Die verlaging van die meerderjarigheidsouderdom het enorme praktiese implikasies. Hierdie bydrae ontleed die effek daarvan op verjaringstermyne, derdepartyeise, die *restitutio in integrum*, onderhoudsbevele, skikkingsaktes en soortgelyke dokumente. Ten slotte word aan die hand gedoen dat meer as net die erkenning van kinderregte ingevolge hierdie nuwe Wet nodig is. Dit is naamlik van kardinale belang dat kinders bemagtig word om hulle regte en verantwoordelikhede te kan uitleef.

1 Introduction

In Roman law the age of majority was set at twenty-five years.¹ Before 1 July 2007 the age of majority in South Africa was twenty-one years and this was provided for by section 1 of the Age of Majority Act.² But both before and after the passing of the Age of Majority Act, there were problems with the age of majority being twenty-one years. This is illustrated by the case of *Ex parte van den Hever*.³ The brother of Ignatius van den Hever made application to the court to release the nineteen-year-old Ignatius from tutelage, thereby granting him full capacity to act. After finishing

1 Jolowicz *Roman Foundations of Modern Law* (1978) 119–120.

2 57 of 1972.

3 1969 3 SA 96 (E). See *In re Cachet* (1898) 15 SC 5 where a minor was released from tutelage to enable him to accept his inheritance. This decision was followed in various cases, viz *Ex parte Louw* 1920 CPD 7; *Ex parte Estate Van Schalkwyk* 1927 CPD 268; *Ex parte Curling* 1952 1 PH M13 (C); *Ex parte Van den Hever* 1969 3 SA 96 (E). However, compare *Ex parte Velkes* 1963 3 SA 584 (C) 587E–H.

school and having completed his military training, Ignatius started farming in the district of Hanover in the Cape Province. The evidence was that he was a responsible young man who was capable of managing the farm independently for his own benefit. He had no parents and his maternal grandfather was appointed as Ignatius' testamentary guardian. His grandfather was eighty-three years old and lived approximately two hundred miles from Hanover. His grandfather further stated that it would be difficult and impractical for him to fulfil his duties as guardian and that he was satisfied that Ignatius could manage the farm with discretion and responsibility. The court decided that it was in Ignatius' interests to authorise him to continue with his farming without being hampered by his minority and granted the application to release him from tutelage.

This judgment evoked much reaction and debate on the High Court's inherent jurisdiction,⁴ and at the very most attempted a solution for this type of situation in the Cape Province only. In the Free State there were no problems in this regard because *venia aetatis* could be granted to a minor under similar circumstances.⁵ *Venia aetatis* was a common-law procedure in terms of which a minor over eighteen years of age could have been declared a major by the head of state.⁶ *Venia aetatis* was governed by statute in the Free State only,⁷ but this capacity of the head of state has since been revoked.⁸ However, in the other provinces there was no remedy which could be applied in these circumstances.

The procedures which have been laid down in the Age of Majority Act thus brought about a welcome solution to this type of problem. Although the Act did not expressly abolish all the common-law procedures that granted majority to a minor, the accepted understanding amongst writers seemed to be that these procedures had, for all practical purposes, been replaced by the procedures of the Act.⁹

The Age of Majority Act also made provision for a person who had already reached the age of eighteen years to apply to the provincial division of the High Court in the area in which he was normally resident, to be declared a major.¹⁰

4 Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 364; De Wet and Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 62 n 67; Zeffertt "*Venia aetatis*, release from tutelage and emancipation" 1969 *SALJ* 407 *et seq*; D'Oliveira "*Venia aetatis*, emancipation and release from tutelage revisited: The Age of Majority Act 1972" 1973 *SALJ* 60-63; Spiro *Law of Parent and Child* (1985) 247-248.

5 In terms of the OFS Statutory Lawbook of 1901.

6 *Ex parte Moolman* 1903 TS 159 161; *Ex parte Du Plessis* 1941 OPD 225.

7 Ch 89 of the OFS Statutory Lawbook 1901.

8 Age of Majority Act 57 of 1972 s 9. See also *Ex parte Smith* 1980 2 SA 533 (O) 534H.

9 Because emancipation does not confer majority status on a minor, this legal concept was not repealed by the Act. Compare D'Oliveira 1973 *SALJ* 64-65; Van der Vyver and Joubert *Persone- en Familiereg* (1991) 155-156.

10 Age of Majority Act s 2.

2 Section 17 of the Children's Act

It is against this background that the Children's Act provides: "A child, whether male or female, becomes a major upon reaching the age of 18 years."¹¹

Section 17 of the Children's Act lowers the age of majority to eighteen years, and repeals the Age of Majority Act *in toto*.¹² It applies to both sexes in accordance with our Constitution¹³ and to people living under and/or born from customary marriages.¹⁴ The South African Law Commission (SALC), as it then was, did consider the fact that repealing the Age of Majority Act would also remove the possibility to apply to court for the declaration of majority. The Commission entertained the possibility of providing for sixteen-year-olds to apply for majority in a similar way, but decided against this.¹⁵ This omission can perhaps be explained by noting that the age of majority is now set at eighteen years in all cases.

3 Interpretation

The "normal" reading of section 17 implies that any young persons aged eighteen, nineteen or twenty years on 1 July 2007 became majors from that date onwards. The effect of the coming into force of section 17 was therefore that people of different ages attained majority on 1 July 2007. However, section 17 can also be interpreted in another way. A "literal" interpretation of section 17 would mean that the definition of "child" in section 1 of the Act, namely "'child' means a person under the age of 18 years" should be read into section 17. This could mean that only people under the age of eighteen years reach majority as stipulated in the Act when reaching the age of eighteen. The practical effect of this interpretation seems to be that a young person who was nineteen years or even twenty years of age on 1 July 2007 does not reach majority when attaining the age of eighteen years.¹⁶

My personal view is that this interpretation, although literal, would lead to absurd consequences and that it could not have been the intention of the legislator. My viewpoint is also in line with the fact that the Children's Act repealed the Age of Majority Act *in toto*, thereby indicating that the new age of majority is intended to apply to all people. The literal interpretation will, on the contrary, mean that a person who is eighteen years of

11 S 17.

12 Children's Act Sch 4.

13 Constitution of the Republic of South Africa, 1996.

14 Recognition of Customary Marriages Act 120 of 1998 s 9 provides that, despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act and as the Children's Act repealed the Age of Majority Act, the same applies to this legislation.

15 South African Law Commission Discussion Paper 103 Project 110 Review of the Child Care Act § 4.5 71.

16 It seems that this interpretation is also supported in November 2007 (4) *Risk Alert Bulletin*.

age today is legally a major while a nineteen- and even a twenty-year old are still regarded as minors.¹⁷

It should be noted that this Act does not have retroactive effect.¹⁸

4 Terminology

It is important to point out that the words “adult” and “major” could sometimes be used interchangeably.¹⁹ The same applies to the words “child” and “minor”.²⁰ In Afrikaans there is more than one word to indicate that a person enjoys the status of a major: These words are “meerderjarig” and “mondig”. The case of *Meyer v The Master*,²¹ in which the court had to decide whether “mondigheid” and majority have the same meaning, should be considered. The facts are briefly as follows: The applicant, who was fourteen years and four months old, inherited a sum of money from his mother. In terms of a stipulation in his mother’s will, the money had to be deposited with the Master of the High Court until such time as he reached “majority”. In an attempt to access his money, the father of the applicant had him enter into a marriage with a girl whom he never saw again. In the application the applicant claimed that the Master should pay the money out to him because he had reached majority on the grounds of his marriage.²² The court dismissed the application and found that the applicant became “mondig” by way of the marriage, that he was not a major and that, in terms of the stipulations of the will, he could receive his money only when he turned twenty-one years of age.

In this regard the difference between minority and majority on the one hand and “mondigheid” and “onmondigheid” on the other hand must be noted. Majority and minority refer to the lifetime or age of a person, in other words, whether the person has attained the age of majority or not. However, “mondigheid” and “onmondigheid” refer to whether or not a person is able to manage his or her own affairs. A “mondige” person is someone who has already obtained full capacity to act through, for example, concluding a valid marriage. An “onmondige” person is someone under the age of majority who has not yet obtained full capacity to act. An “onmondige” person is therefore always a minor – under the age of majority – but a “mondige” person is not always a major and can be under the age of majority. Majority is merely one of the ways in which “onmondigheid” can be terminated.²³

17 In light of the fact that the “literal” meaning leads to absurdities, it is suggested that the word “child” in s 17 be substituted with “person”.

18 There is no provision to that effect in the Act.

19 See *Stassen v Stassen* 1998 2 SA 105 (W) 108G–I where the court objected to the description of parties as “volwassenes” (“adults”), pointing out that *locus standi* is dependent on majority, not adulthood.

20 See Davel & Jordaan *Law of Persons* (2005) 54–55.

21 1935 SWA 3. See too DP “Case review of *Meyer vs the Master* (1935 SWA 3)” 1937 *THRHR* 119 *et seq.*

22 Davel & Jordaan 54–55.

23 *Santam Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A) 863G–866B. The court ruled in this case that the word “minor” refers to a person who has not yet attained a specific age.

5 A Contentious Issue

The age of majority has for some time been a contentious issue. The SALC launched an investigation into the desirability of lowering the age in 1985, but recommended that the age of majority should remain twenty-one years.²⁴ Since then the matter has remained contentious.

International law is clear on the question of when childhood comes to an end. Article 1 of the United Nations Convention on the Rights of the Child (UNCRC)²⁵ states that “‘child’ means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”. According to the UNCRC, therefore, majority is attained by reaching the age of eighteen years or even earlier if the law applicable to the child specifies an earlier age for the attainment of majority. The African Charter on the Rights and Welfare of the Child²⁶ recognises only one age as the age of majority, that is eighteen years: Article 2 defines “child” as “every human being below the age of 18 years”. The South African Constitution followed international law guidelines in this regard stating in section 28(3) that “‘child’ means a person under the age of 18 years”. Various statutes also define children as persons under the age of eighteen years for the purposes of that specific statute.²⁷ Sometimes the term “minor” is used in legislation to denote a “child”.²⁸

6 A Dualistic Approach

In practice the position prior to the Children's Act being passed was, on the one hand, that in terms of various statutes and the Constitution a child is a person under the age of eighteen years. Once a person turns eighteen he or she is able to acquire his or her own domicile, vote in an election and forfeit the special protection afforded to children by section 28 of the Constitution.²⁹ On the other hand, with the Age of Majority Act still intact, young adolescents above the age of eighteen but below the age of twenty-one years still required their parent or guardian's assistance when entering into a contract.³⁰ The dichotomy meant that a nineteen-year-old was old enough to acquire a domicile wherever he or she decided to stay and was old enough to be locked up in a police cell with adults, but needed a parent's assistance to become a member of the local gymnasium or sports club!

24 SALC Investigation into the Advancement of the Age of Majority Project 43 (December 1985) § 13.1 at 55.

25 1989.

26 ACRWC (1999).

27 Eg, Child Care Act 74 of 1983 s 1, Domicile Act 3 of 1992 s 1(1), Births and Deaths Registration Act 51 of 1992 s 1 and Electoral Act 73 of 1998 s 1.

28 Eg, the definition of “minor” in the South African Citizenship Act 88 of 1995 and the South African Passports and Travel Documents Act 4 of 1984.

29 Davis, Cheadle and Haysom *Fundamental Rights in the Constitution – Commentary and Cases* (1997) 264 *et seq.*

30 Davel and Jordaan 66 *et seq.*

7 Depriving Young Adults of Protection

Lowering the age of majority to eighteen years deprives young people between the ages of eighteen and twenty-one of the protective and supportive measures of our common law, in that it is no longer the case that an agreement entered into by the young person without parental assistance or consent is not enforceable against him or her, and the young person can no longer institute a *restitutio in integrum* under certain circumstances.³¹ It is also true that prescription of the young adolescent's claim can now take place when he or she is only nineteen years old.³²

8 Prescription

Olivier makes the statement³³ that there was a previous aborted attempt to lower the age of majority two or three years ago. The fact of the matter is that the SALC investigated the possibility of lowering the age of majority in July 1984, but that is more than twenty years ago! What the author might have had in mind could possibly be the amendment of the Births and Deaths Registration Act³⁴ defining children as being persons below the age of eighteen years for the purposes of that specific Act.

Olivier also makes a few vital mistakes in applying the Prescription Act to claims against minors. It could be valuable to consider this issue in more detail.

In terms of section 13(1)(a) of the Prescription Act³⁵ prescription of a minor's claim, the minor being the creditor, takes place at least one year and at the most three years after the date on which he or she attained majority. For example, if the cause of action arose when the child was only sixteen years old, the period of prescription will be completed when the child is nineteen years of age – being one year after the child attained majority. Compare this to a situation where the cause of action arose while the child was only fourteen years of age: once again prescription will only be completed when the child is nineteen years old – being one year after the child attained majority in terms of section 17 of the Children's Act. If the child was older than sixteen years when the cause of action arose, the period of prescription will be completed at a later stage.

31 *Idem* 72–75.

32 In terms of the Prescription Act 68 of 1969 s 13(1)(a) prescription of the minor's claim takes place at least 1 year and at the most 3 years after the date on which he or she attained majority.

33 Olivier "Kinderwet nr 38 van 2005 wat moet prokureurs nou weet en doen – meerderjarigheid" 2006 (Dec) *Orde Nuus/Society News* 5–7 par 9.

34 51 of 1992 s 1.

35 S 13: "Completion of prescription is delayed in certain circumstances
(1) If – (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1) . . . the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

For example, if the cause of action arose when the child was seventeen years of age the prescription period will be completed when the child is twenty years old. Practitioners should be aware of the fact that claims are due to prescribe at various ages for the different individuals involved.

When minors are involved in road accidents the Road Accident Fund Act (RAF Act)³⁶ has to be applied. Section 16 of the Prescription Act stipulates that:

“(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt . . . apply to any debt arising after the commencement of this Act.”

The RAF Act does contain such inconsistent provisions and the Prescription Act therefore does not apply to the claims of minors in terms of the RAF Act.³⁷ In terms of section 23(1) of the RAF Act:

“the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose”.

This provision is subject to subsection (2), in terms of which prescription does not run against the minor. Young adolescents between the ages of eighteen and twenty-one years, on 1 July 2007, whose cause of action in terms of the RAF Act arose prior to that date, became majors on 1 July 2007 and the three-year prescription period commenced on 1 July 2007. The claims of all these young adolescents will therefore prescribe at midnight on 30 June 2010.

9 Cancellation of Contract/*Restitutio in Integrum*

The *restitutio in integrum* is a legal remedy that is available to a minor who has, with the necessary consent, entered into a prejudicial agreement in terms of which he or she has already performed.³⁸ *Restitutio in integrum* may be resorted to in all circumstances where the minor is prejudiced: An interesting case in this regard is *Landers v Estate Thomas Landers*³⁹ where *restitutio in integrum* was granted to a minor who had lost his inheritance as a result of his guardian's neglect in protecting his interests. It is a requirement that the agreement must have been prejudicial to the minor at the moment it was entered into. The fact that it became prejudicial at a later stage as a result of changing circumstances or as a result of an

36 56 of 1996 s 6.

37 See Dicker “The new age of majority revisited” 2008 (Jan/Feb) *De Rebus* 46.

38 *Davidson v Bonafede* 1981 2 SA 501 (C) 509D. See also Caney “Minors' contracts” 1930 *SALJ* 183–185; Van der Vyver and Joubert 159; Van Heerden *et al* *Boberg's Law of Persons and the Family* (1999) 724; Cronjé and Heaton *The South African Law of Persons* (2003) 97–98; Davel and Jordaan 72–75.

39 1933 NPD 415 425.

accident is not a basis for instituting the *restitutio in integrum*.⁴⁰ The minor who relies on *restitutio in integrum* enters a claim for the cancellation of the agreement and for the restoration of the *status quo ante*.⁴¹ After 1 July 2007, as was the case before that date, the *restitutio in integrum* can be relied upon by the minor him- or herself, assisted by his or her parent or guardian, or by the parent or guardian on behalf of the minor.⁴² However, the minor can also wait until he or she becomes a major and then institute the action him- or herself.⁴³ In terms of section 11(d) of the Prescription Act,⁴⁴ *restitutio in integrum* must be applied for within three years after the minor attains majority or else the claims prescribes.⁴⁵ Again section 13(1)(a) of the Prescription Act applies⁴⁶ and varying ages will mark the end of the prescription period, for example from nineteen years onwards and not twenty-two years onwards as in the past. Once again the attorneys concerned with cases such as these should be very cautious: Young adolescents can now forfeit the *restitutio in integrum* at the age of nineteen and not twenty-two years as was the case previously.

10 Maintenance

Parents are legally obliged to support their children provided that they are financially capable of doing so and that the child is in need of support. This duty to support children prevails until the child becomes

40 *Van der Byl & Co v Solomon* 1877; Buch 25 27–28; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 501; *Wood v Davies* 1934 CPD 250 258; *Metedad v National Employers' General Insurance Co Ltd* 1992 3 SA 538 (W) 5411; Hahlo and Kahn *The Union of South Africa* (1960) 385; Boberg 724.

41 In *Davidson v Bonafede* 1981 2 SA 501 (C) 510D–E the court correctly stated that the aggrieved party may claim damages according to the negative *interesse* in order to restore the position to that which it was before the agreement was entered into. Cf also *Wood v Davies* 1934 CPD 250 260–261 where a long-term lease agreement which the parents had concluded on behalf of the minor was cancelled. The court, however, ordered that the other party should be compensated for the use of the property by the minor. See also *Wolff v Solomon's Trustee* (1895) 12 SC 42 49; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 3 SA 739 (NC) 743H; *Barnard v Barnard* 2000 3 SA 741 (C) 752D–I.

42 Cf also *Van der Vyver and Joubert* 161 where the authors indicate that this may happen without the approval of the minor and even without his or her knowledge.

43 *Opperman v Labuschagne* 1954 2 SA 150 (E) 158D–E.

44 68 of 1969.

45 Cf *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA) where the appellant instituted an action for damages against her uncle for sexual assault between 1958 and 1967. The appellant attained majority in 1973 but the action was instituted only in 1999. The trial court held that the appellant's claim had prescribed 3 years after she attained majority. The appellant appealed against this judgment. It was agreed on behalf of the appellant that she had not been aware until 1997 that it was not she, but her uncle, who bore responsibility for the sexual assaults and that this knowledge set prescription in motion. The appeal succeeded and the matter was remitted to the trial court for consideration.

46 *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 880; *Grevler v Landsdown* 1991 3 SA 175 (T) 177A–F; *Road Accident Fund v Smith* [1998] 4 All SA 429 (SCA); *Gqamane v The Multilateral Motor Vehicle Accidents Fund* [1999] 3 All SA 671 (SE) 684.

self-supporting. The fact that the child has become a major is therefore not relevant in constituting the duty to support a child.

The fact of the person's minority or majority is, however, relevant when the onus of proof is considered. When a minor is involved, the facts on which the duty to support are based need not be stated or proved.⁴⁷ Once the person involved becomes a major, the two facts mentioned above on which the duty to support are founded have to be stated and proved.⁴⁸

11 Wills, Trusts, Deeds and Settlement Agreements

In a recent case⁴⁹ where a settlement was made an order of court, the settlement agreement stated that maintenance will be paid until the child becomes "mondig" or self-supporting, whichever occurs first. In this case the child was a grade 12 pupil, already eighteen years of age, and entirely dependent on her parents. Practitioners should be mindful that the wording of settlement agreements such as these have far-reaching consequences for the children concerned. The father in the case under discussion relied on a literal interpretation of the settlement agreement when the mother claimed that the maintenance should be increased. In such a case the child will have to bring an urgent application. It will take time to enforce the duty to support in a case such as this.

12 Conclusion

An implication of section 17 of the Children's Act is, amongst others, that young adolescents above the age of eighteen years have sufficient ability to judge and to choose their own life partners without parental consent. Logic requires that if eighteen years is old enough to be an adult in terms of the Constitution, which is the supreme law, then surely eighteen is old enough in all the areas of private law as well.⁵⁰

The real question to be answered is: Why does the law protect minors? The answer to this question is most probably that they lack *iudicium*, being "discernment or judicative faculty". It is my submission that if an eighteen-year old is capable of deciding on his or her life partner then he or she needs no assistance when entering into a contract or instituting an action in a court of law.

13 The Way Forward

The Children's Act lowered the age of majority for cogent reasons. However, young adolescents between the ages of eighteen and twenty-one years are deprived of the protection that the law once afforded them. If

47 *Gildenhuis v Transvaal Hindu Educational Council* 1938 WLD 260 263.

48 *Grobler v Union Government* 1923 TPD 429 430-431.

49 Discussed by Curlewis in "Onderhoud vir kinders: die bewoording van skikkingsaktes in die lig van die nuwe Kinderwet" 2007 (Nov) *Orde Nuus/Society News* 12.

50 Constitution of the Republic of South Africa s 2.

the well-being of these young adolescents is important, the answer in deciding on the way forward should be found in changing peoples' attitudes towards children. The mind shift that should be made is from a protective approach when dealing with children, to an empowering approach. The latter is only possible when acknowledging that children have rights and responsibilities. The empowering approach is mandatory when applying the Children's Act. This change in the attitudes of people calls for huge efforts in education, development and advocacy.