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Topic: Exploring the possibilities of relaxing the privity principle of contract to accommodate the interests of third parties in South Africa.
DECLARATION

I declare that this thesis, “Exploring the Possibilities of Relaxing the Privity Principle of Contract to Accommodate the Interests of Third Parties in South Africa,” is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

This research is dedicated to my mother, Mavis Goni. The strongest woman I have known.
ACKNOWLEDGEMENTS

This mini-thesis marks the beginning of a new adventure and the end of another. I would really like to extend my gratitude to the following persons:

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KEYWORDS

Accommodate
Beneficiary
Contract
Detriment
Principle
Privity of Contract
Reformation of the privity doctrine
Third party interest
CHAPTER ONE – INTRODUCTION

1.1 INTRODUCTION

This thesis investigates the possibility of relaxing the privity principle of contract to accommodate the interests of third parties in South Africa. It explores concepts relating to the doctrine of privity as well as the two legs that constitute this common law doctrine. It will draw lessons from the English legal system because English law of contract managed to reform the doctrine of privity in order to accommodate the interests of third parties to a contract. While this thesis is not a comparative study of England and South Africa, it will draw substantially from lessons that can be taken from England with regard to abrogating the privity principle of contract. England has been chosen as the point of reference because there has not yet been any other African country that has reformed this privity principle of the common law of contract in order to accommodate the interests of third parties.

Various theories will be employed to try and establish how the doctrine came to be. It has to be noted that this thesis does not allow for a comprehensive discussion of the theories that explain the doctrine of privity and therefore the discussion will only be limited to issues directly relating to the formulation of the doctrine. The thesis will also bring to the fore the general reasons why the doctrine is regarded as essential in the law of contract.

This thesis advocates for the relaxation of the privity doctrine ranging from social contracts to commercial contracts in order to identify the appropriate elements of minimising the negative effects that it has on third parties. It investigates the promulgation of the doctrine in the early periods of the common law as well as to how the doctrine found its roots in South Africa. The doctrine of privity in the English law has undergone a legislative summersault as it has been highlighted to cause considerable injustice to third parties.¹ This reformation was spearheaded by the English law reform commission who noted the dire need to dilute the common law doctrine of privity of contract. The same approach is also going to be taken in this thesis as it is going to traverse the development and the operation of this doctrine in South Africa and how it causes so much detriment to third parties.² The thesis also suggests solutions to the problems

² See chapter 3.2.
incurred by third parties as a result of the privity doctrine as well as solutions to address the problems.

To fully understand the privity doctrine, regard has to be had to the English legal system because the doctrine of privity emanated from there. It was then subsumed into the South African legal system with colonisation and has been part of our legal system up to date. Unlike in the English legal system however, the doctrine of privity of contract has not been reformed in South Africa. It still remains part of our legal system. As the thesis illustrates in chapter three, sometimes the doctrine causes hardships to third parties in a contract. It is for this reason that it must be reformed in order to avoid undue hardships which are sometimes faced by third parties to a contract.

As already mentioned, the doctrine of privity of contract is a long-established principle of the law of contract which was introduced to South African law during the British colonisation of South Africa. Its essence is that only parties who actually negotiated a contract are privy to it and can enforce its terms. While the concept will be explained in detail later on in chapters two and three, for now it suffices to state that privity of a contract entails that no one may be entitled to or bound by the terms of a contract to which he is not an original party. This was a decision reached upon by the common law judges in the ground breaking case of *Tweddle v Atkinson*. This common law principle for the law of contract, however, was not settled during this period. It was not universally accepted as true in the earlier common law. This was mainly because the actions of debt and account had been available to third parties who wished to

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4 Together with Roman Dutch Law. The end result is legal pluralism in South Africa.
7 *Tweddle v Atkinson* (1861 EWHC J57 (QB).
9 Action of debt and account extended the right that lawsuits could be brought against persons who were required to act primarily for someone else’s benefit, such as guardians and partners.
reap the benefit of an arrangement made by others on their behalf. There were also attempts to circumvent this doctrine by the early common law decisions as they allowed a party to sue upon a promise, provided that there was some tie of natural affliction and a family relationship between the third party beneficiary and one of the contracting parties.

It was only in the middle of the 19th century that judges reaffirmed the idea of bargain as the foundation of English Contract, and they unnaturally drew the inference that only the parties to the bargain, themselves incurring reciprocal obligations should enjoy reciprocal rights. The doctrine of privity crystallised in 1861 as such bargain cases were denounced. As mentioned above, the decisive case was *Tweddle v Atkinson* where an intended marriage between the plaintiff and the daughter of William Guy was concluded. A contract was made between Guy and the Plaintiff’s father, whereby each of the contractants promised to pay the plaintiff a sum of money. Guy failed to do so, and the plaintiff sued his executors. The action was dismissed and the authority of *Dutton v Poole* was rejected as it encapsulated that a stranger could sue for a benefit provided that parties entered into a contract for such purposes. The court held that, “on the contrary, it is now established that no stranger to the consideration can take advantage of a contract even though it was made for his benefit.” This gave rise to the seclusion of third parties from suing for their benefit. A contract was thus regarded to be an intimate, if not the exclusive, relationship between the parties who had made it. This gave rise to the doctrine of privity which seeks to exclude a person who is not a party to a contract from acquiring rights under it or from imposing duties on a person who is not a party to a contract.

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12 *Dutton v Poole* (1678) 2 Lev 211.
14 *Tweddle v Atkinson* (1861) EWHC J57 (QB).
15 *Tweddle v Atkinson* (1861) EWHC J57 (QB).
16 *Tweddle v Atkinson* (1861) EWHC J57 (QB).
17 *Tweddle v Atkinson* (1861) EWHC J57 (QB).
18 *Dutton v Poole* (1678) 2 Lev 211.
19 *Tweddle v Atkinson* (1861) EWHC J57 (QB).
As highlighted above, South African law of contract takes from the British law of contract. The common law of contract was influenced by the arrival of the British in 1820.\textsuperscript{21} British common law together with the privity doctrine was thus imposed on South Africa.\textsuperscript{22} In its preamble, the Constitution of the Republic of South Africa recognises “injustices of the past” such as the imposition of unjust laws. The privity doctrine in its current form will be highlighted to be an example of an unjust form of law which was inherited from the past. It is unjust in so far as it does not accommodate the interests of third parties in instances when the latter have genuine interests in a contract. It therefore needs to be reformed to accommodate the interests of third parties as is the case in English law. In as much as the law of contract made it easy for commerce in South Africa, most of these contracts were to the detriment of the local populace.\textsuperscript{23} Thus, the doctrine of privity, while not an irrational inference from the nature of contract in general and of English contract in particular, has in its incidence worked injustice and proved inadequate to the needs of contemporary South Africa.\textsuperscript{24} There is a duty bestowed on the courts by the Constitution to develop the common law to promote the spirit, purport and objects of the Bill of Rights.\textsuperscript{25} It is upon this basis that this thesis suggests a revision of the privity doctrine of contract.

1.2 RESEARCH OBJECTIVES
The aim of this study is to investigate how the privity doctrine can be relaxed to accommodate the interest of third parties in South Africa. The study also aims to:

i. Discuss the disadvantages of the privity doctrine on third parties;

ii. Illustrate that it is possible to relax the privity doctrine to accommodate the interests of third parties;

iii. Examine the importance and benefits of relaxing the privity doctrine in South Africa;


\textsuperscript{22} Woods D Biko – Cry Freedom (1991) 30.


\textsuperscript{24} The doctrine violates a fundamental right which is enshrined in the Constitution of access to courts. The constitution allows anyone with a dispute to approach the Courts and the privity doctrine frustrates this fundamental right by excluding interested third parties. The doctrine hence goes against the prescripts of the law of the land and thus needs to be reformed.

\textsuperscript{25} The Constitution of the Republic of South Africa 1996, Section 39 (2).
iv. Explore international best practices in the reformation of the privity doctrine that South Africa could emulate; and also to,
v. Recommend how the privity doctrine can be relaxed in South Africa to accommodate the interests of third parties.

1.3 PROBLEM STATEMENT
As highlighted earlier, the privity principle sometimes results in harsh and unintended consequences on third parties to a contract. This research in part seeks to address these harsh consequences incurred by third parties by the privity rule in South Africa. It also seeks to suggest how the privity principle can be relaxed in order to prevent third parties from experiencing unintended negative consequences. There is also a vitiation of inalienable rights as enshrined in the Bill of rights to particular individuals if the rule is not reformed. Ultimately, the research will address whether the common law rule of contract can be relaxed to accommodate the interest of third parties. This thesis will also make references contracts ranging from the exceptions created to the privity rule such as stipulatio alteri, cession, pre incorporation contracts, companies contracts and investments on behalf of its employees, and separate legal entity of companies just to mention but a few.

1.4 RESEARCH QUESTION
In light of the research objectives as well as the problem statement outlined above, the main question that this thesis seeks to answer is whether or not the Common Law principle of privity of contract can be relaxed to accommodate the interests of third parties in South Africa.

1.5 LITERATURE REVIEW
Hutchison argues that the privity rule can be relaxed with regard to the creation of rights for third parties since there is nothing inherently objectionable about two persons agreeing to confer a benefit. He however omits to indicate the need to completely reform the rule to include not only when a benefit is conferred but where a third party has an interest in the matter. Other countries such as Ireland have however formalised the reformation of the privity rule to allow a third party to sue for their benefit. The Law Reform Commission of Ireland provisionally recommends that the rule of privity should be reformed to allow third parties to

enforce rights under contracts not only made for their benefit, but for those as well who stand to gain from the contract without necessarily being beneficiaries or parties to the contract. In South Africa, such reformation to the doctrine has not yet occurred. As such, there is a need to also fill the gap that has been created by this old age common law doctrine in South Africa.

Academics such as Kotz are of the view that even though the privity of contract still stands, a very considerable number of exceptions have gradually nibbled away at the principle itself. Indeed, there are a few circumstances of practical importance today where the principle is liable to be applicable and to work without posing a serious injustice or inconvenience. This argument acknowledges the dynamic nature that the law has. The principle might not be causing gross injustice in other jurisdictions but it certainly is doing so in South Africa as the thesis will illustrate in chapter three. A good example of such injustice is noted in the case of Member of Executive Council v Terra Graphics which will be discussed later in chapter three. This case involved a local government authority who relied on the privity doctrine to escape contractual liability despite guaranteeing payment upon completion of a job to a sub-contractor. This case illustrates the injustices that are usually perpetuated in cases of construction contracts to third parties. The doctrine should thus be reformed in order to protect, strengthen and enhance the rights of third party beneficiaries with particular attention to construction contracts. This thesis will therefore illustrate the inconveniences and injustices that will continue to exist if this doctrine is rigidly applied in South African contract law.

Lilienthal J argues that the doctrine has exploded and that the jurisprudence has advanced to such a stage where the law operating on the act of the parties created the duty, established the privity, implied an obligation upon which the action was relied upon. This is an indication that, in some jurisdictions such as Ireland, Britain and the United States of America, efforts are already underway to try and curtail the harsh and unintended consequences that the privity doctrine has on third parties. There is a need to learn and inculcate the reformulation and the

relaxation of this principle in certain circumstances as in some jurisdictions the same developments are taking influence as will be highlighted below.\textsuperscript{33}

While some argue that there is a theoretical basis for the exclusion of third party rights, Ronan MacSweeney maintains that a strict adherence of the privity doctrine can cause considerable inconvenience and apparent injustice on third parties.\textsuperscript{34} This illustrates the position that South Africa is susceptible to if the doctrine is not abrogated to a significant extent. As will be discussed later in chapter two, a rigid adherence to the doctrine has an effect of causing significant inconvenience and injustices to the people who find themselves as interested third parties in contracts. This point is succinctly illustrated in the case of \textit{Member of the Executive Council v Terra Graphics} which involves a provincial government behaving unconscionably as it relied on the doctrine of privity to escape liability from a subcontractor.\textsuperscript{35} The court in this case had an opportunity to develop the common law of the law of contract in as far as the privity of contract is concerned but nevertheless, it did not.

The doctrine has also been described as notoriously inconvenient by John Adams who argues that one important cautionary note should be inserted in the whole paradigm and rationale of the privity doctrine.\textsuperscript{36} Adams suggests that there is need for an adoption of a concept known as reasonable foresight as to the range of contractual liability.\textsuperscript{37} The concept entails that the law simply extends the range of liability beyond the parties to the contract to those who are sufficiently proximate, without affecting the available defences to such a cause of action.\textsuperscript{38} This was the outcome in the British case of \textit{Muirhead v Industrial Tank Specialities} where the court held that it was high time for the concept of foreseeability\textsuperscript{39} to be imported to dilute the harsh

\textsuperscript{33} Reformation has been effected in common law countries of Ireland and England. This reformation has been advocated for by the law reform commissions of these respective jurisdictions as there was an indication in its application that it was causing immense injustices.


\textsuperscript{35} \textit{Member of Executive Council v Terra Graphics} (2015) (4) ZASCA 116.

\textsuperscript{36} John N. A ‘Privity and the Concept of a Network Contract’ (1990) \textit{Legal Stud.} 12.145.

\textsuperscript{37} Hugh Collins \textit{The law of contract} (1986) 112.

\textsuperscript{38} John N. A ‘Privity and the Concept of a Network Contract’ (1990) \textit{Legal Stud.} 12.145.

\textsuperscript{39} Foreseeability concept entails the ability to be apprehensive of the fact that the privity doctrine might result in an injury to a third party who might find an interest in a contract that he/she is not a party to.
and unintended injustices that can be caused by applying the doctrine of privity rigidly. The South African law of contract regulating the privity rule should also conform to this test as suggested by John Adams. This is an indication that the law is developing in other jurisdictions and this should be emulated by the South African judicial system.

Roman law seems to also have profound effect on South Africa’s Law of Contract as the Roman Dutch Law writer Voet remarked that,

“If the mandatory has in turn entrusted the business entrusted to himself to some other person, no action is available to the first mandator against the second mandatory, but the first mandator ought to sue the first mandatary, and the latter in turn to sue the second mandatary.”

This is indicative of the Roman law entrenching the doctrine of privity. This was held in the Watson v Sachs case which is going to be discussed in more detail later in chapter three. The series of legal processions that were mentioned by Voet seem to preclude the nature and setting of the South African environment. South Africa is constituted by a majority of previously disadvantaged and vulnerable members of society. Most of these individuals live in squalid circumstances and they do not afford legal fees required to mount legal battles.

In Watson v Sachs, Van Heerden JA quoting Devilliers CJ disagreeing with Voet remarked that

“I still consider, as I then did, that this principle enunciated by Voet was not intended to apply to cases where in the ordinary course of business it becomes necessary for the agent to employ a subagent. If the custom is established and well known, it would be no violation of that principle to hold that a privity is thus created between the principal and the subagent.”

This obiter signalled the dawn of a new era as far as the issue of the development of the common law was concerned in relation to the doctrine of privity. This laid a fertile and solid foundation for the reformulation of the doctrine of privity in the South African contractual prism. The opportunity was however missed as the Court enunciated that it was only going to be a once off decision where privity would be established between a principle and a sub agent. It was on

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40 Muirhead v Industrial Tank Specialities (1985) 3 WLR 993.
41 Watson v Sachs and Another (1994) ZASCA 419 (A).
42 Watson v Sachs and Another (1994) ZASCA 419 (A).
43 Watson v Sachs and Another (1994) ZASCA 419 (A).
44 Watson v Sachs and Another (1994) ZASCA 419 (A).
this case that signals of change should have been effected to outlaw the common law principle of privity.

1.6 SIGNIFICANCE OF STUDY
The study will add to the existing jurisprudence on the reformation of the common law doctrine of privity of contract and will be of interest not only in South Africa but to other jurisdictions in Africa particularly because of the increase of contracts being concluded which involve third parties on a day to day basis. As already discussed, while this is not a comparative study, this thesis will also significantly refer to England as the latter has made some considerable strides towards reforming this common law doctrine of privity of contract. The United States of America has actually woken up to the realisation that a body of judges in the New York Court of Appeals had, in words at least, distinctly made this legal somersault, and had apparently succeeded in legislating the old principle out of existence.\textsuperscript{45} In the United States, they accepted that the doctrine imposes limitations that are not justifiable and reasonable in an open and democratic society.

1.7 METHODOLOGY
The research will analyse primary sources of law such as relevant international conventions and protocols, the Constitution of South Africa, relevant legislation and case law. Secondary sources such as textbooks, journal articles and newspaper articles that deal with rights of third parties in South Africa are also going to be taken into consideration. It has to be highlighted however that the research shall limit the use of secondary sources as this is a fairly new topic where not much has been written. Internet based publications, reports and other desktop materials will be utilised for this study.

1.8 CHAPTER OUTLINE
Chapter one is an introduction to the thesis; it will give the background to the study, the problem statement, aims of the study, literature review and the significance of the study.

Chapter two will be an analysis of the privity of contract doctrine generally as well as the development of the doctrine.

Chapter three will focus on the conceptual framework regulating the privity doctrine in South Africa.

Chapter four will be an analogy to Britain pertaining to the reformation of the common law doctrine of privity of contract.

Chapter five will be a conclusion of the topic and recommendations for South Africa.
CHAPTER 2 - THE DOCTRINE OF PRIVITY OF CONTRACT

2.1 INTRODUCTION
The first chapter introduced the thesis by focusing on the background to the study, the problem statement, aims of the study, literature review and the significance of the study. The chapter also gave an overview of what will be contained in the research. A brief introduction to the concept of privity was also hinged upon and the doctrine will be explained further in this chapter. This chapter will discuss what the privity principle entails and how it was formulated in the English system as well as to how the doctrine eventually found its roots in South Africa. Much focus is going to be placed on how the doctrine was formulated in the English legal system. This will assist in following and understanding the injustices that are associated with the doctrine as will be highlighted in this chapter. The background to the doctrine of privity is also going to be demonstrated by using the leading cases. The chapter will also discuss various theories which are utilised to explain the doctrine of privity and this is not going to be done comprehensively because the theories have been expounded on by other authors elsewhere. The thesis will only deal with the aspects that help in assisting the genesis of the principle of privity of contract.

2.2 THE PRIVITY PRINCIPLE OF CONTRACT
The principle of privity is one of the noted and respected cornerstones for the law of contract. A contract, being a private transaction, generally creates personal rights and duties only for the parties to the contract and not anyone else. Christie has cited that a contract creates rights and duties exclusively for the parties to that contract and does not include random third parties. The rationale behind this principle is to avoid the imposition of duties on third parties as it would be manifestly unreasonable and unfair if two parties, by their own private act burden a third party to incur obligations that he/she is not cognisant of. The doctrine therefore reinforces the idea that only parties to a contract are legally entitled to enforce it, or be bound

of the fact that, while performance of a contract may in some circumstances result in a benefit, it can also result in a burden for a third party to a contract. As a matter of law, a third party cannot enforce the contract or be subject to liabilities imposed by the contract. Treitel defines the concept of privity as that general rule that a contract should be between two parties to confer rights or impose obligations arising under it and not on any person except the parties to it. The Law Commission of England reiterates the same position as privity is treated with regards to the theory of consideration that is a contract cannot confer rights to impose obligations arising under it on any person except the parties to it.

Furthermore, in terms of privity of contract, the rights and obligations of parties are strictly the private matters of contracting parties and because of this; a stranger has no legal access to them. In simple terms, it means that a non-contracting party cannot bring an action on the contract. The doctrine enunciates a fundamental principle of law of contract that a stranger to a contract cannot sue upon it. In common parlance, the term may mean something secret. This is in keeping with the Webster Third International Dictionary which defines the term privity as something that is not made public or displayed. Similarly under the Random House Dictionary, the word privity signifies private or secret knowledge or participation in the knowledge of something private or secret especially as implying concurrence or consent.

The doctrine of the privity of contract, however, is not only limited to the dictionary meanings as they do not give a complete idea about the doctrine. The common man’s approach to the doctrine and its dictionary meanings, although, helpful in understanding the doctrine to some extent, do not assist us in understanding the legal importance of the doctrine as well as to how

51 Price v Easton (1833) 4 B AD 433.; Tweddle v Atkinson (1861 EWHC J57 (QB); Grant v Stonestreet 1968 (4) SA 1 (A); Jansen v Piennar (1881) 1 SC 276; Cullinan v Noordkaaplandse Aartappelkenmoerkwekers Kooperasie Bpk (1972) 1 SA 761; Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms) Bpk (1980) 4 SA 475 (A); Minister of Public works and Land Affairs v Group five Building Ltd (1999) 4 SA 12 (SCA).
55 Hugh Collins The law of contract (1986) 112.
it reached the shores of South Africa. The doctrine of privity has not been defined specifically and convincingly in South Africa but it has been well established in England and its meaning and scope are very clear.\textsuperscript{60} This is pertinent as the development of the doctrine in England led to the development of the doctrine as well in South Africa.\textsuperscript{61}

The doctrine has two distinct elements that can be subtle in appearance. It prevents third parties from obtaining rights or benefits under a contract. This hand of the doctrine refuses to recognise a \textit{jus quasitum tertio}.\textsuperscript{62} The other aspect also prohibits parties in a contract from imposing liabilities or obligations on third parties. This concept which has been identified as the first limb was intended to curtail strangers from enforcing contractual provisions. It has also been applied in cases where the contract attempts either expressly or impliedly, to confer benefits on a third party as was highlighted in the South African case of \textit{Mohammed v Southern Sun International Hotel}.\textsuperscript{63} Third party beneficiaries are therefore not entitled to take an enforcement action if they have been denied the promised benefit and such benefit can range from financial, goods, services or other advantages such as the exclusion of liability or an indemnity in favour of a third party.\textsuperscript{64}

A classic example of the dilemma that can be faced by a third party who is promised the benefit under the contract might be where under a contract, X promises Y to pay a sum of money to Z as a consequence of a transaction. Provided that X fails to pay Z and Y does not pursue X for breach of contract, this results in little that Z can do to receive or enjoy the benefit of X’s promise. The doctrine in this event will operate as an obstacle to Z in pursuing an action against X and Y. This is most apparent in a lot of construction contracts where there can be a contract between an employer and the main contractor which may be beneficial to a sub-contractor who happens to be the third party in this event. The third party’s rights in this event are subject to the doctrine of privity. It is therefore fundamental to determine how the doctrine became a force to be reckoned with in the contractual sphere to understand how it is violating the rights


\textsuperscript{61} The inception of the privity doctrine will be discussed in chapter 3.

\textsuperscript{62} A right acquired or vested in a third party.

\textsuperscript{63} \textit{Mohammed Leisure Holdings v Southern Sun International (PTY) Ltd} (183/17) (2017) ZASCA 176.

\textsuperscript{64} Mahmood A \textit{The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia} (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
of third parties. This is the basis upon which the need to explore the possibilities of relaxing the privity principle emanates from.

2.3 BACKGROUND TO THE DOCTRINE OF PRIVITY OF CONTRACT
In the middle of the nineteenth century, the common law judges reached a decisive conclusion upon the scope of a contract.\textsuperscript{65} It was declared that no one may be entitled to or bound by the terms of a contract to which he is not an original party.\textsuperscript{66} This marked the introduction of the privity principle in the domain of the law of contract. As has been highlighted in chapter one, the privity doctrine consists of two limbs. The first limb was aimed at preventing a third party from enforcing benefits conferred on them by those contracts.\textsuperscript{67} This suggests that only parties to a contract can sue or be sued in terms of that contract and third parties were not entertained in the contractual matrix of the two contracting parties. This has been noted to be the problematic element of the doctrine of privity as enforcing this limb will result in third parties incurring injustices hence the need to find a way to relax the common law doctrine in order to accommodate the interests of third parties.\textsuperscript{68}

In addition to the above, the second limb to the doctrine consisted of the proposition that parties to a contract cannot impose liabilities or obligations on third parties.\textsuperscript{69} The second limb differs from the first limb in that the latter attracts criticism and scrutiny as it fails to address the intention of the contracting parties to confer a benefit on a third party.\textsuperscript{70} This limb has not attracted much scrutiny as the conduct of two parties cannot be imposed on a third party. This usually happens where a third party is going to be burdened with an obligation. It is only logical therefore, not to impose an obligation to a third party.

\textsuperscript{66} \textit{Price v Easton} (1833) 4 B AD 433., \textit{Tweddle v Atkinson} (1861 EWHC J57 (QB).
\textsuperscript{67} Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
\textsuperscript{68} Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 337.
\textsuperscript{69} Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 337.
\textsuperscript{70} Furmiston \textit{Law of Contract} 12\textsuperscript{th} ed (1991) 450.
As highlighted in chapter one, the key objective of this thesis is to analyse the impact of the doctrine of privity in South Africa on third party beneficiaries of commercial contracts paying particular attention to construction contracts for the purpose of identifying third parties most disadvantaged by the doctrine. It is therefore important to highlight the need to reform the privity doctrine. The relaxation of the privity doctrine can be observed from several common law countries including England, Ireland and Malaysia which opted to legislatively reform the first limb of the doctrine of privity by allowing third parties in certain circumstances to enforce a contract made for their benefit.

2.4 HISTORICAL DEVELOPMENT OF THE PRIVITY DOCTRINE

The historical development of the doctrine of privity shall trace the subtle elements that were utilised by the common law courts before the leading case of *Tweddle v Atkinson*\(^{71}\) and the ground breaking case of *Berswick v Berswick*.\(^{72}\) The formulation of the privity doctrine commenced way before the decisive case of *Tweddle v Atkinson*\(^{73}\) was heard. The privity principle was first enforced in the case of *Jordan v Jordan*\(^{74}\) as shall be discussed below.

The doctrine of privity of contract owes its origin to the English common law courts. This doctrine originated during the period when the judges were busy discovering a suitable principle for determining who was entitled to sue for breach of a promise. It, however, took considerable time to come to prominence. The doctrine of privity of contract was, for the first time, applied in the case of *Jordan v Jordan*\(^{75}\). The doctrine was however not applied in the way that the privity doctrine has crystallised but definitely left room for development. In this case, the lawsuit of a non-contracting party to a promise did not succeed.\(^{76}\) Following this ruling to exclude third parties from suing in terms of a promise, in *Lever v Keys* the court overruled the decision in *Jordan v Jordan* and allowed the stranger's suit on a contract.\(^{77}\) In this case, the father of a girl promised the father of a boy that if he would be willing to give his consent to the marriage of the boy with the girl and assure 40 pounds to the son, he would pay 200 pounds

\(^{71}\) *Tweddle v Atkinson* (1861) EWHC J57 (QB).

\(^{72}\) *Berswick v Berswick* (1966) Ch 538.

\(^{73}\) *Tweddle v Atkinson* (1861) EWHC J57 (QB).

\(^{74}\) *Jordan v Jordan* (1594) Cro Eliz 369.

\(^{75}\) *Jordan v Jordan* (1594) Cro Eliz 369.

\(^{76}\) *Jordan v Jordan* (1594) Cro Eliz 369.

\(^{77}\) *Lever v Keys* (1598) Cro Eliz 619.
to the son in marriage. The action of assumpsit was brought by the son upon breach of the promise. It was held that the son was entitled to sue thereby defeating the precedence that was set in *Jordan v Jordan* that a stranger could not raise an assumpsit in a contract that he is not a part of. It can be noted that the development of this common law doctrine was marred with confusion at this early stages. The two contrasting provisions were mainly at play and there was still a definitive position to be taken.

*Taylor v Foster* reaffirmed the decision in *Jordan v Jordan* and applied the doctrine of privity of contract and a stranger to the contract was prevented from maintaining his action upon breach of the contract. In this case, the defendant, in consideration that the plaintiff would marry his daughter, promised to pay 100 pounds in two instalments to one J S to whom the plaintiff was indebted. The court held that the plaintiff was the proper person to sue and not J.S thereby reinforcing the privity doctrine. The doctrine had not been established and developed but indications of the severity of the doctrine were starting to become apparent at this early age. There was therefore a dire need to come up with a clear-cut position as to whether the doctrine should be implemented in its rigidity or completely scrapped off.

In the case of *Provender v Wood* however, the court overruled the decision of *Taylor v Foster* and allowed a stranger's action on a contract. This was indicative of the indecisiveness of the common law courts as the doctrine began to take traction. There was a certain level of uncertainty surrounding the application of this doctrine as to whether a third party could actually sue or be sued by contracting parties. Similarly, in *Sprat v Agar* the father of a girl promised the father of a boy to transfer certain land to the boy in consideration of the boy's marriage with his daughter. The court in this matter held that the son, although, not a promise,

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78 *Lever v Keys* (1598) Cro Eliz 619.
79 One of the common law form of action. It determined the right to sue and the relief available for someone who claimed that a contract had been breached.
80 *Jordan v Jordan* (1594) Cro Eliz 369.
81 *Taylor v Foster* (1601) Cro Eliz 776.
82 *Taylor v Foster* (1601) Cro Eliz 776.
83 *Taylor v Foster* (1601) Cro Eliz 776.
84 *Provender v Wood* (1630) Hetley 30.
85 *Sprat v Agar* (1658) 2 Sid 115.
could sue. In another leading case on privity of *Bourne v Mason* the court overruled the *Provender v Wood* and *Sprat v Agar* cases and held that the doctrine of privity of contract was applicable. The plaintiff's action in this case to sue the contract failed as the court held that the plaintiff was not the proper person to sue as it said that the plaintiff was a stranger and no meritorious cause moved from him. The consideration did not move from the plaintiff, he could not be held entitled to bring an action for enforcing his claim on breach of contract. The privity principle was therefore taking form as it proved to be getting bolder and bolder by each passing case that required the employment of the doctrine. The various inconsistent decisions where the privity doctrine featured indicated that this was an area that needed special and particular attention. The development of the doctrine was therefore associated with a lot of indecisiveness as it has not been decided whether to allow a stranger to be involved in the affairs of two contractual parties.

The case of *Dutton v Poole* proved to be an enemy of progress to the strides of the doctrine developing as the court of the King's Bench overruled the decision in *Bourne v Mason* case and upheld the stranger's claim, but on a different ground. The court did not follow the doctrine of privity of contract strictly. The court observed that the stranger was having very close relations to the promisee. He could, therefore, maintain an action on a contract as a beneficiary. In this case the father of the defendant wanted to sell some timber trees. The defendant promised in consideration that his father would refrain from cutting down the trees to pay to his sister Grizil £1000. Grizil, who was Mrs. Dutton with her husband sued for breach of the promise. It was held that the action was maintainable. It appears that the basic ground in this case for ignoring the doctrine of privity of contract was the very near and affectionate

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86 *Sprat v Agar* (1658) 2 Sid 115.
87 *Provender v Wood* (1630) Hetley 30.
88 *Sprat v Agar* (1658) 2 Sid 115.
89 *Bourne v Mason* (1699) 1 Ventris 6.
90 *Bourne v Mason* (1699) 1 Ventris 6.
91 *Dutton v Poole* (1678) 2 Lev 210.
92 *Dutton v Poole* (1678) 2 Lev 210.
93 *Dutton v Poole* (1678) 2 Lev 210.
94 *Dutton v Poole* (1678) 2 Lev 210.
95 *Dutton v Poole* (1678) 2 Lev 210.
relation between the plaintiff and her father who was the promisee under the contract. The court was of the opinion that natural love and affection could constitute consideration, therefore, the consideration and promise to the father could extend to the children for there existed natural love and affection between them. The plaintiff was no doubt, a stranger to the contract, but not a stranger to the consideration, she was deemed to have furnished consideration, so she was held entitled to sue. The court in *Dutton v Poole* reiterated that the principle of privity was of paramount importance and worthy of protecting by the court but created an exception where a claim in assumpsit was allowed.

It is submitted that this was the case where an idea emanated that if the stranger, upon whom contractual benefit was to be conferred, was closely related by blood to the promisee, a right of action would vest in him. The development of the privity doctrine also continued with the case of *Crow v Rogers* where a stranger could not base his claim on breach of a promise. In this case, a person named Hardy owed 70 pounds to Crow and an agreement was made between Rogers and Hardy whereby Rogers promised to repay Hardy's debt in consideration that Hardy would give a house to him. On the basis of this promise Crow sued Rogers but, the court rejected his claim on the ground that he was a stranger to the agreement and consideration.

The above view was confirmed in the leading case of *Price v. Easton*. However, in the present case, the court preferred to accept only one of the two reasons given for rejecting the claim in *Crow v Rogers*. This reason was that as the plaintiff was a stranger to the contract he could not enforce the contract. The facts of the case were that one W.P owed 13 pounds to Price and he promised to work for Easton who in lieu of it, promised to repay his debt to Price. W.P. did the work but, Easton failed to repay the debt and Price sued Easton for breach

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96 *Dutton v Poole* (1678) 2 Lev 210.
97 *Dutton v Poole* (1678) 2 Lev 210.
98 *Dutton v Poole* (1678) 2 Lev 210.
99 *Dutton v Poole* (1678) 2 Lev 210.
100 *Crow v Roger* (1724) 1 str. 592.
101 *Crow v Roger* (1724) 1 str. 592.
of this promise. The suit was rejected and the observation of the court in this case in defence of privity of contract is worth quoting:

"No one may be entitled to or bound by terms of a contract to which he is not an original party."

**Tweddle v Atkinson** is the case in which the doctrine of privity of contract was finally established by the Court of Queen's Bench in 1861. In consideration of an intended marriage between plaintiff and daughter of one W. Guy, the plaintiff's father entered into a contract with W. Guy. By this contract, both agreed to pay the plaintiff a definite sum of money which Mr Guy failed to do. The plaintiff sued his executors but the suit was dismissed by the court. It is to be noted that the court in rejecting plaintiff's claim laid more emphasis on doctrine of privity of consideration than on the doctrine of privity of contract. Nevertheless, the doctrine of privity of contract acquired a definite shape in this case. An analysis of the above decisions reveals that although the origin of the doctrine of privity of contract may well be traced in some earlier decisions, it was the decision in **Tweddle v Atkinson** which indeed ended the uncertainty about the doctrine and gave finality to it. The outcome of this case laid a foundation for the doctrine of privity to regulate contractual dealings in which third parties were involved.

It is pertinent to mention that a doctrine which had been toiling hard for its existence in the nineteenth century had finally succeeded in getting the final seal of approval by the House of Lords in the leading case of **Dunlop Pneumatic Tyre Co.Ltd. V. Selfridge & Co. Ltd.** The plaintiff in this case sold a number of tyres to Dew and Company with an agreement that Dew and Company would not resell them below a fixed price. Dew and Company sold the tyres to Selfridge who agreed to observe the restriction and promised to pay to Dunlop Company 5 pounds for each tyre if he violated the restriction clause but Selfridge sold the tyres to another at a price which was below the price fixed by restriction clause in the agreement. The court rejected the claim of the plaintiff and held that a stranger to a contract had no right to sue upon

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107 **Tweddle v Atkinson** (1861 EWHC J57 (QB).
108 **Tweddle v Atkinson** (1861 EWHC J57 (QB).
110 **Dunlop Pneumatic Tyre Co Ltd. V. Selfridge & Co. Ltd.** (1915) AC 847.
111 **Dunlop Pneumatic Tyre Co Ltd. V. Selfridge & Co. Ltd.** (1915) AC 847.
112 **Dunlop Pneumatic Tyre Co.,Ltd. V. Selfridge & Co. Ltd.** (1915) AC 847.
it and ascertained that the plaintiff was a stranger to the contract between Dew & Company and Selfridge.\(^{113}\) It can therefore be noted that the claim of the plaintiff was rightly rejected, in the absence of such an attitude of the court the commerce would have suffered badly. This became the leading case on the validation of the privity rule as a doctrine of the Law of contract.

### 2.5 HISTORICAL FORMULATION OF THE DOCTRINE

The development of the doctrine of privity can be explained by three individual theories and these are the interest theory, the benefit theory and the consideration theory. These theories enabled the doctrine to take shape as courts were able to crystallise different elements of the doctrine from these theories. The scope of this thesis does not allow for a substantial and comprehensive discussion of each of these theories. Besides, this has been done by scholars elsewhere.\(^{114}\) The discussion of these theories in this section is limited to the underlying values and principles contained in each of these three theories in respect of the privity doctrine.

#### 2.5.1 INTEREST THEORY

The interest theory allows a third party to enforce a claim for a benefit promised, for it is in the better interest of society as well as that of the third person.\(^{115}\) The interest theory which can be traced to the early 17\(^{th}\) century diminished in popularity around 1680.\(^{116}\) In terms of the interest theory, the reason for permitting third parties to be involved in actions wherein they were not primary contractants was because non-performance of the promise caused an injury to the third party beneficiary’s interest. If the third party had a clear interest which entitled him to an enforcement action and compensation for injury, there should not have been any deterrence on him to bring an action.\(^{117}\) This is the position that is being sought by many who feel that the

\(^{113}\) *Dunlop Pneumatic Tyre Co., Ltd. V. Selfridge & Co. Ltd.* (1915) AC 847.

\(^{114}\) See for example; Mahmood A *The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia* (unpublished LLD thesis, Queensland University of Technology, 2013) 76.


\(^{117}\) *Brand v Lisly* (1610) Yelv 164.
privity principle as it is currently observed in South Africa, is operating to the detriment of third parties today.\textsuperscript{118}

2.5.2 THE BENEFIT THEORY
Subsequent, to the interest theory was the benefit theory. This theory also made its appearance in the early period of the 17\textsuperscript{th} century.\textsuperscript{119} The judicial trend at this particular time was to recognise promises of gifts, marriage contracts and family agreements even though the third party beneficiary gave no consideration and had no compensable interest.\textsuperscript{120} The idea of a benefit provided grounds for the third party beneficiary’s action. This was aired out in the \textit{Rook v Wood} case where two brothers had the right to sue for a promise made to their father by the defendant.\textsuperscript{121} The promise was that the defendant would pay the brothers if the father charged his land for annuity and this action was allowed on the basis that the promise was made for the benefit of the brothers.\textsuperscript{122} The court stated that the plaintiff did nothing of trouble to himself or benefit to the defendant but is a mere stranger to the consideration.\textsuperscript{123} The benefit theory therefore entailed that the action was allowed if there was a benefit made and in the above case, the benefit was made to the brothers.

2.5.3 THE CONSIDERATION THEORY
Despite the concerted attempts to recognise the interests of third parties in a contract, the development of the benefit theory was curtailed by the case of \textit{Bourne v Mason} where a third party beneficiary’s action failed on the ground that he had not provided consideration for the bargain.\textsuperscript{124} The court in this case based their decision on the basis that only those who provide consideration have the right to sue and it provided the emergence of the consideration theory. The third party had no right to maintain an action and enforce it. As the interest and the benefit theory were being replaced by the consideration theory, it resulted in the relief for third party

\begin{thebibliography}{9}
\bibitem{Mahmood} Mahmood A \textit{The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malysia} (unpublished LLD thesis, Queensland University of Technology, 2013) 123.
\bibitem{Clarence} Clarence B, \textit{The history of the beneficiary action and the need for reform of the parties only rule in malysia} (unpublished PhD thesis st clements 2001) 84.
\bibitem{Rook} \textit{Rook v Wood} (1588) Cro Eliz 164.
\bibitem{Lever} \textit{Lever v Heys} (1599) Moo k B 740.
\bibitem{Bourne} \textit{Bourne v Mason} (1669) Vent 457.
\bibitem{Bourne2} \textit{Bourne v Mason} (1669) Vent 457.
\end{thebibliography}
beneficiaries being curtailed at common law. There are however a number of inconsistent statements about support for the doctrine of privity as will be highlighted in the third chapter.

The consideration theory was concretised in the famous case of *Tweddle v Atkinson* around the period of 1861 as it was made succinctly clear that consideration had to be effected as a condition for the enforcement of a contract. This was the period that put an end to the uncertainty of the position with regards to the doctrine of privity in the contractual realm. The case elucidated that a third party is unable to sue on a contract between two others even though it was made for the benefit of the third party.

The consideration position was also followed in the case of *Dunlop Pneumatic tyre Co ltd v Selfridge and Co* where the learned Judge ruled that only parties to a contract can sue and be sued on it. This decision was substantiated by three basic reasons and the first being that the party to a contract can only be one to sue under it. The second basis was that the doctrine of consideration requires that a person with whom a contract is made is only able to enforce it if there is consideration from the promise to the promissor. The third being based on agency requires that a principal not named in the contract can only be sued if the promisee contracted as an agent. In *Dunlop Pneumatic tyre Co ltd v Selfridge and Co*, the Court did not find any consideration passing between Dunlop and Selfridge and there was no agency relationship between the relevant parties hence Dunlop’s case failed. Following this case, the doctrine of privity was firmly established as a doctrine in English contract law and was reaffirmed by the house of Lord’s in *Scruttons Ltd v Midland silicones ltd*.

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127 *Dunlop Pneumatic tyre Co ltd v Selfridge and Co* (1915) AC 847 HL.
130 Hugh Collins *The law of contract* (1986) 112.
131 *Dunlop Pneumatic tyre Co ltd v Selfridge and Co* (1915) AC 847 HL.
132 *Scruttons Ltd v Midland silicones ltd* (1962) AC 446.
The precedent for the privity doctrine was set in the case of Beswirck v Beswick where a coal merchant transferred his business to his nephew who made various promises in return.\textsuperscript{133} One of them was that he would, after his uncle’s death pay a certain amount of money to the uncle’s widow.\textsuperscript{134} The uncle indeed passed away and the widow brought an action to enforce the nephew’s promise suing both in her own right and as administratrix.\textsuperscript{135} The House of Lords ruled that the widow could only enforce the nephew’s promise in her capacity as an administratrix and she was entitled to an order of specific performance. She could therefore bring an action as a third party even though the contract was to her benefit. This marked a milestone for the doctrine of privity as it was enshrined in the English Law of Contract. The effect, therefore, of the privity doctrine is that, a person who is not party to a contract is prohibited from suing a party under the contract or enforcing the benefit of the contract.\textsuperscript{136}

2.6 GENERAL RATIONALE FOR THE PRIVITY DOCTRINE

It has been argued that the first leg of the privity doctrine is harder to justify.\textsuperscript{137} Furmiston, however argues that denial of a third party right under a contract may be justified on four bases as firstly, a contract is a private affair which should only affect the parties to it. The second basis is that it would be unjust to allow a person to sue on a contract on which he or she could not be sued. The third is that if parties could enforce contracts made for their benefit, the rights of contracting parties to rescind or vary such contracts would be unduly hampered. The last is that a third party is often merely a donee and a system of law which does not give a gratuitous promissee a right to enforce the promise is not likely to give this right to a gratuitous beneficiary who is not even a promisor.\textsuperscript{138}

Collins also sites that there are three principal justifications for the survival of the privity doctrine and the first one is the concept of autonomy.\textsuperscript{139} The concept of autonomy entails that contractual rights and duties remain personal to those who create them and that is the parties

\textsuperscript{133} Berswick v Berswick (1966) Ch 538.
\textsuperscript{134} Berswick v Berswick (1966) Ch 538.
\textsuperscript{135} Berswick v Berswick (1966) Ch 538.
\textsuperscript{137} Pavey & Matthews pty Ltd v Paul (1987) CLR 221.
\textsuperscript{138} Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
\textsuperscript{139} Hugh Collins The law of contract (1986) 112.
in the contract. This reason coincides with the one proposed by Treitel who believes privity is a two party affair only. Smith also contributes to the literature by forwarding that contractual obligations are voluntary in nature and they are undertaken by and extending only to particular persons who undertook the voluntary obligations. Third parties are not included in these promises undertaken in terms of the voluntary obligations hence should not be able to claim or enforce contracts made to others.

Mutuality of rights is also another reason why proponents for privity of contract vie for the doctrine to remain in full force. The third party provides nothing in return for the promised benefit and cannot be liable for breach of contracts. It is therefore inequitable to give the third party the right to sue upon the contract. The third proposed reason for the survival of the privity doctrine is the fear of indeterminate range of liability. A danger of introducing third party rights is the possibility of exposing the promisor to an indeterminate range of liability for an indeterminate time to an indeterminate class. This justification is premised on the fundamental principle that the law of contract must limit liability as English law had established this line firmly at a point where a person was a party to the contract.

2.7 CONCLUSION
The chapter traced the historical formulation of the privity principle by focusing on the theories that were utilised to develop the privity principle. The interest, benefit and the consideration were explained and their contribution to the development of this jurisprudential doctrine. The chapter also articulated the background to the privity doctrine. The emphasis was placed on where the problem with the privity doctrine lies, that being it causes significant injustices to third parties. Several general principles of this cornerstone of the law of contract were also expounded. The historical development of the privity doctrine was also explored sighting the myriad and a plethora of approaches in cases that involved third parties. This was noted to be

142 Hugh Collins The law of contract (1986) 112.
145 Hugh Collins The law of contract (1986) 112.
146 Ultramares Corporation v Touche (1931) 174 NE 441.
the developing phase of the privity doctrine as there were some progressive steps as well as some frustrations in the crystallisation of the principle as a common law principle in the law of contract. Earlier cases that had subtle elements of the doctrine were discussed leading to a point where there are various leading and ground breaking cases with regards to the privity doctrine. This background helps in understanding how the privity doctrine was conceived in the common law of contract.
CHAPTER 3 – THE PRIVITY DOCTRINE IN SOUTH AFRICA

3.1 INTRODUCTION

The previous chapter dealt with the background and the premises upon which the doctrine of privity of a contract is founded upon. The chapter also traced the background to the doctrine where the common law judges reached a decisive decision upon the scope of a contract. It further went on to enunciate the historical development of the doctrine by focusing on the first cases where the doctrine was applied. The cases that frustrated the development of the doctrine were also highlighted. The principle was also shaped by theories and these amongst other things have been explained briefly as this thesis does not allow for an in depth analysis of these theories. The chapter ended on discussing the general rationale of the privity doctrine. Be that as it may, this chapter will deal with how the doctrine of privity operates in South Africa focusing on the rationale and the criticisms thereof. The chapter will also look at the exceptions that have been levelled against this common law doctrine.

As was discussed above in chapter one, the doctrine of privity of contract is a common law doctrine. It has its genesis in the decision of a leading English case of *Tweddle v Atkinson*. Although there is no specific provision under the South African law of contract dealing with the doctrine, the doctrine is implicit in various provisions of the law of contract. This chapter will focus on the privity doctrine in South Africa showing why the need for reform should be entertained.

3.2 THE DOCTRINE OF PRIVITY OF CONTRACT IN SOUTH AFRICA.

As explained in the previous chapter, the privity doctrine functions to make sure that only contracting parties acquire rights or incur duties in terms of the obligation or obligations created by the contract and that third parties are not directly affected as the rights derived from the obligation are personal and relative. The rule has been negatively applied in South Africa as it states that a particular litigant has no contractual cause of action against another litigant when the latter is an outsider to the contract. Contracts for the benefit of third parties have been

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accepted by institutional writers\textsuperscript{151} of South African law and by the courts. There has however been a fundamental debate regarding the construction of the contract for the benefit of third parties in South Africa as a result of the influence of the English doctrine of consideration.\textsuperscript{152}

The case of \textit{Unitrans Freight (Pty) Ltd v Santam Ltd}, categorically emphasised that prior to acceptance a third party has no right to a contract whatsoever, whether contingent or otherwise.\textsuperscript{153} This reiterates the same position in the English system that a third party should not interfere in the contract between two parties regardless of a benefit accruing to the third party. The court indicated that, the beneficiary had nothing more than a mere expectation, which could, for instance, not survive her death.\textsuperscript{154} Whether these decisions will be the final word on the matter remains to be seen.\textsuperscript{155} This case highlights a dire need for reform of the doctrine and looks for ways to relax rigid application of the rule as it often results in injustices for third parties.

\subsection*{3.3 OPERATION OF THE PRIVITY DOCTRINE IN SOUTH AFRICA}

The doctrine of privity has been a contentious subject by the judiciary and academic commentators in relation to the aspect that only parties to a contract can sue or be sued.\textsuperscript{156} As mentioned earlier in chapter 2, a third party is prevented from enforcing benefits conferred on them by contracting parties which in turn results in third parties suffering loss and injustice. This injustice incurred by third parties has resulted in some common law countries such as Britain making legislative summersaults to circumvent the harsh and unintended consequences that result from the doctrine. As has been highlighted in the introduction of chapter one, the doctrine was established in the famous English case of \textit{Tweddle v Atkinson} where the fathers of the engaged couple contracted with each other to pay some money to the son on the marriage

\begin{itemize}
\item \textsuperscript{151} Particularly Grotius and Voet.
\item \textsuperscript{152} Van Huyssteen \textit{Contract law in South Africa} (2017) 146.
\item \textsuperscript{153} \textit{Unitrans Freight (Pty) Ltd v Santam Ltd} (2004) 6 SA 21 (SCA).
\item \textsuperscript{154} \textit{Unitrans Freight (Pty) Ltd v Santam Ltd} (2004) 6 SA 21 (SCA).
\item \textsuperscript{155} \textit{Unitrans Freight (Pty) Ltd v Santam Ltd} (2004) 6 SA 21 (SCA).
\item \textsuperscript{156} Mahmood \textit{A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia} (unpublished LLD thesis, Queensland University of Technology, 2013) 76. The first limb is that only parties to the contract are legally entitled to enforce the contract hence third parties do not obtain rights or benefits under the contract. The second limb prevents parties to the contract imposing liabilities and obligations on third parties.
\end{itemize}
taking place, and it was held that the contract could not be enforced by the son.\textsuperscript{157} This was the genesis upon which the doctrine found its roots and stretched to most countries where the common law doctrine was imposed on a subjugated people and this includes jurisdictions like South Africa. It is trite that the test to determine whether there was privity of agreement or not is a factual one and requires a careful consideration of the factual matrix.\textsuperscript{158} This is going to be the approach to discussing the doctrine of privity in South Africa.

The privity doctrine has been utilised by South African courts immensely.\textsuperscript{159} For example, the court in \textit{Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC} dealt with an issue where the doctrine was employed.\textsuperscript{160} The matter before the Court was essentially a claim for specific performance, but the main stumbling block in the applicant’s cause of action was the absence of privity of contract.\textsuperscript{161} The court remarked that,

\begin{quote}
"in the absence of privity of contract between the applicant and the council, the applicant does not have the necessary locus standi to bring the present application against the council."
\end{quote}

The court heard that the third respondent, a local authority, had invited tenders, in accordance with its black empowerment policy, for the purchase and development of three pieces of land.\textsuperscript{163} It had subsequently accepted the tender submitted by the first respondent, Lubbe and had sold the land to it in terms of two agreements.\textsuperscript{164} The agreements required Lubbe to commence with the development of the properties within six months from the date of transfer, and to complete the development within 18 months.\textsuperscript{165} Some two months later, without having obtained transfer of the properties from the local authority (and without having commenced development of the properties), Lubbe sold them to the applicant, Cosira, in terms of two further agreements (the August 2005 agreements). After the land had remained registered in the name of the local authority for some time, Cosira brought an application against both the local authority and Lubbe for an order directing Lubbe to take transfer of the properties from

\begin{footnotes}
\textsuperscript{157} Tweddle v Atkinson (1861 EWHC J57 (QB)).
\textsuperscript{158} Member of Executive Council v Terra Graphics 2015 (4) ZASCA 116.
\textsuperscript{159} Watson v Sachs and Another (1994) (3) SA 655 (AD); Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (PTY) ltd (1985) All SA 347 (A); +Member of Executive Council v Terra Graphics 2015 (4) ZASCA 116.
\textsuperscript{160} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\textsuperscript{161} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\textsuperscript{162} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\textsuperscript{163} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\textsuperscript{164} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\textsuperscript{165} Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction 2011 (6) SA 331 (GSJ).
\end{footnotes}
the local authority and directing both Lubbe and the local authority to do all things necessary to give effect to the August 2005 agreements and pass transfer of the land into Cosira’s name. The court held that Cosira could not sue the municipality as there was no privity between the two.\(^{166}\) It has to be noted that the court indicated that privity could only be established between the Local government and Lubbe and one between Lubbe and Cosira. The court therefore disregarded the \textit{causal nexus} between the parties in order to determine whether indeed there were reasonable grounds to establish privity.

The privity rule has also been used by parties to escape contractual liability.\(^{167}\) This has been a huge problem that surrounds this common law doctrine as most parties will raise lack of privity to escape their contractual obligations.\(^{168}\) Third parties are often left without recourse as the exceptions do not extend to their circumstances.\(^{169}\) This came to light in the case of \textit{City Of Cape Town v Khaya Projects (Pty) Ltd and Others} where Counsel for second respondent submitted further that it was not possible for the court to deal with the alleged defective work by first respondent because there was no privity of contract between them.\(^{170}\) The contract was between the first and second respondents, and not with the applicant. This case is particularly interesting as it shows the injustice incurred by third parties in contractual matters. In this instance, the doctrine was employed to ensure that the third party could not get the relief he sought. This becomes a cause for concern as it highlights that the doctrine has been abused as it perpetrates injustices for the poor.

The Constitution recognises that no one may be deprived of property except in terms of a law of general application.\(^{171}\) This right has been violated where the doctrine has been applied. The doctrine has been employed by both private persons and juristic persons. What is particularly striking is the prevalence of local municipalities employing this doctrine. A good illustration would be the case of \textit{City of Cape Town v Khaya Projects} dealt with development of properties

\(^{166}\) \textit{Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction} 2011 (6) SA 331 (GSJ).


\(^{168}\) \textit{Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (PTY) Ltd} (1985) All SA 347 (A), \textit{Member of Executive Council v Terra Graphics} 2015 (4) ZASCA 116.

\(^{169}\) Mahmood A \textit{The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia} (unpublished LLD thesis, Queensland University of Technology, 2013) 76.

\(^{170}\) \textit{City Of Cape Town V Khaya Projects (Pty) Ltd and Others} 2015 (1) SA 421 (WCC).

\(^{171}\) The Constitution of the Republic of South Africa 1996 Section 25 (1).
for the benefit of third parties (community of Witsand).\(^{172}\) The local government contracted with a contractor to build houses for the benefit of the community.\(^ {173}\) The contractor however constructed poor structures and the community brought an application against the local government to which the government raised the privity of contract as a defence as they had entered into a contract with the contractor and not with the community.

The court noted that the City’s case is that whilst it bears a positive constitutional obligation as an organ of state to provide adequate housing, because of the widespread problem of contractors building defective low cost housing, an order from a court will provide clarity to housing developers that when building for the State, they are also bound by constitutional obligations.\(^ {174}\) The City wanted all construction companies to incur a constitutional obligation not to build defective houses. On that basis it sought a declaration from the Western Cape Division of the High Court that Khaya failed to comply with its constitutional obligation to construct adequate housing in terms of section 26 of the Constitution, alternatively, a declarator that Khaya, in concluding the contract to provide and construct housing as part of the Witsand Project, undertook constitutional obligations as set out in s 26(1) of the Constitution. The court a quo dismissed the application with costs but granted leave to appeal. The Court’s reasoning was that there was a severe lack of privity between all the interested parties in the case. It can be noted however that the third party was immensely affected by this decision as the court allowed an application to be brought for appeal. It is therefore evident that third parties will forever be excluded from contracts that have a bearing on their constitutional rights if the doctrine of privity is applied rigidly.

Be that as it may, courts in South Africa have played a significant role in trying to regulate the operation of the doctrine.\(^ {175}\) The courts in most cases have noted that the doctrine is mostly used by unscrupulous and dubious parties who attempt to escape contractual liability.\(^ {176}\) The court has been loath to this practise and has cautioned against the misuse of the doctrine. The problem however lies in the fact that there has not been a conceptual framework to regulate the exercise of this rule. This has resulted in inconsistencies in the application of the privity

\(^{172}\) City Of Cape Town V Khaya Projects (Pty) Ltd and Others 2015 (1) SA 421 (WCC).

\(^{173}\) City Of Cape Town V Khaya Projects (Pty) Ltd and Others 2015 (1) SA 421 (WCC).

\(^{174}\) City Of Cape Town V Khaya Projects (Pty) Ltd and Others 2015 (1) SA 421 (WCC).


doctrine. The court in the case of Member of Executive Council v Terra Graphics cautioned against the defence employed by the local government that there was a dearth of contractual privity between the subcontractor and the Local government. The case involved a direct claim for payment from the Local municipality by a subcontractor who had been sourced by a contractor. The subcontractor had been promised full payment by the employer and when the subcontractor completed the work and demanded payment the employer raised lack of privity. In this instance, the court discovered that the local government was behaving unconscionably and was abusing the privity doctrine. The local government had made an undertaking that they will pay the subcontractor upon completion of the project. The court ruled in favour of the sub-contractor by citing that privity had been established. The court looked and focused more on practicality than it did on the theoretical concept of privity. The court having given this matter careful consideration was satisfied that the applicant had proved that there was privity between itself and the first respondent and not the second respondent who for all intents and purposes was a project manager.

3.4 EXCEPTIONS TO THE PRIVITY RULE
The harshness of the doctrine of privity has been acknowledged over time. The courts have given legal recognition to some of the devices which have been developed to circumvent the doctrine of privity. The exceptions are going to be explained and they are agency and stipulatio alteri. These exceptions will not be discussed in depth as that has been done already by other authors. There are also exceptions of cession and doctrine of notice which are not going to be discussed in this research as the scope of the research will not allow for such.

3.4.1 AGENCY
Agency is a situation that has a principal authorising another person, the agent, to represent her or him in negotiating a contract. A contract entered into by the agent on behalf of the

principal will be legally binding on the principal.\textsuperscript{185} Agency was mentioned as an exception to the privity doctrine in \textit{Totalisator Agency Board OFS vs Livanos}.\textsuperscript{186} The court held that a third party may be able to take the benefit on an exclusion clause by proving that the party imposing the clause was acting as his or her agent thereby bringing the party into direct contractual relationship with the promisor.

In South Africa, the use of agency in circumventing the doctrine of privity can be seen in a case concerning pre-incorporation contract of \textit{Venter NO and Another v Silver Lakes Homeowners Association NPC}.\textsuperscript{187} The case involved a section 21 statutory agency pre-incorporation contract. Section 21 of the Companies Act stipulates that,

\begin{quote}
“A person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of this Act, but does not yet exist at the time.”\textsuperscript{188}
\end{quote}

This demonstrates an avenue that has been legitimised as an exception to the privity rule as an individual is allowed to represent a juristic person with a third party who in turn has privity with the Company once it gets incorporated. The third party in this case has a direct relationship with the company once it is formed regardless of the fact that the contract is entered into between the third party and the agent.

\subsection*{3.4.2 STIPULATIO ALTERI}

\textit{Stipulatio alteri} is an institution established in South African law where one party to a contract may promise another that he will confer some benefit on a third person who is not party to the contract.\textsuperscript{189} In \textit{McCullough v Fernwood Estate Ltd} Innes CJ described a \textit{stipulatio alteri} in the following terms:

\begin{quote}
“An agreement for the benefit of a third person is often referred to in the books as a stipulation. This must not be taken, however, in the narrow meaning of the Civil law, for in that sense the stipulatio did not exist in Holland. It is merely a convenient expression to denote that the object of the agreement is to secure some advantage for the third person.”\textsuperscript{190}
\end{quote}

\begin{itemize}
\item \textsuperscript{185} Hutchison et al \textit{The Law of Contract in South Africa} 3 ed (2018) 229.
\item \textsuperscript{186} \textit{Totalisator Agency Board OFS vs Livanos} 1987 (3) SA 283 W 291.
\item \textsuperscript{187} \textit{Venter NO and Another v Silver Lakes Homeowners Association NPC} (2017) ZAGPHC 11.
\item \textsuperscript{188} Companies Act 71 of 2008 Section 21 (1).
\item \textsuperscript{189} \textit{Crookes, NO and Another v Watson} and Others 1956 (1) SA 277 (A).
\item \textsuperscript{190} \textit{McCullough v Fernwood Estate Ltd} 1920 AD 204.
\end{itemize}
The *stipulatio alteri* is a convenient instrument for the institution of a third person as beneficiary under certain contracts for example, a life policy in South Africa.\(^{191}\) In South African law it is possible to contract independently for the benefit of a third party, but it is not necessary to do so as an agent. The South African courts have confirmed that it is possible for two parties to conclude a valid contract for the benefit of a third person, who is not a party to the contract, and who at the stage of contracting need not even exist.\(^{192}\) One party (called the stipulans), stipulates the benefit that he or she wishes the other party (called the promittens) to confer upon the third person.\(^{193}\) The stipulans extracts a promise from the promittens that he will confer that benefit on the third party, or at least offer that benefit to the third party, which the latter can accept or reject.\(^{194}\) The English law is different as it does not recognise an agreement for the benefit of a third party that is a *stipulatio alteri*.\(^{195}\)

To constitute a valid *stipulatio alteri*, it is required that the stipulans and the promittens should intend to create an enforceable obligation in favour of the third person, obliging the promittens to make a performance to the third person, giving the third person an independent right to demand that performance upon acceptance.\(^{196}\) The third party in turn has a right to sue for the benefit that has been promised to him regardless of the fact that he/she was not directly involved in the contract. The privity doctrine is therefore circumvented by *stipulatio alteri nemo poteste*. It has to be noted that pension agreements, life insurance policies, and *inter vivos* trust deeds are important examples of this phenomenon.\(^{197}\)

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\(^{191}\) *Movie Camera Company (PTY) Ltd v Van Wyk and Another* (2003) 2 All SA 291 (C).

\(^{192}\) *Masterpiece Gold Mining Co Ltd v Brown’s Executrix* 1914 AD 231 235; *McCullogh v Fernwood Estate Ltd* 1920 AD 204 206 215; *Commissioner of Inland Revenue v Estate Crewe* 1943 AD 656; *Crookes v Watson* 1956 (1) SA 277 (A).


\(^{194}\) *Hofer v Kevitt NO* 1998 (1) SA 382 (SCA) 387.


\(^{196}\) *Crookes v Watson* 1956 (1) SA 277 (A) 291; *Total SA (Pty) Ltd v Bekker* 1992 (1) SA 617 (A) 625; *Shrobsbree NO v Love* 2005 (1) SA 309 (SCA) 313; *JR 209 Investments and another v Pine Villa Estates* 2009 (3) All SA 32 (SCA) 37.

3.6 CRITICISMS OF THE PRIVITY DOCTRINE IN SOUTH AFRICA

As already referred to in chapter one above, one of the most apparent and vivid disadvantages of the privity doctrine in the South African contractual sphere is the violation of third parties’ rights to have access to the courts. The doctrine violates the constitutional rights of third parties to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal.\textsuperscript{198} The Constitution acknowledges the need to develop the common law while promoting the spirit, purport and objects of the Bill of Rights.\textsuperscript{199} Common law principles have been in need of reform and our courts have been constantly and consistently reiterating this position. The case of \textit{Barkhuizen v Napier} showcases the need to reform the common law rules as Justice Z Yacoob remarked that,

\begin{quote}
“the question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later.”\textsuperscript{200}
\end{quote}

This also means that the time is now to develop the doctrine of privity of contract as it is a colonial legal tradition which does not find a place in the South African modern contractual framework.\textsuperscript{201}

The South African law of Contract therefore has to be viewed through the prism of the Constitution. The constitutional dispensation enshrines the notion that the Constitution is the supreme law of the country and all law or conduct inconsistent with it is invalid.\textsuperscript{202} There is therefore a duty upon contracting parties to ensure that contractual terms are within the prism and confines of section 2 of the Constitution. The Constitution also empowers individuals to approach a court or a tribunal by application of law.\textsuperscript{203} The privity doctrine therefore violates this right as it does not confer third parties with a right to approach a court in case of having an interest in a particular contract.

\begin{footnotes}
\item[198] The Constitution of the Republic of South Africa 1996, Section 34.
\item[200] \textit{Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd} (2011) ZACC 30.
\item[201] A detailed analysis available in Chapter 3.
\item[203] The Constitution of the Republic of South Africa 1996, Section 34.
\end{footnotes}
It has been made explicitly clear throughout the previous chapters that exclusion of third party involvement in the contractual matrix emanated in the English legal system. The denigration of this common law principle in the case of *Berswick v Beswick* by Lord Denning seems to have spread to the South African judicial arena.\textsuperscript{204} Lord Denning was critical of the accuracy and necessity of the fundamental principle that no one who is not a party to contract can sue or be sued.\textsuperscript{205} The same notion was also reiterated in the case of *Member of Executive Council v Terra Graphics*\textsuperscript{206}. The court reinforced the idea that there are avenues to avoid its application when desired as the principle is not far from ancient.\textsuperscript{207} The court therefore vilified the exclusion of third parties and noted that this was an area that had to be developed as justice so required.

In the case of *Berswick v Beswick*, Lord Reid expressed discontent and called for a reconsideration of the doctrine prohibiting a third party from having an interest in a matter. This sentiment was also echoed in the South African Case of *City of Cape Town v Khaya Projects (Pty) Ltd And Others*,\textsuperscript{208} where a local government awarded a tender for the construction of Reconstruction and Development Programme (RDP) houses to a contractor who in turn sub contracted to a sub-contractor.\textsuperscript{209} The sub-contractor did a shoddy job and the recipients of the houses sued the municipality. The Municipality in turn raised privity as a defence and claimed that the plaintiffs had no locus standi.\textsuperscript{210} The court indicated that in as much as the contract was privy between the municipality and the tender recipient, the RDP recipients were entitled to bring a case forward. It was however unfortunate that the court could not make a decision on the case as it remarked that it was up to the parliament to make or amend the law and not the judge. This is a classic example of the need by the courts to develop the common law as envisaged in the Constitution.\textsuperscript{211} The court however did indicate that there was a dire need to relax the common law principle as the exceptions created in our legal system

\textsuperscript{204} *Berswick v Berswick* 1966 ch 538.
\textsuperscript{205} *Berswick v Berswick* 1966 ch 538.
\textsuperscript{208} *City Of Cape Town V Khaya Projects (Pty) Ltd And Others* 2015 (1) SA 421 (WCC).
\textsuperscript{209} *City Of Cape Town V Khaya Projects (Pty) Ltd And Others* 2015 (1) SA 421 (WCC).
\textsuperscript{210} *City Of Cape Town V Khaya Projects (Pty) Ltd And Others* 2015 (1) SA 421 (WCC).
\textsuperscript{211} The Constitution of the Republic of South Africa 1996, Section 39 (2).
did not extend to the scenario that was unfolding in front of the court. The court did indicate that intervention in the operation of the doctrine was desired sooner rather than later.

The material facts of *Gugu v Zongwana* also illustrate how the privity doctrine has been operating in South Africa. On a reading of the sale agreement, it was clear to the court that the first respondent had not intended to sell, and the appellants had not intended to buy, the first respondent's undivided share in the property. The parties had intended to sell and buy the actual property itself. It also had to be accepted on the evidence that the second respondent had not consented to the sale of the property to the appellants on the terms in the sale agreement. The result was that by virtue of the doctrine of privity of contract, the second respondent was not bound by the terms of the sale agreement. A contract being a matter between the parties thereto, no one other than the contracting parties can incur any liability or derive any benefit from its terms. Accordingly, the second respondent, not being a party to the sale agreement, could not be compelled to comply with any of its terms. This is axiomatic and encapsulates how the doctrine of privity has been utilised in South Africa. It goes on to show that the doctrine has been linked to the element of consensus as lack thereof results in an unenforceable contract. The case of *Gugu v Zongwana* illustrates that the privity doctrine goes against the will theory which is used in South Africa to determine consensus. The privity doctrine negates the essential intention of the parties to benefit the third party. This shows that the intention of the parties should be given pre-eminence over the privity principle.

It has often been said that the developer, sub-contractor, architect and financier must provide undertakings separately to each other as well as to the owner. This informs that any subsequent owner or any occupiers of the building for the defective work would need a different contract to enforce obligations and corresponding duties. It would be more efficient if the same obligations arose from a single provision. This echoes the case of *Move on Up (Pty) Ltd v Martin Kruger Associates CC*, where the architect appointed a principal agent in terms of a standard building contract contended that because he had not signed the contract, there was no contractual privity between him and the employer under the agreement. Meer J rejected the

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212 *Gugu v Zongwana* (2014) 1 All SA 203 (ECM).
213 *Gugu v Zongwana* (2014) 1 All SA 203 (ECM).
contention and claimed that prejudice would be incurred by the third party. The privity rule has also been noted to be flawed in such circumstances when it comes to contractual contracts in South Africa. This has also been a mutual problem in other common law jurisdictions.

All of these problems together with the injustice and hardship caused by the doctrine of privity must be remedied by reforming the doctrine. South African courts, law commission bodies as well as academics alike have subjected the doctrine of privity to extensive criticism. Most of this criticism has been directed to the limb of the privity doctrine that only parties to contract can claim under it. The injustices that the third party rule causes can only be viewed through the prism of its massive failure in common law countries like England and Ireland where the doctrine has been extensively utilized. It is incumbent upon South African courts and legislature to remedy the operation of this doctrine before the principle causes so much unsatisfactory and unintended consequences. The need for reform can be attributed to the legislative summersaults to circumvent the harsh and unintended consequences that result from the doctrine taking way in other common law countries. It is therefore a matter of time before some of the apparent issues that forced the reformation of the doctrine in England take pre-eminence in South Africa.

3.7 CONCLUSION
This chapter has demonstrated that the privity doctrine has been prevalent in South Africa for a period more than 120 years. In the English law, the doctrine has been a feature for more than 150 years. There have been various criticisms levelled against the principle. There have also been attempts to abrogate the doctrine of privity in some jurisdictions. Despite all the criticisms and concerns, the doctrine continues to be applied and incorporated in other common law countries as well as jurisdictions like South Africa that had the doctrine imposed on them. The criticisms of the privity principle when weighed against the rationales for the doctrine

218 Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
221 Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
indicate that reform and relaxation is desirable. The arguments advanced in defence of the doctrine of privity are mostly premised upon the theoretical and doctrinal aspects of the doctrine of privity.\footnote{Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malysia (unpublished LLD thesis, Queensland University of Technology, 2013) 64.} It appears that the concept of autonomy of the contract whereby the contract remains personal to the parties to the contract and thus the contract could only be affected by them, dominates arguments in favour of privity. It is however of paramount importance to note that, theoretical justification alone is not sufficient to preserve the doctrine of privity from undergoing reformation. The theoretical formulations in defence of the doctrine of privity have failed to produce evidence to the effect that the doctrine has not caused difficulties in injustices be it in the commercial life. It can be ascertained that the doctrine of privity has caused unimaginable difficulties, hardship and injustice for the third party beneficiaries. These hardships which have real effect on the populace are far more important in justifying the need to reform the doctrine of privity than the theory that has long supported the existence of the doctrine.
CHAPTER 4 - REFORMING THE PRIVITY DOCTRINE IN SOUTH AFRICA - LESSONS FROM ENGLAND

4.1 INTRODUCTION
The previous chapter discussed how the privity doctrine operates in the South African contractual context in an attempt to highlight the injustices that the doctrine has on third parties. The chapter also mentioned some of the recognised exceptions to the doctrine of privity even though this was not done holistically because of the limitations of the thesis. Further, the chapter also brought to surface the criticisms that have been directed at the doctrine in a South African contractual context. This following chapter is going to discuss the operation of the privity doctrine in England and will assess how the rule was reformed to cater for the interest of third parties.

As explained in chapter one, England has been chosen as a standard of analogy because the privity rule developed in the English legal system. In addition, the reform of the privity principle was also implemented in England in 1999 following the recommendations of the Law Reform Commission (LRC). This was welcomed as it meant that third parties would no longer experience the injustices brought about the privity principle. It has been established that the criticisms of the privity doctrine in South Africa outweigh the rationale of retaining the doctrine. If not for everything else, the doctrine has some of the most severe injustices for third parties and violates fundamental values and rights enshrined in the Constitution of the republic. Some of these fundamental rights include the right to approach a court of law in case of a dispute. The chapter analyses the suitability of the route followed by the English Law of Contract to reform the doctrine of privity for compatibility to also be emulated in the South African contractual context.

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224 Word limitations; It would also detract from the core of this research
225 See also Mahmood A The need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia (unpublished LLD thesis, Queensland University of Technology, 2013) 76.
4.2 DOCTRINE OF PRIVITY IN ENGLAND

The doctrine of privity in England has survived for over 172 years.228 There were, however, problems that arose with the rigid application of the common law principle of privity of contract which resulted in third parties to a contract suffering injustices particularly in relation to commercial contractual contracts.229 In recent years, the courts have gone a considerable way towards developing rules which in many appropriate cases allow the promisee to recover damages on behalf of the third parties.230 The law commission proposed the reformation of the privity doctrine as it noted the consistent legal battles by third parties for realisation of their benefits which proved to be increasing on a yearly basis.231

As discussed in chapter one, the doctrine was implemented and first applied in England before it spread to other common law countries. Understanding how the doctrine was reformed in the English system will therefore lay a foundation to determine how best the reformation of the privity doctrine in South Africa will work.

The enquiry that has to be made is to determine whether reformation in South Africa is possible and that can be answered in the affirmative. This can be substantiated by the fact that reformation of the doctrine was effected in England where the doctrine was promulgated. In order to be able to achieve the desired effect, lessons have to be learnt from the English and learn how they were able to reform the doctrine that had caused many injustices to third parties in England.

4.3 THE NEED FOR REFORM IN ENGLAND

In 1995 the court of Appeal in Darlington Borough Council v Wiltshier Northern Ltd,


229 This has been dealt with in chapter 3.


Steyn LJ noted the following when criticising the doctrine of privity:

“The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

It was on this basis that the LRC was prompted to push for the reformation of the doctrine of privity. The commission made recommendations citing why the doctrine needed to be relaxed to alleviate the injustices incurred by third parties who have contracts drafted for their benefits. The part that sought reformation the most was the part that stipulates that a contract does not confer rights on someone who is not a party to the contract. The main contention of the commission was to allow subsequent purchasers or tenants of buildings to be given rights to enforce an architect’s or building contractor’s contractual obligations without the cost, complexity and inconvenience of a large number of separate contracts.

The general rule that a third party cannot acquire rights under a contract to which he is privy has been criticised even though it is, in most cases, self-evidently desirable that a complete stranger to a contract should not have contractual obligations forced upon him. This criticism on the doctrine has been levelled by academics. The doctrine has also been condemned by law reform bodies in the United Kingdom and the judiciary in the form of the Law Reform Commission and the House of Lords. In the case of Beswick v Beswick, Lord Reid cited with


approval that the Law Revision Committee's proposals that when a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name. While implying that the way forward was by legislation, he stated that the House of Lords might find it necessary to deal with the matter if there was a further long period of Parliamentary procrastination.

In the same vein, in *Swain v Law Society*, Lord Diplock referred to the general non-recognition of third party rights as an anachronistic shortcoming that has for many years been regarded as a reproach to English private law. This articulates that the privity doctrine was causing more harm than good on contracts that involved the benefit of third parties. There had been consistent calls for the reformation of the doctrine due to its nature of repressing third party interests. The court in *Woodar Investment Development Ltd. v. Wimpey Construction Ltd* held that the law concerning damages for loss suffered by third parties was most unsatisfactory and furthermore hoped that, unless it were altered by statute, the House of Lords would reconsider it. The Court in this instance reminded the House that twelve years had passed since Lord Reid had called for a reconsideration of the rule in *Beswick v. Beswick*, and hoped for the recommendation to be implemented. The court also noted that all the cases which stand guard over this unjust rule should be reviewed.

The call for reformation from the judiciary was so intense that other law bodies got involved. The Law Commission also came on board soon after its creation in 1965. The program of the Law commission amongst other objectives was to codify the law of contract as well as deal with the issue of third party rights. The law commission did some substantial work on the

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237 *Beswick v Berswick* 1966 ch 538.
238 *Beswick v Berswick* 1966 ch 538.
239 *Swain v Law Society*, (1983) 1 AC. 598.
242 *Beswick v Berswick* 1966 ch 538.
243 *Beswick v Berswick* 1966 ch 538.
doctrine of consideration as there could have been no fruition in reforming the doctrine of privity without first reconsidering the consideration doctrine. The cry of third parties as espoused by the LRC resulted in an opportunity for the fundamental review of the third party rule.

4.4 CONSTRUCTION OF REFORM
It is common knowledge that building and engineering projects typically involve a number of different contracts between the developer, architects, the head contractor, sub-contractors and financiers. In observation of the third party rule, those who had not been privy to a particular contract were not able to rely on its provisions or to find a contractual action as providing a defence. Recourse has been available in foreign jurisdictions in the law of tort. This can be illustrated with the case of Junior Books Co. Ltd v Veitchi Ltd. In the aforementioned case, the House of Lords held that a building owner was able to sue a sub-contractor in tort for economic loss occasioned by the latter's negligence. This was, however not the case aired in the case of D & F Estates Ltd. v. Church Commissioners for England where it was held that a builder was not liable in tort to a subsequent purchaser in respect of the cost of repair of defects in the quality of the building. This entailed that a builder, in the absence of a contractual duty or a special relationship of proximity sufficiently akin to a contract to introduce the element of reliance such that the owner owes a duty to prevent economic loss, owes no duty of care in respect of the quality of his work. This decision was also followed in Murphy v. Brentwood D.C where it was additionally held that the liability of a local authority, which negligently failed to ensure that the builder complied with building by-laws and regulations, did not exceed that of the builder.

As a result of cases such as *Murphy and D & F Estates*, third parties, such as property financiers, purchasers and tenants frequently seek to protect themselves by means of collateral warranties made with the developer, contractor, sub-contractors and professionals such as architects, surveyors and structural engineers. In the case of an average shopping centre, one professional may be expected to enter into separate warranty transactions with the financiers, the purchaser and 50 or more tenants. Reforming of the privity principle, therefore entailed that there would be a reduction to the present complexities by removing the need for so many separate documents. If the contract between developer and contractor were expressed to be for the benefit of financiers, purchasers and tenants alike, it could remove the need for collateral warranties.

4.5 ARGUMENTS FOR REFORM

The English law commission in pushing for reformation of the privity doctrine disagreed with the view that the third party rule does not cause significant problems in practice. The need for reform would usher in a new era where there was refusal of third parties to enforce a contract for their own benefit by the doctrine. The third party rule prevents effect being given to the intentions of the contracting parties. If the theoretical justification for the enforcement of contracts is seen as the realisation of the promises, the will or the bargain of the contracting parties; the failure of the law to afford a remedy to the third party where the contracting parties intended that it should have one frustrates their intentions, and undermines the general justifying theory of contract. There is thus a need to enforce the will of the contracting parties if their intentions are to allow a third party to benefit from a contract which can only be done by reforming the privity principle.

256 See chapter 3.6
The other argument for reformation of the privity principle focused on the injustice to the third party where a valid contract, albeit between two other parties, has engendered the third party’s reasonable expectations of having the legal right to enforce the contract, particularly where the third party has relied on that contract to regulate his or her affairs.\(^{259}\) It should be noted that in most circumstances this argument compliments the argument based on the intentions of the contracting parties. In most circumstances, the intentions of the contracting parties and the reasonable expectations of the third party are consistent with each other. However, one of the most difficult issues that arise is the extent to which the contracting parties can vary or discharge the contract.\(^{260}\) That issue can be presented as raising the conflict between these two fundamental arguments for reform.

The thesis will now discuss the 3 main criticisms of the privity doctrine which should lead to its reformation. These criticisms bring to the fore the reasons why the privity doctrine should be reformed in the South African contractual context.

### 4.5.1 THE PERSON WHO HAS SUFFERED THE LOSS CANNOT SUE, WHILE THE PERSON WHO HAS SUFFERED NO LOSS CAN SUE

According to the LRC, the privity principle needed to be relaxed in respect of a standard situation where the third party rule produces the perverse and unjust result that the person who has suffered the loss of the intended benefit cannot sue, while the person who has suffered no loss can sue.\(^{261}\) This can be illustrated by the ground breaking case of Beswick v Beswick, as the House of Lords held that the widow could not enforce the promise in her personal capacity, since the contract was one to which she was not privy.\(^{262}\) The court however went on to determine that, as an administratrix of her husband’s estate, she was able to sue as promisee, albeit that she could only recover nominal damages.\(^{263}\) Hence we see that the widow in her personal capacity, who had suffered the loss of the intended benefit, had no right to sue, while


\(^{260}\) Hugh Collins *The law of contract* (1986) 112.


\(^{262}\) Berswick v Berswick (1966) Ch 538.

\(^{263}\) Berswick v Berswick (1966) Ch 538.
the estate, represented by the widow in her capacity as administratrix, who had suffered no loss, had that right.

Furthermore, it was established in Beswick v Beswick that the promisee, as represented by the widow as administratrix, clearly wanted to sue to enforce the contract made for her personal benefit. However, in many other situations in which contracts are made for the benefit of third parties, the promisee may not be able to, or wish, to sue even if specific performance or substantial damages could be obtained. Clearly the stress and strain of litigation and its cost will deter many promisees who might fervently want their contract enforced for the benefit of third parties. The other hindrance is often that a contracting party may be ill or outside the jurisdiction within which the action has arisen. If the promisee has died, his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.

4.5.2 COMPLEXITY, ARTIFICIALITY AND UNCERTAINTY

The existence of the rule, together with the exceptions to it, has given rise to a complex body of law and to the use of elaborate and often artificial stratagems and structures in order to give third parties enforceable rights. Reform would enable the artificiality and some of the complexity to be avoided. The technical hurdles which must be overcome if one is to circumvent the rule in individual cases also leads to uncertainty, since it will often be possible for a defendant to raise arguments that a technical requirement has not been fulfilled. Such uncertainty is commercially inconvenient. There was therefore a dire need to provide certainty in the commercial arena through relaxing the privity doctrine of contract. There has been criticism of the third party rule and calls for its reform and relaxation from academics, law reform bodies and the judiciary.

The rule itself has been abrogated throughout much of the

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264 Berswick v Berswick (1966) Ch 538.
269 This has been highlighted in the first chapter
common law world, including the United States, New Zealand, and parts of Australia. The extent of the criticism and reform elsewhere is in itself a strong indication that the privity doctrine is flawed. These findings amid other reasons prompted the advances made in the English law to reform and relax the privity principle to allow third parties to sue for their benefit.

4.5.3 THE LEGAL SYSTEMS OF MOST MEMBER STATES OF THE EUROPEAN UNION ALLOW THIRD PARTIES TO ENFORCE CONTRACTS

To add on the above, another feature that resulted in the reformation of the third party rule in English law is the fact that the legal systems of most of the member states of the European Union recognise and enforce the rights of third party beneficiaries under contracts. In order to keep in the prescripts of global trends, it was of dire importance to reform the common law doctrine. In France, for example, the general principle that contracts have a binding effect only between the parties to them is qualified by Art 1121 of the Code Civil, which permits a stipulation for the benefit of a third party as a condition of a stipulation made for oneself or of a gift made to another. The French courts interpreted this as permitting the creation of an enforceable stipulation for a person in whose welfare the stipulator had a moral interest. In so doing, they widened the scope of the Article so as to permit virtually any stipulation for a third person to be enforced by him or her, where the agreement between the stipulator and the promisor was intended to confer a benefit on the third person.

In Germany, contractual rights for third parties are created by Art 328 of the Burgerliches Gesetzbuch permitting stipulations in contracts for performances to third parties with the effect that the latter acquires the direct right to demand performance, although the precise scopes of these rights depend on the terms of the contracting parties. The difference with South Africa in relation to stipulation therefore lies in the fact that it has been made a condition that

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272 Art 1121 of the Code Civil.
274 Art 328 of the Burgerliches Gesetzbuch.
withstands as law in the jurisdictions of Germany and France yet in South Africa it is implicit in the common law.

4.6 CONTRACTS RIGHTS OF THIRD PARTIES ACT 1999
As a result of the relentless persistence of the Law commission, the common law of contract was transformed in the area of privity by the Contract Rights of Third Parties Act, 1999 hereinafter referred to (CRTP). As discussed already in chapter 2 the former general rule was that only a party to a contract could enforce its terms, anyone else (a third party) could not.\textsuperscript{275} The Act is applicable to a situation which involves any sorts of rights including the right to rely on the limits on liability in a contract where parties may agree, especially in circumstances where a subcontractor is to benefit. The Act does not take away any other rights that a third party might have independently.

The English law solved the privity conundrum by enacting legislation. The Act makes provision for a person who is not a party to a contract (a third party) to the extent that he may, in his own right, enforce a term of the contract if the contract expressly provides that he may do so.\textsuperscript{276} This means that if there is a benefit that has been agreed upon by contracting parties, the third party now has the right to sue on the basis of one of the contracts to enforce his benefit. In English law this means that a subcontractor is now capable of alleviating unnecessary legal protocols of suing the contractor in the hope that the contractor will sue the developer. This furthermore means that a subcontractor can sue the developer. The legislative summersault has been applauded and alleviates the injustices that third parties are prone to. Moreover, the CRTP also stipulates that the third party may only enforce a contract if the terms purports to confer a benefit on him.\textsuperscript{277} This therefore precludes a third party from relying on the Act if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.\textsuperscript{278}

Section 1 of the Act which provides that,

\textsuperscript{275} Contracts rights of third parties Act 1999
\textsuperscript{276} Contracts rights of third parties Act 1999, section 1 (1) (a).
\textsuperscript{277} Contracts rights of third parties Act 1999, section 1 (1) (b).
\textsuperscript{278} Contracts rights of third parties Act 1999, section 2.
Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the party to enforce a contractual term.\(^{279}\)

overrides the old common law rule that a third party cannot enforce the terms of a contract, as established in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*\(^{280}\), and also the rule that a third party could not act against the promisor, established in *Tweddle v Atkinson*.\(^{281}\) It allows a third party to enforce terms of a contract in one of two situations: first, if the third party is specifically mentioned in the contract as someone authorised to do so and secondly, if the contract purports to confer a benefit on him or her.\(^{282}\) Moreover, under section 1 of RTP, the Act provides that a third party has a right under it if the contract expressly allows for the third party to enforce rights and if the contract purports to benefit them.\(^{283}\) So, this part of the Act satisfies the problems which third parties had with the common law and thus cases such as *Beswick v Beswick*\(^{284}\) and *Tweddle v Atkinson*\(^{285}\) could have gone the other way if they would have been heard under this new era.

### 4.7 REQUIREMENTS TO RELY ON THE ACT

The act requires a third party to comply with some requirements in order to rely on the legislation specifically implemented for third parties to alleviate injustices being perpetuated against them. The Act requires a party to be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into is also another requirement.\(^{286}\) The contracting parties must therefore be in a position to explicitly outline who the third beneficiary is as was the case in *Tweedle v Atkinson* where the third party was determinable.\(^{287}\) This has improved the position of third parties as it gives effect to the intentions of the parties.

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\(^{279}\) Contracts Rights of Third Parties Act 1999, Section 1(1).

\(^{280}\) *Dunlop Pneumatic tyre Co Ltd v Selfridge and Co* (1915) AC 847 HL.

\(^{281}\) *Tweddle v Atkinson* (1861 EWHC J57 (QB).

\(^{282}\) Contracts Rights of Third parties Act 1999, Section 3.

\(^{283}\) Contracts Rights of Third parties Act 1999, Section 3.

\(^{284}\) *Beswick v Beswick* (1966) Ch 538.

\(^{285}\) *Tweddle v Atkinson* (1861) EWHC J57 (QB).

\(^{286}\) Contracts Rights of Third Parties Act 1999, section 3.

\(^{287}\) *Tweddle v Atkinson* (1861 EWHC J57 (QB).
The second requirement entails that the Act confers a right on a third party to enforce a term of a contract within the bounds of the contract subject to, and in accordance with, any other relevant terms of the contract.\textsuperscript{288} This provision provides context so as to avoid an indeterminate range of liability.\textsuperscript{289} A third party can only enforce a contract which has a direct affiliation to him/her. This has a tendency of preventing third parties jumping into every contract as they will always find a \textit{nexus} to various contracts.

The Act also comes to the assistance of many sub-contractors who find themselves, in most cases, suffering a loss as a result of breach of contract. In construction contracts there are often interested third parties, such as a purchaser of the building, a tenant or a funder, who are not parties to the building contract but may suffer a loss as a result of breach of the building contract. Traditionally, such parties have received a collateral warranty in order to create a contractual link between them and the building contract, consultant’s appointment or sub-contract itself and therefore allow the beneficiary to pursue contractual remedies to recover losses that it may suffer. The third party’s only option otherwise being to pursue a claim in tort. The Act provides an alternative to collateral warranties by making it possible to incorporate drafting in building contracts, consultant’s appointments and sub-contracts which confers rights upon third parties who would have previously only been able to acquire such rights by virtue of a collateral warranty.

4.7.1 CANCELLATION IN TERMS OF THE ACT

Unless the contract expressly provides a right to cancel or vary without a specified third party’s prior consent, it will generally not be possible for the contracting parties simply to agree to cancel the contract or vary a third party’s right, if the third party had communicated his assent to the term in question or has otherwise relied on it.\textsuperscript{290} The Act therefore recognises the interest of the third party and this deserves to be celebrated as it mitigates a lot of court cases when the contracting parties do not take the interest of the third party into consideration. It also has to be noted that the Act safeguards the third party to prevent the contracting parties agreeing to rescind or vary the contract in such a way as to extinguish or alter the rights of a third party, unless the third party consents in certain circumstances.\textsuperscript{291} The same can also be

\textsuperscript{288} Contracts Rights of Third Parties Act 1999, section 4.

\textsuperscript{289} Peel & Treitel \textit{The Law of Contract} (2011) 357.

\textsuperscript{290} Contracts Rights of Third Parties Act 1999, Section 1 (1).

\textsuperscript{291} Contracts Rights of Third Parties Act 1999, Section 2 (3) (a).
emulated within the South African contractual context to safeguard the interests of third parties.

The Act also, subject to any express terms of the contract, reserves to the promisor, in any enforcement of a contract term by a third party, the same defences and/or set-off rights that the promisor would have had available to them if the proceedings had been brought by the promisee. This provision may come as a surprise to third parties who might otherwise have thought they had a clear run at a third party claim, without the risk of being met by such defences and set-off claims by the promisor. At the same time, there is protection of the promisor from double liability. If the promisee has already recovered a sum in respect of the third party's loss which stems from the relevant contract term, then the third party's damages are reduced by an amount that the court or arbitral tribunal think is appropriate.

The analysis above showcases that it is possible to reform the privity principle in South Africa. The answer of the reformation of the privity doctrine lies within promulgation of legislation as done in England and some common law countries like Ireland. The legislation has to mirror the developments that occurred in England which resulted in the birth of the Contract Rights of Third Parties Act 1999. The steps to be taken have been discussed above as well as the most important provisions to be encapsulated in the proposed legislation. This should have an effect of reducing the exclusion of third party development of the common law in terms of section 39 (2) of the Constitution is also a mechanism that has to be explored in order to relax the privity principle. It is therefore possible to reform the privity principle in South Africa using either two of the possible mechanisms suggested. The development of this common law principle is in tandem with section 172 of the Constitution which stipulate that,

“When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency…”

The privity principle has been noted that it violates one’s right in terms of section 34 of the Constitution which grants everyone the right to access a court of law. The privity principle is

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293 Contracts Rights of Third Parties Act 1999, Section 3 (2).
294 Contracts Rights of Third Parties Act 1999, Section 3 (6)
therefore inconsistent with the Constitution as it denies third parties the right to access a court solely on the basis that they were not a party to the contract in which they have an interest/benefit a benefit in. this instance requires the common law to be developed to cater for such injustices as they are violating third parties rights in a post-colonial society founded on the values of dignity, equality and freedom for all persons.

While the reforms suggested above, prima facie mirror the English counterpart, the English approach is considerably wider and that is the same that is being suggested in this thesis in the South African contractual sphere. The English legislation, Contracts (Rights of Third Parties) Act, includes a right of enforcement where the contract purports to confer a benefit on the third party. The use of the term “purports to confer a benefit” has been used by the English and includes third party beneficiaries of an express benefit under the contract and those situations where the benefit is ambiguous. Where the contract contains an express benefit, the contract does purport to benefit the third party, thus manoeuvre for controversy is limited. However, the interesting point is that the term also covers those third party beneficiaries under a contract which contains an ambiguous benefit. The result is that all third party beneficiaries in the English jurisdiction have a presumption of enforcement where the contract purports to benefit them. The risk of a third parties being marginalised or the intentions of parties being frustrated is thus limited and circumvented.

In addition to the above, there is a presumption of enforcement whenever there is a contract that purports to benefit third parties in English law and the same is also advocated for in the South African contractual spaces. The proposed reform must just not therefore propose for a presumption of enforcement in favour only of those third party beneficiaries who are expressly conferred with a benefit under the contract. As a matter of fairness it would be manifestly appropriate to uphold an implied third party benefit as well. The presumption of enforcement

295 Contract Right of Third Parties Act, Section 1 (a).
296 Contract Right of Third Parties Act, Section 1 (b).
297 Contract Right of Third Parties Act, Section 1 (b).
should therefore be extended in South Africa as well to those beneficiaries that have not been expressly mentioned to benefit but those as well who have implied benefits. It is reasonable to assume that not all contracts shall be clear and unequivocal as to the benefit for third parties. Indeed, the need to provide a redress for beneficiaries of an implied benefit must also be recognised in South Africa and this is one of the lessons that South Africa can emulate from the reformation of the privity doctrine in England.

4.8 CONCLUSION
A number of statutory and common law exceptions to the third party rule exist in the South African law of contract. Some of these exceptions have been discussed in chapter two above, where an exception to the third party rule has been either recognised by case-law or created by statute. The rule may now not cause difficulty as a result of the exceptions created to circumvent the harsh and unintended consequences for example, causing hardships and injustices to third parties. There is need to highlight however that, this is not the case where the situation is a novel one in which devices to overcome the third party rule have not yet been tested. The inconvenience of the privity doctrine was identified in the case of Member of Executive Council v Terra Graphics where a government relied on the principle to escape contractual liability to a sub-contractor.

The mere existence of exceptions to the third party rule in South Africa is a strong justification for reform that is elucidated in this case. This is for two reasons: first, the existence of so many legislative and common law exceptions to the rule demonstrates its basic injustice and secondly, the-fact that these exceptions continue to evolve and continue to be the subject of extensive litigation demonstrates that the existing exceptions have not resolved all the

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300 This would, however, be a matter for the courts to decide, after having considered the relevant circumstances as facts differ from case to case. While not in favour of promoting widespread reliance on implied benefits there is need to be considerate as some third parties may have implied benefits in certain contracts.


problems. To overcome these problems, it can be suggested that reform of the privity doctrine needs to be underway in South Africa.

It is important that reform improves the legal position and rights of third party beneficiaries especially in construction contracts while also of benefit to other third parties in other types of commercial contracts. The right of third parties to enforce benefits conferred upon them must be clearly stated in order to provide certainty. If parties to a contract wish to confer a benefit on a third party, they should be able to do so thus their intention should be given legal effect. This is essentially the reason for legislative transformation in the English law where the goal was to give effect to the intention of the parties. Recommendations can be made in terms of these developments in the next chapter by way of judicial reform or by way of legislative reform. It has been suggested and seen, however, that legislative reform is more desirable in comparison to judicial reform.

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CHAPTER 5 – CONCLUSION

5.1 INTRODUCTION

This thesis commenced with the explanation of the privity of contract doctrine as well as its historical origin in the English legal system. The thesis identified that the doctrine has two limbs, one which prevents third parties from obtaining rights or benefits under a contract to which they are not a party and the other which provides that the parties to a contract cannot impose liabilities or obligations on third parties. Unlike the second limb the first has been highlighted to be problematic as it attracts continued criticism from the judiciary, law commission bodies and academics alike. The critique was focused on the failure of the doctrine to respect the intentions of the contracting parties to confer benefits on third parties which in produces unsatisfactory results and injustices for third parties. This position which is consistent with the preferred position in South Africa as the will theory has been preferred over the declaration theory.308

The key objective of this research was to analyse the negative effects that the doctrine of privity in South Africa has on third party beneficiaries of commercial contracts. This is for the purpose of identifying the third parties most disadvantaged by the doctrine of privity with a view to making appropriate recommendations for reform. The thesis therefore explored the impact of the privity doctrine on commercial contractual contracts in South Africa.

The objectives of this thesis amongst other things were:

i. To determine the advantages and disadvantages of the privity doctrine if there is rigidity in its application.

ii. Illustrate the operation of the privity doctrine in South Africa and in England.

iii. Show the importance and benefits of relaxing the privity doctrine in South Africa as well as,

iv. To explore international best practices in the reformation of the privity doctrine that South Africa could emulate.

This chapter will therefore sum up the research key findings resulting from the analysis carried out. From these findings, this chapter will also offer recommendations to remedy any injustices incurred by third party beneficiaries as a repercussion of the privity doctrine.

5.2 THE KEY ISSUES/RESEARCH FINDINGS
Chapter two tracked the origins of the privity doctrine as well as established the underlying theories and principles of the doctrine thereof. The historical formulation of the doctrine was also articulated as well as the rationale of the doctrine of privity whilst also outlining a brief history of the development of the rule. The chapter traced the decisive conclusion upon the scope of a contract with regards to the position of the doctrine of privity. The court in the case of Tweeddle v Atkinson declared that no one may be entitled to or bound by the terms of a contract to which he is not an original party to.\(^\text{309}\) The two components that comprise the doctrine were elucidated. The privity doctrine is comprised of two limbs, aimed at preventing a third party from enforcing benefits conferred on them by those contracts as well as the second one that denotes that parties to a contract cannot impose liabilities or obligations on third parties. The criticism levelled against the first limb was highlighted and addressed as the need that calls for the relaxation and the reformation of this common law principle.

The chapter also highlighted the transition from the interest theory to the consideration theory. The interest theory allowed third parties to be involved in actions because non-performance of the promise caused an injury to the third party beneficiary's interest. Subsequent, to the interest theory was the benefit theory. The judicial trend at this particular time was to recognise promises of gifts, marriage contracts and family agreements even though the third party beneficiary gave no consideration and had no compensable interest.\(^\text{310}\) The consideration theory replaced the interest and the benefit theory. The consideration theory made it succinctly clear that consideration had to be effected as a condition for the enforcement of a contract.\(^\text{311}\) This was noted to be the period all the uncertainty surrounding the privity doctrine was cleared.

The development of the privity doctrine was critically examined. It has to be acknowledged that the doctrine of privity of contract owes its origin to the common law courts. The Common

\(^{309}\) Tweeddle v Atkinson (1861 EWHC J57 (QB).

\(^{310}\) Clarence B, The history of the beneficiary action and the need for reform of the parties only rule in Malaysia (phd thesis st clements 2001) 84.

law of South African contract is therefore, mostly based on the principles of the English legal
system. The chapter explained that; a discussion of historical development of the doctrine in
England will help in better understanding the development of this doctrine. It, however, took
considerable time to come to prominence. The doctrine of privity of contract was, for the first
time, applied in the case of Jordan v Jordan. The development was followed through the
advances that were made in all the cases of Lever v Keys where there was frustration to the
development of the privity doctrine as progress was halted.

The re-affirmation of the stance in Jordan v Jordan was also entrenched in the case of Taylor
v Foster where a stranger to the contract was prevented from maintaining his action upon
breach of the contract. The court in Provender v Wood, however overruled the decision
Taylor v Foster. The court similarly, in Sprat v Agar also overruled the ruling in Taylor v
Forster where the father of a girl promised the father of a boy to transfer certain land to the
boy in consideration of the boy's marriage with his daughter where the son even not a promisee
was allowed to sue. The chapter also discussed the frustration brought by the Dutton v
Poole case towards the doctrine as the of the King's Bench overruled the decision in Bourne
v Mason case and upheld the stranger's claim, but on a different ground. The position was
also followed in the subsequent case of Crow v Roger where a stranger could not base his
claim on breach of a promise. The view was also shared in Price v Easton. The case of

312 Jordan v Jordan (1594) Cro Eliz 369.
313 Lever v Keys (1598) Cro Eliz 619.
314 Jordan v Jordan (1594) Cro Eliz 369.
315 Taylor v Foster (1601) Cro Eliz 776.
316 Taylor v Foster (1601) Cro Eliz 776.
317 Provender v Wood (1630) Hetley 30.
318 Taylor v Foster (1601) Cro Eliz 776.
319 Sprat v Agar (1658) 2 Sid 115.
320 Sprat v Agar (1658) 2 Sid 115.
321 Dutton v Poole (1678) 2 Lev 210.
322 Bourne v Mason (1699) 1 Ventris 6.
323 Dutton v Poole (1678) 2 Lev 210.
324 Crow v Roger (1724) 1 str. 592.
325 Crow v Roger (1724) 1 str. 592.
Tweddle v Atkinson\textsuperscript{327} finally ended the uncertainty about the doctrine and gave finality to it. The doctrine of privity of contract has been followed ever since the decision of this case. The chapter also dealt with the privity doctrine generally. The chapter discussed the general rationale of the privity doctrine as an important cornerstone of the common law of contract.

Chapter three deliberated on the privity doctrine in South Africa. It highlighted that the rationale of the principle is mainly to make sure that only contracting parties themselves acquire rights or incur duties in terms of the obligation or obligations created by the contract and that third parties are not directly affected as the rights derived from the obligation are personal and relative.\textsuperscript{328} The rule has been negatively applied as it stipulates that a particular litigant has no contractual cause of action against another litigant when the latter is an outsider to the contract.\textsuperscript{329} The case of Unitrans Freight (Pty) Ltd v Santam Ltd, categorically emphasised that prior to acceptance a third party has no right whatsoever, whether contingent or otherwise.\textsuperscript{330} This case highlighted a dire need for reform of the doctrine and looks for ways to relax rigid application of the rule as it often results in injustices for third parties. The highlighted the need with a need to rectify the injustices incurred by third parties.

Chapter three also analysed the operation of the doctrine of privity in South Africa. The fact of the matter is that the doctrine has been a contentious subject in various jurisdictions as well as in South Africa was highlighted. The basis of the privity doctrine is that a third party is prevented from enforcing benefits conferred on them by contracting parties which in turn results in third parties suffering loss and injustice. This is the reason why the doctrine has to be relaxed as it ought to accommodate that third parties have interests in various contracts that they are not entirely a party to or of.

The chapter also traced the use of the privity doctrine usage from cases ranging from Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC which dealt with an issue where the

\begin{thebibliography}{9}
\bibitem{327} Tweddle v Atkinson (1861 EWHC J57 (QB)).
\bibitem{328} Van Huyssteen Contract law in South Africa (2017) 146.
\end{thebibliography}
doctrine was employed.\textsuperscript{331} The case of \textit{City Of Cape Town V Khaya Projects (Pty) Ltd and Others} was also discussed at it highlighted how the privity rule is used to escape contractual obligations.\textsuperscript{332} The same plight was also highlighted in the case of \textit{Member of Executive Council v Terra Graphics} where a local was behaving unconscionably in trying to escape contractual liability using the privity doctrine.\textsuperscript{333} This highlighted the dire need to address the problems associated with third parties when the doctrine is used to advance a position to their detriment.

There are also exceptions that were explored that have been introduced to try and circumvent the harshness of the doctrine of privity. The chapter identified the first exception as to be that of agency which is a situation that has a principal authorising another person, the agent, to represent her or him in negotiating a contract.\textsuperscript{334} The court in \textit{Totalisator Agency Board OFS vs Livanos} held that a third party may be able to take the benefit on an exclusion clause by proving that the party imposing the clause was acting as his or her agent thereby binging he party into direct contractual relationship with the promisor.\textsuperscript{335}

Another form of exception that was acknowledged is \textit{stipulatio alteri} which was enunciated in the \textit{McCullough v Fernwood Estate Ltd.}\textsuperscript{336} \textit{Stipulatio alteri} was described as a concept that allows parties to conclude a valid contract for the benefit of a third party. This has an effect of circumventing the privity doctrine as it gives the third party an independent right to demand performance upon acceptance. These mechanisms have proved inadequate to cater for all contractual matrices that the doctrine finds itself operating. It is against this backdrop that the doctrine has to be relaxed. The chapter also juxtaposed the rationale of the privity doctrine with the criticisms of the doctrine. The doctrine of privity was found wanting as the criticism outweighed the rationale of the common law rule. The chapter ended off on a note that indicated that reform and relaxation of the doctrine was desirable.

\begin{itemize}
\item \textsuperscript{331} \textit{Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction} 2011 (6) SA 331 (GSJ).
\item \textsuperscript{332} \textit{Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (PTY) ltd} (1985) All SA 347 (A); \textit{Member of Executive Council v Terra Graphics} 2015 (4) ZASCA 116.
\item \textsuperscript{333} \textit{Tweddle v Atkinson} (1861) EWHC J57 (QB).
\item \textsuperscript{334} Hutchison et al \textit{The Law of Contract in South Africa} 3 ed (2018)) 71.
\item \textsuperscript{335} \textit{Totalisator Agency Board OFS vs Livanos} 1987 (3) SA 283 W 291.
\item \textsuperscript{336} \textit{McCullough v Fernwood Estate Ltd} 1920 AD 204.
\end{itemize}
Chapter 4 explored best international practices in the reformation of the privity doctrine that South Africa could emulate. England was used as the best jurisdiction as the doctrine emanated from this common law country. The country also made some summersaults to dilute the rule as it was also causing grave injustices in the contractual sphere. The development of the rule was also discussed in this chapter as it was pertinent to allow the doctrine in order to understand why it was reformed in England and why it needs to be relaxed and reformed in South Africa as well.

The doctrine was indicated to be married to the concept of consideration which also underwent progressive transformation in to ensure the realisation of the reformation of the doctrine in England. The same methods are therefore proposed to be followed in South Africa. The call for reformation was mainly championed and engineered by the Law Reform Commission. Their main agenda was to codify the law of contract in this regard as well as to relax the operation of the privity doctrine.

### 5.5 RECOMMENDATIONS

#### 5.5.1 SPECIFIC LEGISLATION

There has not been any legislation enacted to regulate the operation of the privity doctrine in South Africa. Despite the fact that general legislation is unlikely to improve the situation for sub-contractors in relation to security of payment for works completed in construction projects, it is vital to enact legislation dealing with the operation of the privity doctrine. The contents and the operation have been explained in chapter 4. There is therefore a need to emulate the Contracts Right of Third Parties as has been the development in the English legal system where the doctrine has been transformed. This has an effect of circumventing the need to make multilateral contracts between the promisor and the promisee and between the promisor and the third party.

In situations however, where there have been promises in the main contracts between the employer and the main contractor that the employer would make payment direct to subcontractors, such legislation may fall short to provide justice for subcontractors. Jenkins and Duckworth have recognised that sub-contractors should consider alternative means rather than...
than seeking to rely on the provisions of the proposed legislation. This is because the legislative solution needs to refer specifically to requirements for employers to honour promises to pay sub-contractors. There is therefore a need for specific legislation addressing the issue of direct payment to sub-contractors. The specific legislation must embody the effect of reforming the privity rule to the extent that sub-contractors are allowed to enforce at the promises made by employers in the principal contracts to pay the sub-contractors directly. This mechanism of direct payment has to be allowed despite not being parties to the contract. The inclusion of this provision in the proposed legislation will become specific legislation targeting the problem of direct payment by employers and accordingly abrogating the doctrine of privity in relation to third party benefits in the construction industry.

This thesis therefore resolves the issue of direct payment and demonstrated injustice to subcontractors as a result of the doctrine of privity as discussed in chapter 3. This addition is lacking in the legislation regulation the doctrine of privity in England in the CRTP 1999 Act as that has been opted for enactment as well in the South African contractual sphere.

5.6 CONCLUSION
This chapter has demonstrated criteria which would effectively contribute to the legislative reform of the doctrine of privity in South Africa thereby providing for and enhancing the rights of third parties especially in contractual contracts as well as insurance contracts. The proposed reform is in line with South Africa’s preferred will theory as it empowers law bodies to dispense the operation of the doctrine of privity and to give effect to the intention of the contracting parties to benefit third parties. By allowing third parties to enforce their rights to obtain the benefits conferred on them under the contract, the spirit and letter of the will theory are fulfilled. In conclusion, the following recommendations are made:

i. South Africa should reform the doctrine of privity to recognise the right of third party beneficiaries to enforce benefits conferred by the parties to a contract.

ii. The existing types of third party beneficiaries who are already equipped with the right to enforce benefits should be expanded to include all types of third party beneficiaries.

iii. The general legislation similar to England’s 1999 Act should be enacted in South Africa with some amendments to ensure the efficacy of the proposed reform. This general

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legislation will offer rights to various categories of third party beneficiaries to sue for
the benefits promised by the contracting parties. This has also an effect of eliminating
uncertainty and unpredictability as to the rights of third parties as the proposed
legislation specifically identifies who is entitled to enforce the benefits in the contract.
This has an effect of eliminating the need for Courts to apply common law exceptions
which can be timely and costly thereby enhancing efficacy and efficiency.

There is a duty that has been bestowed on our Courts by the legislature to develop the
common law. Section 39(2) of the Constitution stipulates that when interpreting any
legislation, and when developing the common law or customary law, every Court, tribunal
or forum must promote the spirit, purport and objects the Bill of rights.\textsuperscript{339} There is an outcry
for reformation and relaxation of this doctrine in South Africa as it has worked so many
injustices for third parties.

\textsuperscript{339} The Constitution of the Republic of South Africa, Section 39 (2).
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