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1. Introduction

1.1 Background and meaning

The doctrine of the undisclosed principal has been described as odd, anomalous, unsound and inconsistent with established legal principals, not only in South Africa, but also in England.[1] Regardless of the constant conflict associated with the implementation of this English law doctrine, South African courts have confirmed its existence, particularly in light of its commercial convenience.[2] The purpose of this dissertation is to consider the relevance of the doctrine of the undisclosed principal, in the South African context, with specific reference to the doctrine's constitutional perpetuality.

By 'undisclosed principal' is meant a principal whose existence is not known to the third party and not a principal who, known to be existent by the third party, are nevertheless not identified by name.[3] By 'agent' is meant a person who in his own name contracts ostensibly for his own account, but behind whom there stands an undisclosed principal.[4]

The doctrine of the undisclosed principal may be illustrated by the following scenario: An agent acting on behalf of a potential party to a contract (for the sake of this explanation referred to as "A"), enters into an agreement with another

1 Goodhart and Hamson 1932:320.
2 *SA Metal Machinery Company (PTY) Ltd v Klerck* 2005 1 ALL SA 44 (E): 45.
3 Goodhart and Hamson 1932:320.
4 Goodhart and Hamson 1932:320.

("B"). At the time of entering into the contract, A's identity is unknown to B. Rather than entering into the agreement on A's behalf, A's agent concludes the agreement with B in his (agent's) own name.

By operation of the doctrine of the undisclosed principal, A is allowed to take action against B in the case of non-fulfilment of the latter's obligations agreed upon in the contract concluded between A's agent and B. Similarly, B can also institute action against A once he or she comes to know of the existence of the latter, which will only occur in the instance when A decides to hold B liable based on the non-performance initially concluded between A's agent and B.

Delport submits that the undisclosed principal is in a position similar to a cessionary wherein the "agent" is seen as the cedent when he or she comes to the fore and seeks to enforce the contractual rights against the third party. A fictional cession is presumed, since the principal's right to intervene is not based on any actual cession. When the principal steps forward to enforce the contract and the third party decides to sue the principal, the intermediary ("agent" or cedent) is released from all the rights and duties flowing from the contract and a cession of rights and an assignment of obligations are deemed to have taken place.

Another theory states the agent in fact acts in the capacity of a trustee in such an instance. He uses the example of the sale of land as the subject of the conclusion of the contract between the agent and the third party. The example holds: When A conveys the land to B, no one will say that the title passes to C. But B, who gets the title, does not hold it for himself, but as trustee for C. To say that A may charge C upon B's contract of purchase, is to maintain what no one would maintain, that a *cestui que* trust may be sued, and at law, upon contracts between the trustee and third persons.

1.2 Relevance of the current research.

What is firstly unclear is the following: on what legal basis can A in the scenario above intervene and institute action against B on a contract to which A was not initially a party? This question stems from the fact that *a vinculum iuris* exists only between the two contracting parties (A's agent and B from the scenario above).

Thus, from a contractual law stance the legal bond between A's agent and B is the only established legal relationship from which rights and obligations can accrue. The established consensus between A's agent and B with regards to the identity of the parties, the nature of the performance contracted on as well as the nature of the contents of the agreement should be established *inter partes*, to the contractual exclusion of any other party but the two contracting parties. In *Sasfin Bank v Soho Unit 14 CC t/a Aventura Eiland*[5], Van Den Heever AJ stated:

> The fact that an undisclosed principal can step forward and enforce rights in terms of an agreement entered into between an intermediary and a third person does not concern the acceptance of an offer or the conclusion of a contract. The undisclosed principal does not acquire the right to sue the third party by reason of a contract entered into between the third party and the undisclosed principal. That much is clear. The contract comes into existence between the third party and the intermediary and not between the third party and the undisclosed principal.

Therefore, due to the existence of the doctrine, the undisclosed principal can thus hold the third party liable by operation of law, and not based on the law of contract or the law of agency specifically.[6]

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5 2006 (4) SA 513 (T).

6 *Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland* 2006 (4) SA 513 (T): 519 F-J.

Secondly, the nature of the relationship between the undisclosed principal and the so-called “agent” assigned to conclude such a contract by the authority of the former, is also uncertain in law.

What is the true nature of an authority (the undisclosed principal) who permits an “agent’ to conclude a contract in his or her own name, binding such an agent and consequently accruing rights and obligations as a result of such a contract?

Such authority does not emanate from the law of agency, which traditionally stipulates that the agent only concludes a contract on behalf of the principal and in the name of the principal. According to the law of agency, a *vinculum iuris* exists between the third party and the principal. The agent accrues no rights and or obligations to the contract at hand. Such authority, the courts hold, should be in existence at the very instance that the ‘agent’ concludes a contract and that ratification is not possible.[7]

There can be no doubt as to the fact that a person with full contractual capacity to act as a major does not need the authority of another person to bind himself contractually.[8] The doctrine itself presupposes that there must be some sort of a relationship that exists between the agent and the undisclosed principal; that due to this relationship the “agent” concluded the contract with the third party and that it is due to this very relationship that the undisclosed principal can have an action against the third party.

7 *Durity Alpha (Pty) Ltd v Vagg* 1991 2 SA 840 A 843.

8 Children’s Act 38/2005: sec 17.

This dissertation aims to explore the legal basis of the existence of the doctrine of the undisclosed principal. It will explore the origin, current use and perpetuality of the doctrine in modern Constitutional South Africa. Furthermore, it will aim to establish whether legally sound reasons exist for the continued existence of the doctrine in the current South African legal system.

2. Origins and limitations of the doctrine of the undisclosed principal

2.1. Introduction

The doctrine of the undisclosed principal was established in English law. This chapter will therefore focus on English cases, due to the fact that the doctrine was only incorporated into South African law fairly recently. The inception, operation and predicaments faced by the English courts in the application of the doctrine will be scrutinized.

2.2 Origins of the doctrine of the undisclosed principal in English law

The first judicial deliberation of the doctrine of the undisclosed principal was in 1743 in the case of *Schrimshire v Alderton*.[9] This case, states Ames, was instructive due to the reluctance of the jury to accept the direction of the judge.[10] In this case a farmer had consigned oats to an agent for sale on a *del credere* commission. The agent subsequently became insolvent. The farmer then later gave notice to the buyer not to pay the agent, however despite such notice the buyer paid the agent and was sued by the principal. The presiding officer directed the jury in favour of the farmer, however the jury found for the buyer.[11] The jury was sent out the second and the third time to reconsider their decision, however still

9 174 2 Stra.

10 Ames 1909: 446.

11 *Schrimshire v Alderton* 174 2 Stra: 1183.

adhered to their verdict.[12] The jury were subsequently asked individually as to the reason behind their decision and individually held that they found for the buyer instead, herein referred to as the third party.[13]

Upon this, a new trial was formulated and at the sittings after this term, the matter came again before a special jury and the Chief Justice declared that the agents sale does by the general rule of law create a contract between the farmer and the buyer.[14] However, notwithstanding this, the jury still found for the third party and individually declared that they thought that from the circumstances no credit was given as between the undisclosed principal and the third party, and that the latter was answerable to the agent only, and the agent to the undisclosed principal.[15] Ames purports that, even though the jury were overridden by a 'masterful judge', they were indeed right in their decision.[16] The third party was only the debtor of the agent, the latter holding his claim as trustee for the undisclosed principal.[17] Ames further states that the third party was justified in paying the factor unless he had reason to suppose that the agent would use the money for his own personal use.[18] Even in such a case, he opines, his payment would make him answerable to the undisclosed principal, not in law but only in equity for confederating with a delinquent trustee.[19]

It is quite clear from the case discussed above that from its inception, the doctrine of the undisclosed principal had created a lot of controversy and surpassed logical legal rationality as to the reason why the third party could be held liable by an

12 *Schrimshire v Alderton* 174 2 Stra: 1183.
13 *Schrimshire v Alderton* 174 2 Stra: 1183.
14 *Schrimshire v Alderton* 174 2 Stra: 1183.
15 *Schrimshire v Alderton* 174 2 Stra: 1183.
16 Ames 1909: 446-447.
17 Ames 1909: 446-447.
18 Ames 1909: 446-447.
19 Ames 1909: 447.

undisclosed principal on a contract that was initially concluded between the agent and the third party, to the exclusion of the undisclosed principal. It was only in the last quarter of the 18th century that the right to charge the undisclosed principal as a defendant was established.[20] The only reason why English (and later US courts) accepted such a doctrine was provided in *Keighley v Durant*.[21] In this case, Lord Lindley stated that the only reason why the undisclosed principal can sue and be sued on a contract made by another person with his authority, is because the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made and the person who makes it for him is only an instrument by which the undisclosed principal acts.[22] By allowing the undisclosed principal to sue and to be sued upon it, effect is given, so far as he is concerned, to what is true in fact, albeit the truth may not be known to the third party.[23] Therefore with this doctrine, the anomaly is true, that a person can be bound to another of whom he knows nothing, and with whom he did not initially intend to contract.

20 Ames 1909: 447.
21 1901 AC.
22 *Keighley v Durant* 1901 AC: 261.
23 *Keighley v Durant* 1901 AC: 261.

2.3. The problematic nature of the doctrine of the undisclosed principal

The development of undisclosed "agency" was characterised by the lack of an underlying general principal. The underlying justification of contractual liability changed. This lead to internal tensions, which are evident in several decisions, particularly so in the course of the second half of the nineteenth and the beginning of the twentieth century.[24] This is evident from the English case of *Armstrong v Stokes*,[25] which demonstrates how the court moved away from the old basis of undisclosed agency.[26] Uncertainty about the doctrine is evident in the following judgement by Blackburn J:[27]

> It is we think, too firmly established to be questioned now, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind now come too late: for we think if it is established law that, if on the failure of the person, with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend. . . he may recover the price himself directly from the principal, subject to an exception, which is not so well established as the rule, . . . that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

Such an exception Blackburn states would occur in an instance where the third party could sue the undisclosed principal who had *bona fide* and without moral blame paid his agent at a time when the third party still gave credit to the agent alone and knew of no one else.[28] He further states that it would perhaps be a mistake to allow the third party to have

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24 Müller-Freienfels: 312.
25 1872 7 QB.
26 Müller Freienfels: 312.
27 *Armstrong v Strokes* 1872 7 QB: 604.
28 *Armstrong v Strokes* 1872 7 QB: 604.

legal recourse at all against one to whom he never gave credit, and that the law ought not to develop an illogical exception in order to cure a fault in a rule.[29]

Müller-Freienfels suggests that the idea that the third party has his own original right against the undisclosed principal was not the basis of this decision. Rather the decision was based on the view that the third person only has a right against the agent and that he may, when the principal is disclosed, elect to sue the principal instead of the agent, to take over the agents right to an indemnity from the principal.[30] Based on this premise, the third party obtains "satisfaction" from the undisclosed principal because the principal is liable to the agent to pay, or to provide the funds with which the agent may pay the third party.[31] He can therefore hold the undisclosed principal indirectly responsible for the fulfilment of the agents contracts.[32] Müller-Freienfels insists that only this rationale will explain why a payment from the principal to the agent before the disclosure of the agency to the third party may preclude the third party from suing the principal.[33] Furthermore, he states, this implies that the third party does not have his own original right against the principal, because otherwise he would not have been deprived of his right to sue the principal by something which, unknown to him, passes between the agent and the principal.[34] The end result is that the third party risks having to look for payment to an insolvent agent.[35]

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29 *Armstrong v Strokes* 1872 7 QB: 604.
30 Müller-Freienfels 1953: 313.
31 Müller-Freienfels 1953: 313.
32 Müller-Freienfels 1953: 313.
33 Müller-Freienfels 1953: 312
34 Müller-Freienfels 1953: 313-314.
35 Müller-Freienfels 1953: 314.

Müller-Freienfels holds that the truth is that the direct liability of the undisclosed principal is *ex hypothesis*, that is, not part of the disclosed intentions.[36] He suggests, however, that this is not necessary if the underlying idea is the doctrine of consideration.[37] Importantly, he states that it was due to the idea of mutual consent that had replaced the doctrine of consideration that the judges from conception were obliged to regard undisclosed agency as an anomaly.[38] He suggests that there could be a close connection between the doctrine of the undisclosed principal and the doctrine of consideration.[39] The doctrines are easily reconcilable, since the consideration ultimately derives from the patrimony of the undisclosed principal who ultimately bears the burden of the transaction.[40] It is for this reason, Müller-Freienfels suggests that he (undisclosed principal) could sue the third party directly.[41] Conversely, the undisclosed principal ultimately enjoys the benefits of the transaction, and this justifies the right of the third party to sue him directly.[42]

Whatever the legal basis may be for the existence of this doctrine, English courts subsequently introduced limitations to its applicability. These limitations were introduced to safeguard the interests of the third party who might be in an unfair position should he later find out that the other party was in fact the agent of the principal.[43]

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36 Müller-Freienfels 1953: 315.
37 Müller-Freienfels 1953: 315.
38 Müller-Freienfels 1953: 315.
39 Busch 2005: 143.
40 Busch 2005: 143.
41 Busch 2005: 143.
42 Busch 2005: 143.
43 Richards 2009: 503-506.

2.4. Application of the doctrine of the undisclosed principal and limitations

The general rule concerning the doctrine of the undisclosed is that the undisclosed principal cannot intervene if the agent's contract is of a personal nature that is where the third party relied upon the skill, solvency or any other personal characteristic of the agent. The case of *Greer v Downs Supply*[44] is an example of such an occurence. In this case, the third party had bought timber from an agent who was acting for an undisclosed principal.[45] One reason for the purchase was because the agent owed the third party a debt on a previous transaction. The agent agreed to set-off his previous debt against the purchase price.[46] On appeal, the court did not permit the undisclosed principal to intervene in this transaction because the third party intended to contract only with the agent.[47] The agent specifically agreed that the third party could set-off his previous debt against the purchase price.[48] No other party could intervene.[49]

In *Howell v First of Boston International Corporation*,[50] the defendants sold stock to security brokers, which defendants had a legal privilege to do. The plaintiff was an undisclosed principal of the brokers who bought the stock. A sale to the plaintiff of the stock involved would not have been permitted by the blue sky[51] statutes. The plaintiff later sued for a return of the purchase price of the stock. She was, however, not allowed to recover same. The defendants were under no

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44 1927 2 KB: 28.

45 *Greer v Downs Supply Ltd* 1927 2 KB: 28.

46 *Greer v Downs Supply* Ltd 1927 2 KB: 28.

47 *Greer v Downs Supply* Ltd 1927 2 KB: 28.

48 *Greer v Downs Supply* Ltd 1927 2 KB: 28.

49 *Greer v Downs Supply* Ltd 1927 2 KB: 28.

50 194 34 2d 633 1941.

51 This is legislation that is made at State level, which comprised of anti-fraud statutes enforced by the individual States' in the United State's attorneys-general. All States have the authority to take action against securities scams, and they often do if they feel the Security and Exchange Commission has been slow or lax.

obligation to the only vendee they knew in the transaction to return the purchase price. Furthermore, the appearance of the undisclosed principal was not allowed to impose an obligation that was not included in their transaction with the agent.[52]

In *Resky v Meyer*[53] it appeared that the defendant employed the plaintiff, a broker, to find a purchaser for the defendant's property. The plaintiff showed the property to one Weiss, who refused to buy at the defendant's price. The defendant later sold the property to one Solomon, who was not procured by the plaintiff but who turned out to be an agent for Weiss. The plaintiff sued to recover a commission for making the sale, however, was not allowed to recover said commission. The court stated the following: "In this case the broker produced Weiss; he did not produce Solomon." The defendant's obligation was not allowed to be enlarged by the appearance of a principal who remained undisclosed while the defendant sold to Solomon.[54]

The most difficult aspect of this limitation is when the objection of the third party is not necessarily relying on the agent's positive skill, but is actually objecting to the undisclosed principal's negative skill. The case of *Said v Butt*[55] involved a theatre critic who wanted a ticket in order to witness the first performance of an opera that was opening at the Palace Theatre. He applied to buy a ticket but was refused because he had written an unfavourable review on a previous occasion. He then procured a Mr Pollock to buy a ticket in Mr Pollock's own name. This would thus obligate the theatre company to let Mr. Pollock enter and witness the performance. When the critic arrived at the theatre, the manager would not permit him entry. The critic sued the manager for breach of contract. The court held that there was no contract

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52 *Howell v First of Boston International Corporation* 309 Mass 194 34 2d 633 1941.

53 98 NJL 168 119 ATL 97 1922.

54 *Resky v Meyer* 98 NJL 168 119 ATL 97 1922: 173.

55 1920 3 KB.

between the theatre and the critic due to the fact that the theatre had reserved the right to sell the first night tickets to selected persons, and the critic was excluded from these.[56] The court held that the critic could not institute action as an undisclosed principal, because he knew that the theatre was unwilling to enter into contract with him.[57]

Said v Butt has been criticized rather severely. Whether an undisclosed principal should be allowed to intervene ought to depend on whether the third party felt the agent was the only person he wanted to deal with, that is, the agent has some positive attribute important to the third party. The *Said v Butt* decision allows a third party to argue that although the agent's identity does not matter, the undisclosed principal's personality is detrimental to his own interests or the interests of his company.[58] The court in *Said v Butt* clearly felt that the first-night performance at the theatre was a special one. Whatever happened on the first night would more or less determine the success or failure of the play, so the theatre had special reasons for restricting the audience to people who could influence the outcome of the first night in their favour. The theatre management consequently would not wish to permit entry to antagonistic theatre critics.[59]

The second limitation is based on the "exclusions by the terms of the contract." This is where the doctrine of the undisclosed principal is excluded by the terms of the contract as entered into by the parties to the agreement. The leading case concerning the second limitation is *Humble v Hunter*.[60] In this case, an agent chartered out a ship. He signed the

56 *Said v Butt* 1920 3 KB: 501-502.
57 *Said v Butt* 1920 3 KB: 503.
58 *Said v Butt* 1920 3 KB: 504.
59 *Said v Butt* 1920 3 KB: 501.
60 1848 12 QB: 307.

charter party as ‘owner’, while his mother was in fact the owner. His mother then revealed herself as the undisclosed principal and wanted to enforce the contract. The court held that the undisclosed principal could not intervene.[61]

The reason for the courts decision was that the description of the agent as ‘owner’ in the charter party contract was inconsistent with the terms of that contract.[62] It was an explicit term of the contract that the agent was contracting as the owner of the property in question.[63] The agent impliedly contractually that there was no principal “behind” him in the transaction.[64]

It is submitted that the logic behind this case does not make legal sense. This is true especially with regards to the fact that the doctrine of the undisclosed principal is primarily based on the premise that the third party is under the impression that he is entering into a contract with the agent as the “owner”. Müller-Freienfels rightly poses the question “when does the agent of an undisclosed principal not contract as a principal?”[65] It is due to the fact that he contracted as a principal that the doctrine of the undisclosed principal finds application.

Despite the abovementioned statement, the court still applied this limitation in *Formby v Formby*[66]. Herein it was held that where an agent had contracted as the proprietor, no evidence was admissible to charge the undisclosed principal, because it would contradict the terms of the contract.[67] English courts have shown disregard for this legal stance,

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61 *Humble v Hunter* 1848 12 QB: 317.
62 *Humble v Hunter* 1848 12 QB 307.
63 *Humble v Hunter* 1848 12 QB 307.
64 Müller Freienfels 1953:316.
65 Müller Freienfels 1953:316.
66 1910 102 LT. 116.
67 *Formby v Formby* 1910 102 LT: 116.

evidently in the case of *Epps v Rothnie*.[68] In this case, Scott LJ decided that neither the *Humble* nor the *Formby* case could be regarded as good law.[69] Müller-Freienfells cautions that the *Humble* case still stands and has not been overruled.[70] Barnett asks the question of whether this limitation should be practiced in its strict sense and if so, what then happens when the agent, who concluded the contract on behalf of someone else, albeit in his own name, subsequently becomes insolvent.

Consider the following situation:

A third party buys goods from an agent. The undisclosed principal is concerned about the agent's financial position. He then informs the third party that he is in fact- the agent's principal and therefore the "true" seller, and that the third party should pay him (instead of the agent) for the goods. The third party however decides to pay the agent anyway, based on the fact that the initial contract he concluded was with the agent and not the now disclosed principal. The agent then becomes insolvent and fails to pay the principal. The vital question is what legal recourse the principal now has at his disposal.[71] From another point of view, what happens where the third party delivers the goods to the agent, who in turn delivers them to the undisclosed principal, and the latter then pays the agent the money for the goods and finally, the agent subsequently becomes insolvent before paying the third party?[72]

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68 1945 kb 562.
69 *Epps v Rothnie* 1945 kb: 565.
70 Müller Freienfels 1953:316.
71 Barnett 1987: 1972-1973.
72 Barnett 1987: 1972-1973.

Should this limitation apply, what legal recourse can the undisclosed principal utilise, especially in an instance where he did inform the third party not to bestow the payment to the agent as he was the true principal in this transaction?[73] This question was posed in the case of *Schrimshire v Alderton*[74], which led to the birth of the doctrine of the undisclosed principal in an effort to provide the undisclosed principal with legal recourse in an instance that would otherwise cause unfair consequences should the doctrine not apply.[75] This is so despite the fact that the third party himself would, by operation of this doctrine, have to pay the same amount twice.[76] This doctrine has been accepted into the US Law by section 337 of the (Second) Restatement of Agency Act.[77] This limitation therefore goes against the very essence of the doctrine of the undisclosed principal and why it was promulgated in the first place.

The third limitation relates to set-offs.[78] The general rule where the principal is undisclosed is that a third party can set-off against the principal any defences accrued against the agent up to the point where the principal intervenes. On the other hand, if the third party did not consider the other contracting party's identity as relevant or did not believe he was dealing with an agent, or if the third party thought there might be an undisclosed principal involved, the third party cannot set-off the agent's debts against the principal.

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73 *Schrimshire v Alderton* 2 Stra 1182.

74 2 Stra 1182.

75 Barnett 1987: 1972-1973.

76 *Schrimshire v Alderton* 2 Stra 1182.

77 Restatement (Second) Of Agency Sec 337.

78 The right of set-off by third parties against undisclosed principals is allowed at common law on the ground that by remaining undisclosed, the principal has allowed the agent to appear as the party in interest in the transaction, i.e. he has clothed the agent with the *indicia* of ownership. If the agent were as he appeared, the third party could set-off any debts in an action by the former, and this right of set-off is not lost by the entrance of a party claiming he was the principal all the time.

In *Cooke v Eshelby,*[79] the agents were cotton brokers. It was the practice of the Liverpool cotton market that brokers sometimes dealt on their own account and sometimes as agents. The agents sold cotton to a third party on behalf of an undisclosed principal. The third party did not enquire whether this transaction was on their own account or for an undisclosed principal. The third party had not paid when the undisclosed principal went into liquidation. The trustee in bankruptcy claimed the price from the third party. The third party argued that they should be allowed to set-off what the agent owed them on a previous occasion. The House of Lords held that the third party had no right of set-off.[80] If it had really mattered to the third party that they dealt with the brokers on their own account (so they could set-off previous debts), they should have enquired more specifically as to the brokers' status.[81] The third party knew that the agents were either dealing on their own account or for an undisclosed principal. This was sufficient to put the third party on notice of the possible existence of a principal.[82]

Ferson states that an 'appearance of ownership in an agent', like an 'appearance of authority' does not count unless it can be traced to the real owner of the property.[83] It is not sufficient to protect the third person for him to prove that he was fooled by an appearance that the agent was the real owner.[84] He must also show that the principal consented to

79 1987 AC 271.
80 *Cooke v Eshelby* 1987 AC 271: 278-278.
81 *Cooke v Eshelby* 1987 AC 271: 278-278.
82 *Cooke v Eshelby* 1987 AC 271: 278.
83 Ferson 1953: 158.
84 Ferson 1953: 158.

have the agent hold himself out as the owner.[85] In *Cookes*, Lord Watson stated that it must also be that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal.[86]

Additionally a third person does not get the advantage of dealing with an apparent owner if he deals with an agent whose position is equivocal. Payment to such an agent, will not protect the third party against the later disclosed principal, unless it is later found that the agent had authority to make the collection.[87] In *Miller v Lea*[88] the court found that despite the rule that a third party is generally entitled to use defenses he acquired against the agent while the principal was undisclosed, the third party should not act contrary to the rights of the principal, even though the principal is undisclosed. This is especially true if the third party has reason to believe that the person with whom he deals is in actual fact an agent.[89]

Therefore, if the character of the agent is equivocal, for example if he is in the habit of selling sometimes as a principal and sometimes as an agent, a third party who transacts with the view of covering his own debt and availing himself a set-off, is obligated to inquire in what capacity the agent acts with regards to that particular transaction.[90] The court held that, should the third party fail to do that and it later appears that indeed the transaction was fulfilled by an agent on behalf of an undisclosed principal, he will in fact be denied the benefit of this set-off.[91]

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85 Ferson 1953: 158.
86 *Cooke v Eshelby* 1987 AC: 278.
87 Ferson 1953: 158-159.
88 35 MD 396 1872.
89 *Cooke v Eshelby* 1987 AC 278.
90 Ferson 1953: 159.
91 *Cooke v Eshelby* 1987 AC 271: 278.

Ferson states that first, the moment the undisclosed principal becomes known, the agent no longer appears to be the owner of the claims or any other property that he holds for the principal in question.[92] Secondly, once the true character of the agent is made known, the third party cannot make any valid deal with the agent that would prejudice the rights of the real owner.[93] Finally, the third party cannot pay what he owes the principal by releasing a claim he has against the agent.[94]

In *Barker v Dinsmore*[95] the court decided that if it can be proved that the third party knew that no authority existed, he must lose, for an owner cannot be deprived of his property without his consent unless he has placed it in the custody of another and given him an apparent right to dispose of it.[96]

The case of *Blackburn v Mason*[97] is perceived as a leading English authority on the matter under discussion. The custom involved gave a London broker who was employed directly by a country broker the right of treating the country broker as a principal, although acting for someone else. This entitled the London broker to use any claim he may have against the country broker as a set-off against his principal. The Court of Appeal indicated that the defendant London brokers knew that the plaintiff was the principal, a power of attorney on the stock sold in the transaction having been executed by the plaintiff and sent to the defendant. It viewed the custom as a bold attempt to achieve set-off against the principal

92 Ferson 1953: 159
93 Ferson 1953: 159
94 Ferson 1953: 159.
95 72 PA 427 1872.
96 Elliot 1913: 182.
97 1893 LTNS 68: 510.

for a debt owed by the agent even though the latter was known as an agent by the third party. The court in *Blackburn*[98] cited *Pearson v Scott*[99] as supporting its position.[100]

In the case of *Pearson v Scott*[101] the custom said that a London stockbroker (defendant) was bound only to recognize the person actually employing and instructing him, and from this he claimed the right of set-off. There was some evidence that the defendant knew that the plaintiff, rather than the broker with whom he dealt, was the principal. In the court's opinion, a custom allowing the defendant to pay for his purchase by setting off a debt due to him from the plaintiff's broker, "is a custom to pay one man's debts out of another man's money." Such a statement could generally apply to undisclosed principal set-off. However it is reasonable to assume that the court was not enraged at this type of set-off generally but rather at the pleading of a custom which purported to give that defense where there was notice of the agency and consequently no justification for set-off.[102]

The fourth limitation is applicable when money is paid. In *Armstrong v Stokes,* the court suggested that if an undisclosed principal gives money to his agent to pay a third party but the agent fails to make such a payment, the principal is absolved from liability to the third party.[103] The decision in *Armstrong v Stokes*[104] has been severely criticised and the Court of Appeal in Irvine v Watson suggested that Armstrong will probably not be followed.[105] In *Irvine v Watson*,[106] the court

98 *Blackburn v Mason* 1893 LTNS 68: 510.
99 1878 9 Ch D 198.
100 University of Pennsylvania and American Law Register 1913. http:// www.jsor.org/ stable/33133400. Accessed on 24/08/2017.
101 1878 9 Ch D 198.
102 University of Pennsylvania and American Law Register 1913. http:// www.jsor.org/ stable/33133400. Accessed on 24/08/2017.
103 1872 7 QB: 598.
104 1872 7 QB: 598.
105 *Irvine v Watson* 1879 5 QBD.
106 1879 5 QBD: 102.

suggested that the principal remained liable to the third party in similar circumstances. The court held further that, although the doctrine of the undisclosed principal existed for commercial convenience, it was important to protect the third party.[107] In a situation where an agent fails to pass payment to the third party, either the principal or the third party will lose out. It is surely fairer to place the loss on the principal. It is submitted therefore that the better position is this: an undisclosed principal who pays his agent but whose agent does not pass the payment on to the third party, remains liable to said third party.[108]

Finally, the application of the doctrine of the undisclosed principal is limited by the election rule. In an undisclosed principal situation, the initial contract is between the agent and the third party. In *Siu Yin Kwan v Eastern Insurance*[109] it was held that an agent could sue and be sued on the contract. Once the undisclosed principal intervenes, the agent loses his rights of action against the third party. The agent nevertheless remains liable to the third party until the third party elects whether to hold the principal or the agent liable. The third party cannot sue both, because the third party only makes one contract with one person, there is only one obligation. So, the right to sue the agent and the right to sue the principal are alternatives to each other. The third party may lose his right to sue one of them if he has 'elected' to hold the other liable. The third party cannot change his mind as to who to sue once he has elected.[110]

The vital aspect about this limitation is that it will only be applicable once the undisclosed principal subsequently becomes disclosed. Ferson rightly states "there cannot be an election between holding the agent and holding the principal so long

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107 *Irvine v Watson* 1879 5 QBD: 102.

108 Mechem 1910: 522-525.

109 1994 PC 16 DEC.

110 *Siu Yin Kwan v Eastern Insurance* 1994 PC 16 DEC: 201-202.

as the principal remains undisclosed".[111] In *Greenberg v Palmieri*[112] the court held that to make an election binding the party electing must have information of the name of the principal in addition to the fact that the third party had knowledge that he had contracted with an agent on behalf of a principal.[113]

The limitation discussed above emanates from the election doctrine. Under this doctrine, the plaintiff's cause of action would be swallowed up in a judgement against the agent regardless of whether he knew when he procured the judgment, that he had a cause of action against the principal.[114] This doctrine prohibits the third party from holding both the principal and the agent liable on a contract made by an agent of an undisclosed principal. At some point before judgement of the claim, the third party must decide whether to take a judgment on the contract against the agent or the principal. Election of judgment against one precludes a subsequent action against the other.[115]

US courts, based entirely on English doctrine, have at times suggested that the doctrine of election is based on the premise that the liability of the undisclosed principal on a contract made by an agent on behalf of that undisclosed principal creates only one obligation, upon which the third party has alternative claims.[116] This theory presumes that the third party has contracted for only one liability, with the intention of binding only the agent, and concludes that the operation of law should not give the third party the right to obtain a judgement against the undisclosed principal as well. Since the third party intended to bind only one person, binding another would be a windfall.[117] The practical application of this becomes

111 Ferson 1953: 144-145.
112 1904 71 NJL 83 58 ATL: 297.
113 Ferson 1953: 144-145.
114 Rochvarg and Sargent 1982:412.
115 Rochvarg and Sargent 1982: 412.
116 Ferson 1953: 144-145.
117 Rochvarg and Sargent 1982: 415

more interesting in instances where the third party institutes action against the agent, with the solemn view that he is indeed the only contracting party of which he then loses the case due to the insolvency of the agent, for example. Should the third party only know of the existence of the undisclosed principal once the matter has already been tried, can he then pursue the subsequently disclosed principal, particularly in view of the fact that his initial suit against the agent was unsuccessful? US legal authorities seem to believe that procurement of a judgement against either the agent or the undisclosed principal, which is unsatisfied, shall not be deemed an election of remedies which bars an action against the other.[118] This means that should the third party elect to take judgment against the agent, having knowledge of the subsequently disclosed principal, the principal shall then be discharged.[119]

English authorities, Ferson points out, seem to use a different conception in relation to the election rule, which is the "merger theory". The rule is premised on the notion that the third person only has a single claim and that it merges in the judgement if he procures a judgement against either the principal or the agent.[120] Therefore, when judgement is taken against either the principal or the agent, the third party's claim is said to have merged into the judgment, so that no further action upon that claim is possible. Under this theory, the claim is "exhausted" by the judgement against one party, and cannot be pursued against the other.[121]

In *Kendall v Hamilton,*[122] the plaintiffs had brought action and had secured judgment against a Wilson & McLay who had borrowed money from the plaintiffs. The defendants were found to be insolvent and thus unable to settle the claim. The

118 Ferson 1953: 147.
119 Ferson 1953: 145.
120 Ferson 1953: 145-146.
121 Rochvarg and Sargent 1982: 417.
122 1879 App Cas: 526-527.

plaintiffs then discovered that one Hamilton was a secret partner of Wilson and McLay. They consequently sought to recover the claim against Hamilton as an undisclosed principal. The court however decided that the plaintiffs were precluded from instituting action against Hamilton by their earlier action.[123]

The difference between the two doctrines have been noted by writers in the following way: First, the merger theory is not a theory of election.[124] Election requires a conscious choice between alternatives which usually takes place before judgment; the merger theory permits discharge of the undisclosed principal by a judgment against the agent whether the third party knew of his existence at the time of judgment or not.[125] Discharge by judgement pursuant to the doctrine of election occurs only if the third party knew of the principal's existence. Secondly, the notion of "exhaustion" of the claim upon judgment assumes that the third party has only one obligation which can be enforced.[126]

2.5 Conclusion.

The renaissance of the doctrine of the undisclosed principal was not without controversy. Its application in English (and to a lesser extent, US) courts has been inconsistent, and perhaps this could be attributed to the fact that from conception, the doctrine in itself was considered an anomaly. In *Schrimshire,* the fact that the jury vehemently disregarded the idea

123 Ferson 1953: 146.
124 Rochvarg and Sargent 1982: 417.
125 Rochvarg and Sargent 1982: 417.
126 Rochvarg and Sargent 1982: 417.

that an undisclosed principal could sue upon a contract that was concluded by two external parties, was a sign that the doctrine was contradictory to common sense. The controversy of the doctrine also lies in the fact that it seems unfair, as it disregards general conceptions of legal principles mainly emanating from contract law. The continued application of this doctrine (especially in South African law) remains a possibility, however. The mere fact that the doctrine is applied without consensus between the undisclosed principal and the third party, or that the doctrine in itself has given room for more anomalous doctrines, such as the doctrine of election, to better aid its existence, is still to my humble opinion not reason enough to entirely disregard its application.

In the next chapter I will examine the current application of the doctrine of the undisclosed principal in South African Law.Trust law, cession and the doctrine of the *respondeat superior* will be elaborated upon as possible tools to aid the predicaments faced by South African courts regarding the question as to the continued existence of the doctrine in that jurisdiction.

3. The application of the doctrine of the undisclosed principal in South African law: alternatives and *justa causae*

3.1 Introduction

Having critically discussed the English origins of the doctrine of the undisclosed principal in the previous chapter, the purpose of this chapter is to investigate the possible existence of a *iusta causa* for the doctrine (particularly in South African Law). In order to establish the possible existence of the *iusta causa,* three arears of law will be focused on and discussed critically: trust law, specifically the trust *inter vivos*, the law of cession and the doctrine of the *respondeat superior.* The question will be asked pertinently whether the practical functioning of the doctrine of the undisclosed principal could perhaps be absorbed by another area of law, which is more familiar to South African law. If, however, the doctrine cannot be absorbed by the areas mentioned above, it will be argued that the mere existence of areas of law similar to the doctrine of the undisclosed principal presents a *iusta causa* for its continued existence in South African law.

The aim of this chapter is therefore to indicate that a *iusta causa* exists for the doctrine of the undisclosed principal, and especially its incorporation into South African law. The reason why it is important to establish a *iusta causa* for the existence of the doctrine in question, is because of its controversial nature (as explained in the previous chapter) as well as the fact that uncertainty exists whether it should actually form part of South African law.

3.2 The trust *inter vivos* as possible *iustus causa* for the operation of the undisclosed principal.

As suggested by Ames,[127] the operation of the doctrine of the undisclosed principal could be better established and defined by categorizing it as a trust, in terms of which the agent of the undisclosed principal could be seen as a trustee, entering into contractual transactions and holding property for the benefit of the undisclosed principal.[128] Such an idea is perhaps not too far-fetched to entertain, and deserves closer scrutiny.

South African courts have stated that the trust *inter vivos* could possibly be categorized as a *stipulatio alteri*.[129] This is a recognition that a third party, who is not a party to a contract, may acquire rights and assume duties by way of a *stipulatio alteri* which is a stipulation in favour of a third person.[130] The rule in Roman law was that *alteri stipulari nemo potest*. This simply means that Roman Law generally refused to acknowledge the validity of agreements in terms of which a third party was intended to acquire rights.[131] The Roman Dutch law was not in agreement with the Roman law in this respect as affirmed by Grotius who stated that the third party may adhere to the contract, and so acquire a right against the promisor, unless the latter revoked the promise before the third party had adhered.[132] However, although acknowledging the validity of a *stipulatio alteri*, Roman Dutch writers were not in agreement as to its proper construction.[133] The weight of authority seems to have favoured the view that the third person derived an immediate right from the agreement between the *stipulans* and promisor without having to do anything him or herself.[134] At the same time, however, the right which accrued to the third person was uncertain, because the *stipulans* could at any time discharge the promisor from the

127 Ames 1909: 445-446.
128 Ames 1909: 445-446.
129 *Crookes v Watson* 1956 (1) SA 277 (A).
130 *Crookes v Watson* 1956 (1) SA 277 (A): 291-292
131 Zimmerman 1996: 34.
132 Keeton 1929: 82.
133 Keeton 1929: 82.
134 Grotius *Inleidinge* 3 1 28 as translated by Keeton 333.

obligation.[135] To avoid this eventuality, the third person could confirm his or her position by accepting the benefit from the promisor.[136] Should the *stipulans* thereafter discharge the promisor, the *stipulans* could be held liable for the damages incurred by the third party.[137] Importantly however, although a third person could obtain a right from a *stipulatio alteri*, it was not possible for parties to a contract in such a way to impose a duty on a third person.[138]

South African courts have however adopted a different approach from the initial conception to which the *stipulatio* was accepted. First, the benefit that is conferred to the third party need not necessarily consist of a right, and may also consist of a duty. In *Mccullogh v Fernwood Estate Ltd*,[139] Innes CJ made it clear that it may happen that a benefit could carry with it a corresponding obligation, and that the two would go together.[140] The court rejected the notion that a third person could take an advantage of one term of the contract and reject the other.[141] The court held that the acceptance of the benefit in itself would include an undertaking of a consequent obligation.[142] Once the third party had made notice of his acceptance and a *vinculum iuris* was established between himself and the promisor, the third party would be liable to sue and be sued.[143]

The second instance is that the intention of the *stipulans* and the promisor in concluding the contract must not be simply to confer a material benefit to the third party, but to give the third party the ability or the opportunity to become a party to

135 Grotius *Inleidinge* 3 1 28 as translated by Keeton 333. .
136 Grotius *Inleidinge* 3 1 28 as translated by Keeton 333.
137 Grotius *Inleidinge* 3 1 28 as translated by Keeton 333.
138 Grotius *Inleidinge* 3 1 28 as translated by Keeton 333.
139 *Mccullogh v Fernwood Estate Ltd* 1920 AD 204: 207.
140 1920 AD 204: 207.
141 1920 AD 204: 207.
142 1920 AD 204: 207.
143 1920 AD 204: 207.

the contract with the promisor.[144] Such intention can appear expressly or by necessary implication from the contract.[145] Thirdly, the formation of a contract between the *stipulans* and the promisor does not give the third party any vested right or impose any duty on him. The third party is entitled to demand any performance of the stipulation in his or her favour only if he or she has accepted it. The rule is that, until such a time as the third person has notified the promisor of his decision, there is no *vinculum iuris* between them.

The court in *Tradesmen's Benefit Society v Du Preez*[146] reaffirmed this very notion. In this case, De Villliers C J opined that a person could accept a promise made to him on behalf of a third party, but that the latter acquired no right before he had accepted the promise of which he had been informed.[147] Importantly, should the promisor and the *stipulans* wish to revoke the terms of the contract, they are at liberty to do so,[148] provided that the third party has not accepted the offer.[149]

It therefore appears that the contract between the *stipulans* and the promisor exists as an offer to the third person, who can either accept or reject such an offer.[150] In *Gayather And Others V Rajkali*[151] the court observed that the plaintiff was not in fact a party to a contract that was decided in her absence and that it was only alleged that she had accepted the benefits that accrued due to the written agreement that was concluded in her absence.[152] The court exclaimed that when

144 *Crookes v Watson 1956* (1) SA 277 (A): 291.
145 *Protea Holdings Ltd And Another V Herzberg And Another* 1982 (4) SA 773 (K): 622.
146 1887 5 SC 227: 284.
147 1887 5 SC 227: 284.
148 *Tradesmen's Benefit Society v Du Preez* (1887) 5 SC 227: 284.
149 1887 5 SC 227: 284.
150 *Gayather and Others V Rajkali* 1947 4 All SA 330 D.
151 1947 4 All SA 330 D: 332.
152 *Gayather and Others V Rajkali* 1947 4 All SA 330 D: 332.

an agreement is made for the benefit of a third party, such an agreement operates as an offer to the third party and the third party's acceptance of the offer creates a *vinculum iurus* between him and the parties to such an agreement.[153]

The stipulation requires that the promisor ought to honour his agreement with the stipulator and even after acceptance by the third party, he is bound to the contract. He cannot unilaterally withdraw from the contract.[154]

Before acceptance by the third party, the promisor and the *stipulans* can vary or revoke the "offer" to the third party. In *Mutual Life Insurance Co. of New York v Hotz,*[155] the court stated the following:

> The length of time during which a contract in favour of a third person remains open for acceptance must depend upon the circumstances of each case. It was argued in this instance that the son was entitled, in the absence of any formal acceptance by his father, to put an end to the contract; that he did so, by refusing to pay further premiums, and that he is therefore entitled to the resulting amount of the surrender value. No doubt, Lazarus Pelunsky and the Company might have agreed to cancel the contract. But they did not do so. He elected to discontinue the premiums, but that happened after the policy had acquired a surrender value.

On the other hand, should the third party accept the offer, a contract exists between the promisor and the third party and therefore revocation by the two initial contracting parties is no longer possible.

In *Groeschke v Trustee for the Time Being of the Groeschke Family Trust*[156] it was held that once the beneficiary has accepted the benefits arising from a contract that was concluded in his absence and for his benefit, that such a contract

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153 *Gayather and Others V Rajkali* 1947 4 All SA 330 D: 332.
154 *Mccullogh v Fernwood Estate Ltd* 1920 AD 204: 207.
155 1911 AD 557: 567.
156 2013 3 SA 254.

could only be varied with his or her consent.[157] The court stated that the reason for this is that, as in the case of a *stipulatio alteri,* it is only upon acceptance that a beneficiary would acquire a right under a trust.[158] This means that prior to acceptance, the beneficiary is only a contingent beneficiary.[159]

The same sentiments were also shared in *Potgieter v Potgieter,*[160] in which the court held that a contract that was indeed varied without consent from the third party (who had accepted the offer) was invalid.[161] Consequently, the court stated that the provisions of the original deed in unammended form must be applied.[162]

With all of the characteristics of the *stipulatio alteri* mentioned above, there can be little doubt that the doctrine of the undisclosed principle can easily operate under the *stipulatio alteri* as a justifiable ground for its existence. The undisclosed principal becomes part of the contract by way of acceptance of the "offer" at the conclusion of the contract between the stipulant (who could be considered the equal of the third party to be the agent in the undisclosed principle situation) and the promisor (who could be considered the third party in the undisclosed principal situation).

Therefore, by operation of the principles of the *stipulatio alteri*, the stipulant, (agent), would then fall out of the contract and a *vinculum iuris* would be created between the undisclosed principle and the promisor, now known as the third party. The undisclosed principal' can consequently sue the promisor based on the contract that was

157 *Groeschke v Trustee for the Time Being of the Groeschke Family Trust* 2013 3 SA 254: para 11.
158 *Groeschke v Trustee for the Time Being of the Groeschke Family Trust* 2013 3 SA 254: para 11.
159 *Groeschke v Trustee for the Time Being of the Groeschke Family Trust* 2013 3 SA 254: para 11.
160 2012 1 SA 637
161 *Potgieter v Potgieter* 2012 1 SA 637: para 29.
162 *Potgieter v Potgieter* 2012 1 SA 637: para 29.

originally created between the *stipulans* and the promisor, and by the same token the promisor can sue the undisclosed principal based on the contract that was created between him and the *stipulans*.

Ames's proposal- that the doctrine of the undisclosed principal can just as easily function under the law of trust (and even be absorbed by it) is given credence by Schreiner JA who refers to the trust *inter vivos* as a species of the *stipulatio alteri* in *Crookes NO and Another v Watson.*[163] Herein, the court decided that in the strict legal sense, a contract that was made for the benefit of a third party, and was made in the absence of the beneficiary by two other contracting parties, is in fact designed to enable a third person to come in as a party to a contract with one of the other two.[164]

Should it be accepted that the doctrine of the undisclosed principal could indeed function under the law of trust in the guise of an *inter vivos* trust, the pertinent question of what right the undisclosed principal would hold to the contract pending acceptance of such an offer should be considered. Relevant case law on the matter will consequently be discussed.

In *Commissioner for Inland Revenue v Estate CP Crewe And Another*,[165] the court found such a right to be inchoate.[166] The reason for this decision was that until the benefit had been accepted by the beneficiary, such a right could be

163 1956 1 SA 277 (A): 291.
164 *Crookes v Watson* 1956 1 SA 277 A: 291
165 1943 AD 656: 361.
166 *CIR v Estate C P Crewe & Another* 1943 AD 656: 361.

deprived by agreement between the contracting parties.[167] The beneficiary could also be deprived by a donor, who unilaterally releases the trustees from the obligation to which they have contracted towards him as donor.[168]

In *Hofer v Kevitt*[169] the court likened such a right to a mere expectation that the undisclosed principal would have before acceptance.[170] Conradie J stated that the fact that potential beneficiaries were represented by curators *ad litem* in legal proceedings, was indicative of the fact that the rules and norms pertaining to natural justice (particularly the *audi alteram partem* rule), required that persons who had an interest- in the form of an expectation- be heard.[171]

Adversely, in *Crookes v Watson*[172], Centlivres J was of the view that a trust deed that was concluded by two contracting parties for the benefit of another person was still a contract between the parties thereto.[173] Such parties could cancel the contract entered into between them before the third party had accepted the benefits conferred on him under the settlement.[174]

This therefore means that pending acceptance by the third party, the third party will have no right and the trustee and the trust founder could vary or even cancel the contract before acceptance by the beneficiary.

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167 *CIR v Estate C P Crewe & Another* 1943 AD 656: 361.
168 *CIR v Estate C P Crewe & Another* 1943 AD 656: 361.
169 1996 2 All SA 69 (C): 74-75.
170 *Hofer and others v Kevitt NO and others* 1996 2 All SA 69 (C): 74-75.
171 *Hofer and others v Kevitt NO and others* 1996 2 All SA 69 (C): 74-75.
172 1956 1 SA 277 A: 231.
173 *Crookes v Watson* 1956 1 SA 277 A: 231.
174 *Crookes v Watson* 1956 1 SA 277 A: 231.

This sentiment was shared by the Supreme Court of Appeal in the case of *Potgieter v Potgieter*[175] in which the court stated that the vital aspect of acceptance by the beneficiary is that it establishes a right for the beneficiary in relation to the trust deed, whereas no such a right existed prior to such acceptance.[176] The court re-emphasized the fact that once the beneficiary has accepted such a benefit, the trust deed could not be varied or even canceled without the beneficiary's consent.[177] The reason for this, the court held, was to protect the newly established right.[178]

Should the legal reason upon which the doctrine of the undisclosed principal operate be the trust *inter vivos* (as explained above), it would appear that the undisclosed principal prior to acceptance of the relevant offer would have no right in law. It is only until acceptance of the contractual offer that he inheres any right to the contract concluded on his behalf by his agent. Such acceptance could be construed from his conduct when he presents himself to the third party as the real creditor or debtor to a contract that was initially concluded in his absence.

The basis of the abovementioned proposition is therefore as follows: that the doctrine of the undisclosed principal operates as a form of a *stipulatio alteri* under the trust *inter vivos.* The *stipulatio alteri* will then stand as the legal basis upon which the doctrine of the undisclosed principal can operate. This will create legal certainty upon the legal reason (*iusta causa*) according to which the doctrine operates.

175 2012 1 SA 637: Para 28.
176 *Potgieter v Potgieter* 2012 1 SA 637: Para 28.
177 *Potgieter v Potgieter* 2012 1 SA 637: Para 28.
178 *Potgieter v Potgieter* 2012 1 SA 637: Para 28.

3.3 Cession as a *iustus causa* for the operation of the doctrine of the undisclosed principal.

Cession occurs when creditor A (the cedent) transfers a personal right that he or she has against the debtor B to a third person C (the cessionary).[179] The cessionary, subsequently takes the place of the cedent as a newly established creditor to a contract that he or she was initially not privy to.[180]

In *Wilcocks NO v Visser and New York Life Insurance*[181] the court decided that two fundamental essential factors must be present in order for there to be a successful cession of rights, namely: there has to be an intention to make over to another what belongs to oneself in order that it may in future belong to that other peson and not to oneself,[182] secondly, there must be a delivery or some other legal formality equivalent thereto.[183]

Delivery of the said instrument that creates the rights to a title has been said to be a requirement to perfect the cession. This could be a delivery of an insurance policy or a share certificate. This sentiment was confirmed in *Smith v Farrelly's Trustee*[184] where the court held that no form of special words were necessary to constitute a cession.[185]

179 Hutchison 2017: 366
180 Hutchison 2017: 366.
181 1910 OPD 99.
182 *Wilcocks NO v Visser and New York Life Insurance Co* 1910 OPD 99: 102.
183 *Wilcocks NO v Visser and New York Life Insurance Co* 1910 OPD 99: 102.
184 1904 TS 949.
185 *Smith v Farrelly's Trustee* 1904 TS 949: 952.

If the right in question relates to a right of such a nature that is capable of being registered in a deeds registry and it be prudent, by law, to register the cession thereof, the deed of cession must be attested by a notary public as is required by section 16 of the Deeds Registries Act.[186]

There must also be a right that is inherent to the cedent.[187] *In First National Bank of SA Ltd v Lynn NO and Others*[188] the court established a dichotomy of two juristic acts in order to be a valid cession of rights.[189] These juristic acts were comprised of the obligationary agreement and the real agreement.[190] The former created rights and duties, for example the right to claim delivery of the relevant right of action, the latter related to the actual delivery of the right of action.[191] The court further held that such an agreement required consent to give and take delivery of the relevant right of action and that such a juristic act may be incorporated in one form of action.[192]

It is interesting to note that such a right to cession can emanate from a written or a verbal agreement, as long as it can be shown that consensus was reached concerning the cession of such rights. In *Botha v Fick*[193] an agreement of sale was concluded.[194] The defendant was required to transfer his rights of action in the form of shares to the plaintiff.[195] The question of whether the two parties had simultaneously entered into a contract of transfer had to be considered.[196]

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186 Deeds Registries Act 47/1937.
187 *First National Bank of SA Ltd v Lynn NO and Others* 1996 1 All SA 229: 244.
188 1996 1 All SA 229.
189 *First National Bank of SA Ltd v Lynn NO and Others* 1996 1 All SA 229: 244.
190 *First National Bank of SA Ltd v Lynn NO and Others* 1996 1 All SA 229: 244.
191 *First National Bank of SA Ltd v Lynn NO and Others* 1996 1 All SA 229: 244.
192 *First National Bank of SA Ltd v Lynn NO and Others* 1996 1 All SA 229: 244.
193 1995 2 SA 750 AD.
194 *Botha v Fick* 1995 2 SA 750 AD :762.
195 *Botha v Fick* 1995 2 SA 750 AD :762.
196 *Botha v Fick* 1995 2 SA 750 AD :762.

The court held that the agreement did not contain an express agreement of transfer.[197] Furthermore, the question of whether delivery was in certain instances an independent prerequisite for the validity or the completion of a cession was answered in the negative.[198] Mere consensus of a contract not in writing was sufficient, provided that the law did not provide otherwise.[199]

From the abovementioned discussion of the principles regulating the law of cession it could be suggested that the agent in the undisclosed principal situation could be considered to have ceded his right to the undisclosed principal. Such an intention could be construed from the authority given by the undisclosed principal to the agent to enter into the contract in the first place. The delivery of the contract by the agent to the undisclosed principal that was initially concluded by the agent and the third party could satisfy the element of delivery required by the law of cession. As mentioned above, the agreement between the agent and the undisclosed principal need not be in writing: it would be sufficient to show that the parties had reached consensus and that the agent was acting on the undisclosed principal's authority. The cession that occurs here would inevitably be governed by the rules relating to the law of cession.

The abovementioned suggestion is not a novel one. South African courts have in fact accepted the notion that the rules pertaining to the doctrine of the undisclosed principal could be better explained by the law relating to cession.

197 *Botha v Fick* 1995 2 SA 750 AD :762.
198 *Botha v Fick* 1995 2 SA 750 AD :762.
199 *Botha v Fick* 1995 2 SA 750 AD :762.

In the very first case that accepted the doctrine of the undisclosed principal into South African law, *Cullinan V Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Ltd*[200] (also discussed in chapter 1), the court stated the following:

> The doctrine conflicts with the accepted principles of the law of contract and agency: where two parties contract in their own names, a *vinculum iuris* should arise only between themselves Thereafter the accepted and effective rules of cession (and delegation) should apply as far as the transfer of rights (and duties) are concerned.[201]

This is indicative of the fact that the courts have readily accepted the notion that cessionary law would be suitable for the undisclosed principal to establish liability against the third party. The cession of rights and obligations under a contract between the agent, now the cedent and the undisclosed principal, now the cessionary, would better explain the *vinculum iuris* that would otherwise take place in the undisclosed principal situation.

The premise would then hold that should an undisclosed principal situation arise, the person that alleges to be such an undisclosed principal should firstly show that such a cession took place between him or her and the cedent. In that manner, the undisclosed principle would then hold a position as a cessionary to a contract. This possibility however would only arise once the cedent (agent) acknowledges to cede his or her right to the undisclosed principle (as cessionary). Taking note of the fact that the agent had entered into a contract based on the authority of the undisclosed

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200 1972 1 SA 761.

201 *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie* Ltd 1972 1 SA 761 272: 763-764.

principle, in normal circumstances, such a cession between the undisclosed principal and the agent should involve little trouble.

3.4 The *qui facit per alium per se* doctrine as a *iustus causa* of the undisclosed principal: the doctrine of the *respondeat superior*.[202]

The maxim *qui facit per alium per se* means that if a person authorises another to commit an act, or authorises him or her to conduct a general class of transactions, the "principal" is responsible for the acts of his agent committed on his (principal's) behalf. This is evident from the case of *Desai's Trustee v Hack*,[203] in which the court stated:

> If a man directs another to do a certain act, or authorises him to perform a general class of transactions, then, in regard to the matter expressly directed, and all dealings within the scope of the general authority, the principal is responsible for the acts of his agent done on his behalf. Respondeat superior, whether the liability shapes itself in contract, or in tort; the matter having been conducted for him by his authorised representative, he is legally as much responsible as if he had conducted it himself. And this doctrine applies whether the wrong, which the agent has committed, depends for its actionable character on his fraud or even his malice.[204]

The existence of authority between the undisclosed principal and the agent would be sufficient to impute liability on the undisclosed principal, whether liability shapes itself in the form of a contract or in the form of a delict.

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202 Its a general rule that a principal or a master is civilly responsible for the wrongs committed by his agent or servant while carrying out his business.

203 1910 TPD 499.

204 *Desai's Trustee v Hack* 1910 TPD 499: 507.

The fact that the principal has a choice of agent means that said principal is liable if he chooses an unfit or improper agent. In *Feldman v Mall*[205] the court stated that a master who uses servants, creates a risk of harm to others if the servant is proved to be negligent, inefficient or untrustworthy.[206] Therefore should the servant, in carrying out the masters work or his activities, do so in a negligent or improper manner so as to cause harm to a third party, the master will be liable for said harm.[207]

Should it therefore be accepted that the agent is liable for any delict or contractual liability of the principal, and the agent be unable to satisfy the claim against the third party, the undisclosed principal can be held accountable to the third party based on the doctrine of the *respondeat superior*.

Dalley[208] also considers this possibility as the basis upon which an agent's liability can be imputed on the undisclosed principal. She uses the Second Restatement[209] as the basis of her account and further holds:

> [t]o be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized, and it includes a list of factors to be used in determining whether conduct is sufficiently similar to authorized conduct to be within the scope of employment.

Factors necessary to impute liability on the undisclosed principal have been suggested by Botha and Millard.[210] They state that firstly, there has to be an employment relationship in existence at the time that the employee (agent)

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205 1945 AD 733.
206 *Feldman (Pty) Ltd v Mall* 1945 AD 733: 741.
207 *Feldman (Pty) Ltd v Mall* 1945 AD 733: 741.
208 Dalley 2011: 527
209 Restatement (Second) of Agency: 1958.
210 Botha and Millard 2012: 229-230.

committed the delict.[211] Secondly, the employee (agent) must have acted within his or her scope of employment.[212] They implore that some kind of *nexus* must exist between the employee's wrongful conduct and the relationship between him and his employer.[213]

Should the *respondeat superior* doctrine be used as a legal reason (a *iusta causa*) for or even as possible replacement to the application of the doctrine of the undisclosed principal, then it could be accepted that the third party in the latter doctrine could establish liability against the undisclosed principal, even though the liability arose from a contract that was initially concluded between the agent and the third party. The fact that the undisclosed principal gave the authority to the agent and the liability established by the agent was in terms of the contract in pursuance of the interest of the undisclosed principal, means that such a liability can be imputed on the undisclosed principal.

Dalley further uses the Cost-Benefit Internalization Theory to suggest that it could be used in instances wherein the principal is responsible for the foreseeable consequences of using an agent and the principal's manifestations to the agent or third parties will help to determine to what consequences are reasonably foreseeable.[214]

The abovementioned premise has, however, not been considered by South African courts.

In *Durity Alpha (Pty) Ltd v Vagg*[215] it was contended that an agent was acting in pursuance of the undisclosed principal's interests when it incurred liability to the amount of R1 883, 99. The court in this instance looked at external factors in

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211 Botha and Millard2012: 229-230.
212 Botha and Millard 2012: 229-230.
213 Botha and Millard 2012: 229-230.
214 Dalley 2011: 523.
215 1991 2 All SA 146.

order to deduce the principal's manifestations, in order to determine whether the principal had concluded a tacit contract of agency in order to impute liability on the undisclosed principal. The court stated that in having to establish whether there was an agency relationship, it had to be determined whether the defendant was a seller of the plaintiff's goods in accordance with a tacit contract of agency. Importantly, in order to determine whether such a contract did indeed exist, the conduct of the parties and the relevant surrounding circumstances had to be considered. The court found no such evidence that demonstrated that such an agency relationship based on tacit contract actually existed.[216]

Liability on the part of the undisclosed principle was not founded on either a real or tacit agreement and the court considered all relevant circumstances to come to such a conclusion.

It is submitted that this doctrine can only be applied when the liability of the undisclosed principal is to be established from the instance the third party comes to know of his (the undisclosed principal's) existence. This would be in instances where the agent, as contracting party, cannot be held liable due to insolvency, for example. For the mere fact that the agent incurred liability in pursuance of the undisclosed principal's interests and not his own, the third party ought to be afforded a legal leeway that allows him the opportunity to institute action against the "real debtor". It would also be fair to state that the agent himself can use this doctrine as a defence against the third party's claim. This will not only afford legal certainty as to the basis upon which the third party can sue an undisclosed principal based on a contract that he never attested to, but its application will also ensure legal equity to an otherwise unjust doctrine that contradicts traditional contractual principles.

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216 *Durity Alpha (Pty) Ltd v Vagg* 1991 2 All SA 146: Para 14.

3.5 Conclusion

The propositions in this chapter are provided as an effort to better regulate the existence and operation of the doctrine of the undisclosed principal by resorting said principal under areas of law familiar to the South African context. The purpose is not to nullify the doctrine, but to demonstrate that with the existence of already established legal principals, the doctrine of the undisclosed principle can still operate in a legally sound manner. For the reasons discussed above, it is suggested, that the doctrine of the undisclosed principal could find application in the South African legal jurisprudence. The fact that it can be "absorbed" by other areas of the law more familiar in the South African context provides a *iusta causa* for its continued application in South African law. The continued existence of the doctrine must, however, be tested against current South African legislation dealing with said doctrine. Ultimately, the functionality of the doctrine should be tested against the underlying values of the South African Constitution.

4. The continued application of the doctrine of the undisclosed principal in the South African law: national legislation and the Constitution

4.1 Introduction

As explained in chapter 3, there is some uncertainty with regards to the legal basis upon which the doctrine of the undisclosed principal operates. The law – both South African and foreign – has to some extent provided possible underlying bases for the functioning of the doctrine, as explained in previous chapters. In order to ascertain the true and proper bases for the continued existence of the doctrine of the undisclosed principal in South African law, this chapter will focus on courts' interpretation of selected pieces of legislation dealing with the doctrine as such.

In this chapter, various statutory provisions reaffirming the existence of the doctrine of the undisclosed principal in South African law will be analysed and discussed. These provisions will include those sections that have been deemed by the judiciary to either allow or forbid the operation of the doctrine in South African law. Specific reference will be made to Article 13 of the Convention on Agency in the International Sale of Goods Act 4 of 1986, which deals with undisclosed principals in general.

Finally, the question of whether such a doctrine could withstand constitutional scrutiny (in the South African context) will be analysed.

4.2 The legislative affirmation of the doctrine of the undisclosed principal in South African law.

In *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk*,[217] the court accepted the existence of the doctrine of the undisclosed principal through legislation by stating that the erstwhile section 16 (1) of the Transfer Duty Act[218] in fact dealt with the doctrine of the undisclosed principal.[219] In order to come to such a conclusion, the court reaffirmed the decision of *Wendywood Development (Pty) Ltd v Rieger and Another*,[220] in which the court came to the conclusion that said section in fact dealt with undisclosed principals.

Section 16 (1) and (2) of the Transfer Duty Act[221] stated:

1) Where property is sold to a person who is acting as an agent for some other person, the person so acting as agent shall disclose to the seller or his or her agent the name and address of the principal for whom he or she acts, and furnish the seller or his or her agent with a copy of the documents appointing him or her as agent:
   i) If the sale is by auction, on the day of acceptance by the auctioneer of his or her offer; or
   (ii) If the sale is otherwise than by auction, on the day of conclusion of the agreement of sale.

(2) Any person who has been appointed as an agent, but fails to furnish the documents contemplated in subsection (1) and the name of the person on whose behalf he or she is acting to the seller or his or her agent on the date specified in subsection (1) shall, for the purpose

217 1971 ZASCA 1: 768.
218 Transfer Duty Act 40/1949 as amended by the Revenue Laws Amendment Act 45/2003.
219 *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Bpk* 1971 ZASCA 1: 768.
220 1971 3 SA 28 (A).
221 Act 40/1949.

of the payment of the duty payable in respect of the acquisition of the property in question, be presumed, unless the contrary is proved, to have acquired the property for himself or herself.

In *Wendywood Development (Pty) Ltd v Rieger And Another*[222] the court stated that the purpose of the Transfer Duty Act was to protect the national fiscus by ensuring that agents who failed to disclose the identities of their principals, were to be held personally liable for transfer duty payable due to the sale of land.[223] This entailed that the agent that concluded a sale of land transaction without disclosing the identity and/or existence of a principal would be held liable for the transfer duty levies apportioned by law to purchasers of land. The implication of section 16(1) would thus be that it recognises the existence of the doctrine by prohibiting its application by holding the agent liable on such transactions of land.

This case also highlights the aim of the existence of pre-union law[224] to prevent property speculators from evading payment of transfer duty by purchasing property ostensibly on behalf of principals, whilst in fact no principal actually existed. After concluding the sales, they would resell the property to third parties at a higher price and then declare the latter to be their principal under the first transaction.[225]

It is therefore not surprising that legislation prevented the agent from having to rely on the existence of a principal who is in fact non-existent. In *Gounder v Saunders and Others*[226] the court highlighted the fact that should an agent lie about

222 1971 3 SA 28: 109

223 *Wendywood Development (Pty) Ltd v Rieger And Another* 1971 3 SA 28: 109.

224 Laws enacted prior to the establishment, in 1910, of the Union of South Africa, and after the 1806 British annexation of the Cape, have mostly been repealed or incorporated into other legislation.

225 Delport 2015: 470.

226 1935 NPD 219:220-221.

the existence of an undisclosed principal, he or she should be held personally liable for the principal debt in terms of Act No. 7 of 1903.[227] Even more severely, in *Steenkamp V Kruger*,[228] the court highlighted that where an agent lied about the existence of a principal that was never disclosed in a transaction involving the sale and transfer of land, such transaction was actually null and void.[229]

It therefore seems that traditional legislation that deals with the sale of land and subsequent transfer duty does not allow for the operation of the doctrine of the undisclosed principal. The agent that fails to disclose the true identity and the existence of the principal will face the burden of having to pay the levy him or herself. Therefore, although the Transfer Duty Act[230] excluded reliability on the doctrine of the undisclosed principal, it does seem however, that it at least acknowledged its existence.

4.3 Section 2(1) of the Alienation of Land Act and the doctrine of the undisclosed principal.

The possible application of the doctrine of the undisclosed principal to contracts has been discussed in previous chapters. The question must be asked, though, whether the doctrine of the undisclosed principal could apply where legislation specifically requires the identities of the parties to a contract to be made known.

227 *Gounder v Saunders and Others* 1935 NPD 219:220-221.
228 1877 7 Buch.
229 *Steenkamp v Kruger* 1877 7 Buch: 47.
230 Act 40/1949.

Section 2 (1) of the Alienation of Land Act[231] -states that

> No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

Delport[232] states that such formalities as highlighted in section 2(1) of the Alienation of Land Act[233] do not prohibit the applicability of the doctrine of the undisclosed principal.[234] He highlights the fact that the doctrine is not a scheme or a mechanism concocted by a party to escape from the formalities stipulated in the legislation.[235] It is a set of legal principles that exist for sound commercial reasons.[236] His defense of the application of the doctrine of the undisclosed principal to section 2(1) of the Act is that it does not constitute malpractice or fraud to enter into a contract of sale as an agent for an undisclosed principal and that its application will in no way frustrate the policy of the Alienation of Land Act.[237] Delport argues that no uncertainty arises with regards to the contents of the agreement of sale and that the undisclosed principal may in fact appear and sue on the contract. The terms of the contract remain unchanged.[238]

His argument is in fact preceded by Innes CJ in an earlier judgment in *Cook v Aldred*,[239] in which he supports the fact that parole evidence may be permitted to show that a contract was entered into on the principal's behalf.[240] Innes CJ

231 Alienation of Land Act 68/ 1981.
232 Delport 2015: 468.
233 Act 68/ 1981: Sec 2(1).
234 Delport 2015: 468.
235 Delport 2015: 468.
236 Delport 2015: 468.
237 Act 68/ 1981: Sec 2(1).
238 Deport 2015: 468.
239 1909 TS: 151.
240 *Cook v Aldred* 1909 TS: 151.

also decided that such evidence does not necessarily vary the written contract due to the fact that the liability of the other party to the contract remained intact.[241] The court convincingly held that what the application of the doctrine of the undisclosed principal in fact demonstrated to such cases was that it simply informed the court that some other person was entitled to sue upon a contract concluded in his authority (and in his absence) and that the principal merely sought to enforce his rights under it.[242]

South African courts in later judgments have, however, not accepted Innes CJ's line of reasoning. In *Grossman v Baruch*[243] the undisclosed principal sought to enforce an agreement of a sale of land as the true seller.[244] The defendants however raised an exception that there was nothing to indicate that the agent had accepted the agreement in any representative capacity and that due to this the undisclosed principal could derive no benefit to a contract that was concluded by his alleged agent.[245] The defendants argued that no evidence could be lead to identify the true seller due to the provisions of Section 2(1) of the Alienation of Land Act.

The court accepted the defendant's argument and referred to the case of *Mineworkers Union v Cooks*.[246] In this case, the court vehemently disregarded the idea that extrinsic evidence could be allowed to validate the plaintiff as the true

241 *Cook v Aldred* 1909 TS: 151.
242 *Cook v Aldred* 1909 TS: 151.
243 1978 4 ALL SA 156 W.
244 *Grossman v Baruch and Another* 1978 4 All SA 156 W.
245 *Grossman v Baruch and Another* 1978 4 All SA 156 W:158.
246 1959 1 All SA 146 W.

seller and that should a deed of sale require that evidence be lead in order to establish such, that the entire deed of sale would be invalid.[247]

Delport opines that the court in *Grossman* ought not to have even upheld the exception made by the defendants and should have rather invalidated the entire deed of sale, as the name of the principal, who is in fact the true contractant, does not appear from the written deed.[248] He argues that the court misdirected itself by overlooking two pertinent issues: first, that the undisclosed principal is not a party to the contract of sale-the parties were the agent and the third party. Secondly, that after the conclusion of the agreement the undisclosed principal was entitled to make an appearance and enforce the transaction by virtue of the doctrine of the undisclosed principal.[249]

Delport's argument seems logical. In light of the fact that the plaintiff would come into existence and identify himself as the true seller, provided that no objection arises from the agent, means that the true intention of the contract in itself ought to be upheld. South African courts have in many cases referred to the "substance over form"[250] principal. Should it be accepted that the plaintiff in this case is the true seller, a valid contract of sale would come into existence by virtue of the operation of contractual law principles. This means that the deed of sale of land concluded by an agent who alleges that he is acting on behalf of an undisclosed principal, could rely on the fact that a contract was in fact concluded on behalf of another, who now seeks to enforce the contract personally. The contract cannot be invalid or void because the name

247 *Mineworkers Union v Cooks* 1959 1 All SA 146 W: 150.

248 Delport 2015: 472.

249 Delport 2015: 473.

250 This is the doctrine that is used by South African courts which requires courts to ignore the pretence simulated in contractual dealings, and the law will always give effect to the real transaction between the parties.

of another person other than that of the agent in the contract is substituted or exchanged by that of the undisclosed principal by virtue of the operation of the doctrine of the undisclosed principal.

Based on the discussion of the above mentioned cases, there seemingly exists no reason why the doctrine of the undisclosed principal ought to be excluded by legislation that stipulates that the identities of the parties to an agreement should be disclosed (As in the Alienation of Land Act). South African courts have in the past alluded to the idea that in certain circumstances extrinsic evidence could be accepted in order to establish the undisclosed principal as the true contractant or the true party to an agreement. An example would be *Sapirstein And Other v Anglo African Shipping Co (SA) Ltd*[251] wherein the court stated that the provisions of section 6 of the General Law Amendment Act[252] did not invalidate a contract of suretyship, provided that such a contract was in writing and signed by or on behalf of the surety.[253] The court held that there could be no objection to extrinsic evidence of identification being given either by the parties themselves or even a third party.[254] This will be accepted, unless the leading of such evidence would amount to an attempt to supplement the terms of the written contract.[255] Similarly, in *Abro v Softex Mattress (Pty) Ltd*[256] the court stated that extrinsic evidence is admissible in order to determine whether the requirements of section 58 of the Companies Act[257] had been adhered to.[258] The court stated furthermore that such evidence would include evidence as to the proper name of a company and the question whether a particular document was signed or permitted to be signed on behalf of

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251 1978 4 All SA 474 A.

252 Act 50/1956.

253 *Sapirstein And Others v Anglo African Shipping Co (SA) LTD* 1978 4 All SA 474 A: 478.

254 *Sapirstein And Others v Anglo African Shipping Co (SA) LTD* 1978 4 All SA 474 A: 478.

255 *Sapirstein And Others v Anglo African Shipping Co (SA) LTD* 1978 4 All SA 474 A: 478.

256 1973 2 All SA 471 (D):477.

257 Act 46/1926.

258 *Abro v Softex Mattress (PTY) LTD* 1973 2 All SA 471 (D):477.

a particular company.[259] It therefore seems that the courts have accepted the admittance of external evidence in order to establish the true principal of a particular agreement.

There is a caveat to the abovementioned principal which relates to authority in particular. In the normal scheme of things, where the agent argues that he or she was in fact contracting to either sell or purchase land in the name of a principal, evidence of written authority could easily be retrieved as is evidently required by section 2(1) of the Alienation of Land Act.[260] However, the question must be asked, what then happens in the case where the undisclosed principal denies that he ever gave authority to the agent to either sell or purchase a portion of land. This is precisely what happened in *Pretoria East Builders CC v Basson,*[261] where the alleged undisclosed principal denied that he ever gave his agent authority to sell immovable property to the plaintiff. The court held that even if it could be shown that the alleged undisclosed principal had knowledge of the purported sale of land, such knowledge would be insufficient to prove that the alleged undisclosed principal in fact authorised the sale of said land.[262]

In light of all the facts mentioned above, it seems quite clear that the application of the doctrine of the undisclosed principal to section 2(1) of the Alienation of Land Act[263] might be theoretically possible. However, proving the existence of authority that emanates from the alleged undisclosed principal could be difficult if in fact there is no evidence. This would be especially true in an instance where the alleged undisclosed principal denies that he gave authority for the transaction at all.

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259 *Abro v Softex Mattress (PTY) LTD* 1973 2 All SA 471 (D):477.
260 Act 68/ 1981: Sec 2(1).
261 2002 JOL 10141 T.
262 *Basson v Pretoria East Builders CC & Another* 2002 JOL 10141 T: Para 8.
263 Act 68/ 1981.

4.4 Legislation that prohibits the operation of the doctrine of the undisclosed principal.

A section that seems to arouse disputes regarding the doctrine of the undisclosed principal is section 23 (2) of the Closed Corporations Act.[264]

Section 23(2) of the Closed Corporations Act states:

> If any member of, or any other person on behalf of, a corporation
>
> a) issues or authorises the issue of any such notice or official publication of the corporation, or signs or authorizes to be signed on behalf of the corporation any such bill of exchange, promissory note, endorsement, cheque or order for money, goods or services; Or
>
> b) Issues or authorises the issue of any such letter, delivery note, invoice, receipt or letter of credit of the corporation,
>
> without the name of the corporation, or such registered literal translation thereof, and its registration number being mentioned therein in accordance with subsection (1) (b), he or she shall be guilty of an offence, and shall further be liable to the holder of the bill of exchange, promissory note, cheque or order for money, goods or services for the amount thereof, unless the amount is duly paid by the corporation.

Most of the cases relating to the abovementioned section involve situations where the third party would deal with a member of a closed corporation and complain that they did not know that the other contractant was a member of such a closed corporation and that he in fact was acting in a representative capacity. In *Constantaras v BCE Foodservice Equipment (Pty) Ltd,*[265] the court had to decide whether the appellant could plead rectification of two cheques that he had made in his own name to be made in the name of the closed corporation.[266] This would result in the liability being

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264 Closed Corporations Act 69/1984.

265 2007 JOL 2002 2 SCA.

266 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 JOL 20022 (SCA): 1.

imputed on the closed corporation. The respondent alleged, however, that the appellant was personally liable because he failed to indicate that he was acting on behalf of the closed corporation.[267] The court rejected the respondent's allegation and decided that section 23 (2) of the Closed Corporations Act was peremptory and that the name of the closed corporation had to be part of the two signed cheques in order to evade personal liability.[268]

Similarly, in *Dave Stafford t/a Natal Agriculture Co v Lions River Saw Mills (Pty) Ltd*,[269] the court accepted that the appellant acted on behalf of a closed corporation when an agreement of sale of timber was concluded with the agent. The court however questioned whether this fact had indeed been disclosed to the third party and eventually decided that it had not.[270] On this basis, the court therefore held the agent liable due to the fact that he did not disclose to the third party that he was acting on behalf of an undisclosed principal.

It is evident from the abovementioned discussion that the Closed Corporations Act[271] prohibits the operation of the doctrine of the undisclosed principal. Any member of a closed corporation must therefore in all dealings on behalf of a said closed corporation devolve this fact, as well as the authority by which he or she is acting, to another party.

4.5 Legislation that endorses the operation of the doctrine of the undisclosed principal

267 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 JOL 20022 (SCA): 1.
268 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 JOL 20022 (SCA): 1.
269 1999 1 All SA 275 N.
270 *Dave Stafford t/a Natal Agriculture Co v Lions River Saw Mills (Pty) Ltd* 1999 1 All SA 275 N: 282.
271 Act 69/1984.

McLennan[272] refers to an international instrument that he deems to deal with the doctrine of the undisclosed principal. An international instrument that has validated the irrefutable existence of the doctrine of the undisclosed principal is the Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983) Article 13 as incorporated into South African law by Article 13 of the statute of the Convention On Agency In The International Sale Of Goods Act 4 of 1986.

Section 1 of Article 13 of the Convention states that where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind the agent and the third party if the third party did not know or could not have known that the agent was acting in the capacity of an agent.[273] This will also be the case if the agent undertakes to bind himself only.[274] The Article allows for the principal to exercise his right against the third party, subject to any defenses that the third party may have against the agent, in instances where the agents fails to perform according to the agreement or for any other reason is not in a position to fulfill his obligations to the third party.[275] Conversely, where the agent is unable to fulfill his obligations to a third party, the third party is entitled to exercise his rights against the agent towards the principal, subject to any defenses that the agent may set up against the third party and which the principal may set up against the agent.[276]

The rights mentioned hereunder may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. From the moment that the principal receives such a notice, he cannot free himself from his obligations by dealing with the agent.[277] Interestingly, the Article mentioned above authorizes the

272 Mclennan 1998: 242.
273 International Sale of Goods Act 4 of 1986: Article 13 (1a).
274 International Sale of Goods Act 4 of 1986: Article 13 (1b).
275 International Sale of Goods Act 4 of 1986: Article 13 (2a).
276 International Sale of Goods Act 4 of 1986: Article 13 (2b).
277 International Sale of Goods Act 4 of 1986: Article 13 (3).

agent to divulge the name of the principal to the third party in instances where the agent cannot fulfil his obligations to the third party due to the failure of the principal to fulfill his performance.[278] Conversely, where the third party fails to comply with the obligations of the agreement between him and the agent, section 5 of Article 13 permits the agent to divulge the name of the third party to the principal.[279]

The Article asserts a prohibitory rule that dictates that a principal may not exercise his rights acquired on his behalf against the third party, if it appears from the circumstances of the case that the third party, had he known the principals identity, would have not entered into the contract.[280] Finally, both the agent and the third party may derogate or vary the terms and conditions of the contract of section 2 provided that the principal had given an express or implied instruction for the agent to do so.[281]

Article 13 of the convention under discussion is said to be a compromise between the civil and common law systems.[282] Mclennan opines that the Article places the doctrine on a proper systematic basis in that it restricts its operation where necessary, but that it does not reduce its commercial utility.[283]

4.6 Criticism against Article 13 of the Convention on Agency in the International Sale Of Goods Act 4 of 1986.

278 International Sale of Goods Act 4 of 1986: Article 13 (4).
279 International Sale of Goods Act 4 of 1986: Article 13 (5).
280 International Sale of Goods Act 4 of 1986: Article 13 (6).
281 International Sale of Goods Act 4 of 1986: Article 13 (7).
282 McLennan 1998: 242.
283 McLennan 1998: 242.

Article 13 stipulates that the undisclosed principal cannot be held liable to the third if the former could not have known that the agent was acting in a representative capacity.[284] The thorny fact against this stipulation is that the doctrine in itself came into operation precisely for the fact that: firstly, the undisclosed principal sought for the third party to not know of the identity and the existence of the undisclosed principal. Secondly, for the agent to bind himself as if he or she was the principal in any event.

The same level of criticism that was levelled by the English courts and academic writers against the "exclusions by the terms of the contract" limitation (referred to in chapter 2) can be leveled against this part of the Article in the Act[285] as well. As was asked in a previous chapter, when does the agent of an undisclosed principal not contract as an undisclosed principal.[286] This is the very essence of the doctrine of the undisclosed principal.

Additionally, should it then be accepted that in fact the agent is the one to be held liable, what happens in instances where the agent becomes insolvent.[287] Would that mean that the third party would have no form of recourse against the undisclosed principal, because he thought that he was entering into a contract with the agent and that there was no undisclosed agency involved. This in my view, would be very prejudicial to the third party and the Article in this regard might have erred.

What would perhaps bring not only legal and justiciable sense to this part of the Article is if it (the contract) stipulates as a term in the contract that the agent will be held liable to the obligations of a particular contract, thus excluding the

284 International Sale of Goods Act 4 of 1986: Article 13 (1a) and 1(b).
285 Act 4 of 1986.
286 Müller-Freienfels 1953:316.
287 Barnett 1987: 1972-1973.

possible application of the doctrine of the undisclosed principal. Therefore, a contract concluded in such a way would entirely forbid the operation of the doctrine of the undisclosed principal all together. This would be the only way in which the third party could for all purposes think that the person that they are contracting with is by all means the true and only principal to the agreement.

Additionally, the Article further holds that a contract concluded by the agent and the third party can only be derogated or varied only if the undisclosed principal gave express or implied permission for the agent to do so.[288] The question that the legislator fails to answer is: upon what legal basis should a contractant, who signed in his own name, seek authority from an external factor (from the contract) to vary the same. Upon what legal basis, can the agent be obligated to seek such an authority. The answer to this perhaps can be answered, as suggested in chapter 3 by applying the South African rules of cession, the law of trust or the doctrine of the *respondeat superior* respectively.

Perhaps one can however acknowledge, constitutionally speaking, that the Article goes a long in way in having to protect the right to freedom of association of the third party.[289] Should it be made vehemently clear by the third party that he or she does not want to conclude any form of an agreement with a particular individual, then the prohibitory rule found in the Article relating to this aspect should be applauded.[290]

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288 International Sale of Goods Act 4 of 1986: Article 13 (7).

289 Constitution of the Republic of South Africa 1996: Sec 18.

290 International Sale of Goods Act 4 of 1986: Article 13 (6).

What seems to be true therefore about the existence of this anomalous doctrine is that it has nonetheless been certified to be worthy of legislative authority. The question must consequently be asked whether the doctrine of the undisclosed principal can withstand Constitutional scrutiny in the South African context.

4.7 The doctrine of the undisclosed principal and Constitutional principles.

As mentioned in Chapter 1, the doctrine of the undisclosed principal has been described as odd, anomalous, unsound and inconsistent with principle.[291] Numerous attempts have been made to reconcile this doctrine with basic principles but not one has been found to be sound and acceptable.[292] In *SA Metal & Machinery Company (Pty) Ltd v Klerck,* Leach J stated that the doctrine, while its development may be somewhat anomalous, is justified on the grounds of commercial convenience.[293] It recognises that in the world of contractual relations, parties may well be acting on behalf of another person but prohibit to disclose that fact when concluding a contract.[294] The question that still remains however, is whether the doctrine of the undisclosed principal would withstand Constitutional scrutiny. Can it be said that this doctrine is in line with the spirit, purport and objects of the 1996 Constitution? Furthermore, can it be stated that the doctrine of the undisclosed principal enshrines the concepts of equity, freedom and fairness required in all dealings, particularly those that relate to commercial dealings? These questions must consequently be addressed.

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291 *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Ko-öperasie Bpk* 1972 2 All SA 1 (A)

292 *Karstein v Moribe* 1982 1 All SA 324 T.

293 *SA Metal & Machinery Company (Pty) Ltd v Klerck NO and others* 2005 1 All SA 44 (E): 57 f-g.

294 2005 1 All SA 44 (E): 57 f-g.44 (E): 57 f–g.

In *Du Plessis and Others v De Klerk and Another*[295] the court had to consider whether the fundamental rights provisions apply not only as between the State and individuals, that is vertically, but also between private entities, in this instance horizontally.[296] In this case Ackermann J emphasized that the law could limit the private law contractual values such as freedom of contract and other devices of the common law by virtue of the radiating effect of the rights of post constitutional development in the common law and the pre-democratic legislation.[297] He proposes that this could be done by applying concepts such as public policy, the *boni mores*, unlawfulness, reasonableness, fairness and many other similar constitutional concepts without any unsatisfactory consequences that the direct applications of these to contractual principals and pre-democratic statutes may inevitably cause if applied directly.[298] He further alludes to the fact that the common law of South Africa has in the past proved to be flexible and adaptable, and that it too can meet the new constitutional mandate.[299] This therefore demonstrates that South African courts can interrogate the operation and the very existence of the doctrine of the undisclosed principal based on the above-mentioned decision.

One aspect that may raise constitutional objection to the operation of the doctrine of the undisclosed principal is the non-disclosure of the existence and the identity of the true principal to an unsuspecting third party. In *Meskin, No v Anglo - American Corporation of SA Ltd and Another*[300] the court observed the fact that no detailed reference had been made to the position regarding non-disclosure inside the sphere of a contract.[301] The court stated that all contracts had to be

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295 1996 (5) BCLR 658 (CC).

296 *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC): 658.

297 *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC): 658.

298 *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC): 658.

299 *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC): 711.

300 1968 4 ALL SA 281 W.

301 *Meskin, No V Anglo - American Corporation of SA Ltd And Another* 1968 4 All SA 281 W: 289-290.

bona fidei, and that such good faith had to be utilized as a criterion in the process of interpreting a contract and in evaluating the conduct of the parties both with regards to the performance that is agreed upon and its antecedent negotiations.[302]

The notion, however, of having to disregard already established contractual rules that have a centurion lineage of legal standing such as the doctrine of the undisclosed principal, is not supported by the Supreme Court of Appeal. In *Brisley v Drotsky*,[303] for example where the majority of the judges declined to overturn an established contractual principle.[304] The reasons given by the respective judges were that this would cause tremendous uncertainty in the law of contract, which would pose insurmountable evidentiary predicaments and would very likely disrupt trade.[305] This is the very same sentiment that was shared by the court in *Cullinan*.[306]

To further demonstate the courts reluctance to overrule contractual principals that are not in conformity with Constitutional values is the case of *Afrox Healthcare Bpk v Strydom.*[307] In this matter, the court regarded the constitutional values of good faith, reasonableness, fairness and justice. The court cited *Brisley*[308] and stated that although such considerations underlie South African law of contract, they are not an independent or free floating basis for setting aside or not enforcing contractual provisions.[309] The court further highlighted that although the values above represent the basis and the right

302 *Meskin, No V Anglo - American Corporation of SA Ltd And Another* 1968 4 All SA 281 W: 290.
303 2002 ZASCA 35.
304 The court had to decide whether the principle of *Pacta sunt servanda* could be absolved in a lease agreement.
305 *Brisley v Drotsky* 2002 ZASCA 35: para 8,10,21 and 24.
306 *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Ko-öperasie Bpk* 1972 2 All SA 1 (A)
307 2002 ZASCA 73.
308 *Brisley v Drotsky* 2002 ZASCA 35.
309 *Afrox Healthcare Bpk v Strydom* 2002 ZASCA 73: Para 21.

of existence of legal rules and can subsequently lead to the formation and change of legal rules, they are not in themselves legal rules.[310]

Strictly, the court warned that when it comes to enforcing a contractual agreement, the court has no discretion and does not act based on abstract ideas, however on the bases of crystalized and laid down rules.[311]

It must be said, however, that in the instance regarding the constitutionality of the doctrine of the undisclosed principal the court might decide in contrast to what the courts have decided in the past. Issues such as the undisclosed identity of the true principal, the non-disclosure of the true nature of the agreement and the *mala fide* process of negotiations leading to the conclusion of the contract might very well allow the court to consider the existence of the doctrine. Based on consideration of good faith.

This would not be an idea that is far-fetched. In the case of *Everfresh Market Virginia v Shoprite Checkers*[312] the applicant sought that the common law be developed pursuant to section 39(2) of the Constitution of the Republic of South Africa so that the parties to the agreement are precluded from refusing to negotiate in good faith, if an agreement properly interpreted, requires them to do so.[313]

With regards to whether negotiations that are done in good faith constitute a constitutional matter, the applicants argument was that the common law should be developed in accordance with the spirit, purport and the objects of the

310 *Afrox Healthcare Bpk v Strydom* 2002 ZASCA 73: Para 22.
311 *Afrox Healthcare Bpk v Strydom* 2002 ZASCA 73: Para 22.
312 2012 3 BCLR 219 CC.
313 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 CC: Para 16

Constitution as required by section 39(2).[314] They stated that in order for this to be done the Constitution should oblige parties who agree to negotiate rent for renewal period of a lease to do so reasonably or in good faith, which in essence does raise a constitutional matter.[315]

With specific regard to the requirement of good faith, the court stated in the process of forming a contract that:

> Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. 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. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in a contract touches the lives of many ordinary people in our country.[316]

In addition, the court also considered the value of *Ubuntu* as a relevant value in the process of determining the spirit, purport and the objects of the Constitution.

Having had stated all this, what is more clear now is that the constitutional court does now consider good faith to be an important requirement to the formation of a contract. What more can be said of a doctrine that does not allow full disclosure of the identities of the parties to a contract which can very well hinder with the good faith that could reasonably be expected by a contractant. Particularly the contractant that innocently thinks that they are entering into a contract with a particular party, only to realise that in fact there is a true principal, which the innocent party knew

314 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 CC: Para 19
315 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 CC: Para 19
316 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 CC: Para 22

nothing of. Whether such a contract would be considered to comply with the value of *Ubuntu* as stated as a requirement in the formation of a contract in *Everfresh*.

Louw states, that when one considers the prevalence of inequality in bargaining power in modern-day commerce and related issues, and the social realities which may affect the presence of free volition and choice on the part of contracting parties, in order to determine the form, nature and consequences of their bargain, the insertion of *Ubuntu* is important. This sentiment is shared particularly with regards to the doctrine of the undisclosed principal. Such an objective standard, he states, of ethical conduct - imposed on parties by the *boni mores* as evidenced in the constitutional values and, more specifically, *Ubuntu* - might provide a powerful tool with which to level the playing field and ensure that all contracting parties are equal before the law and enjoy equal protection of the law.[317]

By upholding such an ethical standard in contractual law, would therefore question the existence of the doctrine of the undisclosed principal in modern constitutional South African law. There is much weight given to the idea that should the constitutional standing of the doctrine of the undisclosed principal be tested against constitutional ethical standards as mentioned above, that it would not withstand such constitutional scrutiny.

4.8 Conclusion

It is clear from the above, that the doctrine of the undisclosed principal does form part of the South African law as stated in *Wendywood Development (Pty) Ltd v Rieger and Another*[318] by virtue of section 16 of the Transfer Duty

317 Louw 2013: 104.

318 1971 3 SA 28 (A).

Act.[319] What is perhaps also clear in terms of case law is the fact that should legislation require the utmost transparency with regard to the identities of the parties to the agreement, as is found in section 2(1) of the Alienation of Land Act,[320] the doctrine of the undisclosed principal cannot apply. *Mineworkers Union v Cooks*[321] demonstrated that the court will not allow extrinsic evidence to ascertain the identity of the true principal in an agreement of a sale of land and that such an agreement will be null and void. More unambiguous is the courts stance on section 23(2) of the Closed Corporations Act,[322] which prohibits the application of the doctrine. Nonetheless, what is absolutely certain is that the doctrine of the undisclosed principal is indeed recognised in South African law as visible in the Convention On Agency In The International Sale Of Goods Act 4 of 1986, Article 13. The most uncertain aspect of the doctrine is, however, whether in modern day South African constitutional law, such a doctrine would in fact withstand constitutional scrutiny.

319 Act 40/1949.
320 Act 68/ 1981.
321 1959 1 All SA 146 W.
322 Act 69/1984.

5.1 Conclusion on previous chapters

The uncertainty upon which the doctrine of the undisclosed principal was introduced into South African law is perhaps the reason why the doctrine's existence in itself will always have a controversial element attached to it. Not only is this the case in South African law, but also in English law from whence this doctrine emanates (as was alluded to in chapter 2 with reference to *Schrimshire*[323]).

The anomalous nature of the doctrine of the undisclosed principal persuaded the English judiciary to impose limitations that ought to be imposed whenever the doctrine of the undisclosed principal is in operation.

The first is that where the third party relied upon the skill, solvency or any other personal characteristic of the agent, the undisclosed principal cannot intervene if the agent's contract is of a personal nature.[324]

Secondly, in instances where the contract as entered into by the parties in itself excludes the operation of the doctrine of the undisclosed principal, then the doctrine of the undisclosed principal cannot find application.[325]

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323 Schrimshire v Alderton 174 2 Stra.

324 *Greer v Downs Supply Ltd* 1927 2 KB: 28.

325 *Humble v Hunter* 1848 12 QB: 307.

Thirdly, where the principal is undisclosed, the third party can set-off against the principal any defenses accrued against the agent up to the point the principal intervenes. However, in the instance of the third party, if he or she did not consider the other contracting party's identity as relevant or did not believe he was dealing with an agent, or if the third party thought there might be an undisclosed principal involved, the third party cannot set-off the agent's debts against the principal.[326]

The fourth limitation relates to the premise that if the agent has been paid an amount of money by the undisclosed principal and the agent subsequently does not make the payment to the third party that the undisclosed principal will be absolved from any liability towards the third party.[327] This premise however has been criticised by the courts and in *Irvine v Watson*, the court suggested that the principal remained liable to the third party in similar circumstances for the protection of the *bona fide* third party.[328]

The final limitation relates to the election rule. This rule entails that should the undisclosed principal be revealed before judgement, the third party will have a choice to either institute action against the agent or the undisclosed principal. The third party cannot sue both, because the third party only makes one contract with one person, that is, there is only one obligation. Once the third party has chosen to institute action against either the undisclosed principal or the agent, the matter will be final and no other chance of instituting action against either the undisclosed principal or the agent will be permitted.[329]

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326 *Cooke v Eshelby* 1987 AC 271.

327 *Armstrong v Stokes* 1872 7 QB.

328 *Irvine v Watson* 1879 5 QBD: 102.

329 *Siu Yin Kwan v Eastern Insurance* 1994 PC 16 DEC: 201-202.

Despite the limitations of the doctrine of the undisclosed principal as experienced in English law and discussed in Chapter 2, the court in *Cullinan* retained the doctrine of the undisclosed principal for the fact that it had found application in South African commerce for almost a hundred years. As such, it had come to form a practically important part of daily commercial dealings.[330] The court however questioned the applicability of the doctrine to South African jurisprudence since it had the same effect as would the (South African) rules of cession. Authors such as Ames suggest that trust law could be utilised and the doctrine of the undisclosed principal.[331] Whereas other suggestions also hold the use of the *respondeat superior* to explain the reason why the third party could hold the undisclosed principal liable, even though the undisclosed principal was not the party that the third party concluded a contract with. With all these suggestions mentioned above, there still lies an air of ambiguity in relation to the manner in which the doctrine of the undisclosed continues to operate.

Although the courts (in *Cullinan*) and legislature (by virtue of Act of the Convention On Agency In The International Sale Of Goods Act 4 of 1986) have endorsed the continued existence of the doctrine of the undisclosed principal in South African law, the exact nature of the relationship between the undisclosed principal and the agent remains. This dissertation therefore aimed to suggest a bases familiar to South African law upon which the doctrine of the undisclosed principal could continue to function.

Three proposition where made in this regard: firstly that the law of trust be utilised as the *iusta causa* upon which the doctrine of the undisclosed principal may operate. This proposition holds that the doctrine of the undisclosed principal operates as a form of a *stipulatio alteri* under the trust *inter vivos*. The right of the undisclosed principal before acceptance

330 1972 1 SA 761:767H-768A.

331 Ames 1909: 445-446.

of the relevant offer would be that he has no right in law. It is only until he or she accepts the contractual offer that he inheres any right to the contract concluded on his behalf by his agent. Such acceptance can be construed from his conduct when he presents himself to the third party as the real creditor or debtor to a contract that was initially concluded in his absence.

Secondly, the rules of the law of cession, as suggested in *Cullinan,* could be used to better regulate the operation of the doctrine mentioned above. What is suggested is that the agent in the undisclosed principal situation could be considered to have ceded his right to the undisclosed principal. An intention to do this could be construed from the authority given by the undisclosed principal to the agent to enter into the contract in the first place. The delivery of the contract by the agent to the undisclosed principal that was initially concluded by the agent and the third party could satisfy the element of delivery required by the law of cession. As mentioned above, the agreement between the agent and the undisclosed principal need not be in writing. It would be sufficient to show that the parties had reached consensus and that the agent was acting on the undisclosed principal's authority.

The doctrine of the *respondeat superior* could similarly be utilised in order to impute liability on the undisclosed principal instead of the agent. It is submitted that this doctrine can only be applied when the liability of the undisclosed principal is to be established from the instance the third party comes to know of his (the undisclosed principal's) existence. The existence of authority between the undisclosed principal and the agent would be sufficient to impute liability on the undisclosed principal.

The "alternatives" to the doctrine of the undisclosed principal have not been suggested as replacements of said doctrine in South African law. On the contrary, they have been suggested as more familiar aspects to South African law in order to establish firmer bases for the continued existence of the doctrine of the South African law.

By virtue of Section 16 of the Transfer Duty Act[332] it was established in *Cullinan* that the section recognised the existence of the doctrine of the undisclosed principal in South African Law. Due to the legislative recognition of the doctrine, it became important to answer the question of when the doctrine can and cannot find application to a particular legislative framework. To answer this the following was noted: first, the doctrine of the undisclosed principal will not apply when the identities of contractants are pertinent in order to complete a transaction. This is visible in terms of the court's interpretation of Section 2(1) of the Alienation of Land Act.[333] However, writers such as Delport dispute that the doctrine could violate the provisions in the contract, as stated in chapter 4. Another legislation that makes it clear, as applied by the courts, that the doctrine of the undisclosed principal will not apply is section 23 of the Closed Corporations Act.[334]

Second, the doctrine of the undisclosed principal will find application in South African law beyond *Cullinan* because it was endorsed in South African law by Article 13 of the statute of the Convention On Agency In The International Sale Of Goods Act,[335] although some criticism maybe leveled against it (as shown in chapter 4).

However, the mere fact that the doctrine of the undisclosed principal was indorsed into South African law, does not mean that its existence will be constitutionally valid. Constitutional values of *Ubuntu* and good faith may be leveled against the doctrine due to its shortcomings as alluded to in previous chapters (particularly chapter 4).

332 Act 40/1949.
333 Act 68/1981.
334 Act 69/1984
335 Act 4/1986.

5.2 Conclusion

In conclusion, despite the anomalous character of the doctrine of the undisclosed principal from its origins in English law up until its incorporation into South African law and beyond, this dissertation has aimed to show that one must be very careful to discard it too easily. By applying the doctrine using principles more familiar to South African common law, there is no reason why the doctrine should not continue to fulfil its purpose in South African law, provided that, it remains Constitutionally viable.

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