

The best interests of the child: From complete indeterminacy to guidance by the Children's Act*

S Ferreira

BLC LLB LLD

Senior Lecturer, Department of Private Law, University of South Africa

OPSOMMING

Die beste belang van die kind: Vanaf algehele onsekerheid tot leiding deur die *Children's Act*

Die beskerming van die beste belang van die kind is alom bekend, en die Grondwet het aan hierdie konsep permanensie verleen in artikel 28(2). Die presiese betekenis van die beste belang van die kind is egter nie in die Grondwet vervat nie. Ten einde te poog om hierdie betekenis vas te stel, moet nie net Suid-Afrikaanse wetgewing en regspraak ondersoek word nie, maar ook internasionale instrumente soos die Konvensie en die *African Charter*. Beide hierdie instrumente word bespreek, sowel as die beste belang van die kind soos beskerm deur die Grondwet. Daarna word 'n uitleg verskaf van die terminologie wat gebruik word ten aansien van die beste belang van die kind in verskillende instrumente, en dan word die kritiek teen hierdie konsep bespreek. Laastens word ondersoek welke faktore in ag geneem behoort te word in die bepaling van die beste belang van die kind en die rol van die *Children's Act* word uitgelig. Die gevolgtrekking word dan gemaak dat alhoewel die begrip "die beste belang van die kind" nie maklik is om te bepaal nie, daar geen twyfel is oor die noodsaaklikheid daarvan om dit te beskerm nie, en dat enige besluit oor die beste belang van die kind geneem moet word met inagneming van alle relevante faktore en omstandighede.

1 INTRODUCTION

The requirement that the best interests of the child should be a primary consideration in all issues involving children is found in almost all human rights documents.¹ There can be no doubt about the importance of the best interests standard when it comes to children, but in practice the contents and extent of this standard are uncertain.² To act in accordance with the best interests of a child, it is essential that there are guidelines indicating how the child can and should be protected.

* This article is based on certain sections of the author's LLD *Interracial and intercultural adoption: a South African legal perspective* (UNISA 2009).

1 Maithufi "The best interests of the child and African customary law" in Davel (ed) *Introduction to child law in South Africa* (2000) 140.

2 Davel and de Kock "In 'n kind se beste belang" 2001 *De Jure* 274.

2 HISTORICAL DEVELOPMENT AND APPLICATION IN SOUTH AFRICA

The concept “best interests of the child” was introduced into our customary law by courts in the Transkei and Natal at the turn of the twentieth century.³ The common-law rule laid down in the 1948 case of *Fletcher v Fletcher*⁴ was that the most important factor the courts must consider in making a decision regarding a child is not the rights of parents but the best interests of the child. The court thus confirmed that the best interests standard must be the main consideration in matters concerning the child.⁵

As long ago as 1969, the standard of the child’s best interests was described by our courts as “a golden thread which runs throughout the whole fabric of our law relating to children”.⁶ Today, South Africa has a Bill of Rights⁷ which has turned serving the best interests of the child into a constitutional imperative. The standard of the best interests of the child is constitutionalised in section 28(2),⁸ in terms of which the child’s best interests are of paramount importance⁹ in every matter concerning the child. Unfortunately, though, the exact meaning of the standard is not constitutionally defined, and requires judicial interpretation.¹⁰

There are many factors to be considered when deciding what the best interests of a child are. What would be in the best interests of a child in a particular case would depend on the circumstances of that case, and has to be determined for each case individually.¹¹ The Constitution does, however, provide us with guidelines to help us in the decision about what the best interests of the child are. In terms of section 39(1)(b) and (c) of the Constitution, a court, tribunal or forum must consider international law and may consider foreign law in its deliberations. The provisions of these instruments will thus be important in the interpretation of the concept of “the best interests of the child”.¹² A closer look at international law shows us that section 28(2) of the Constitution is in keeping with the universal recognition that the interests of the child must prevail.¹³ Furthermore, by ratifying and acceding to the United Nations Convention on the Rights of the Child¹⁴ and the African Charter on the Rights and Welfare of the Child,¹⁵ South Africa confirmed its commitment to international human rights efforts di-

3 Bennett “The best interests of the child in an African context” 1999 *Obiter* 145.

4 1948 1 SA 130 (A) 143.

5 Bekink and Bekink “Defining the standard of the best interests of the child: Modern South African perspectives” 2004 *De Jure* 22–23.

6 *Kaiser v Chambers* 1969 4 SA 224 (C) 228F.

7 Chapter 2 of the Constitution of the Republic of South Africa, 1996, hereafter “the Constitution”.

8 S 28(2): “A child’s best interests are of paramount importance in every matter concerning the child.” See also *Fraser v Naude* 1999 1 SA 1 (CC) 5B–C, 1998 11 BCLR 1357 (CC); *Jackson v Jackson* 2002 2 SA 303 (SCA) 317F.

9 In *Fletcher supra* the Appellate Division first gave paramountcy to the standard of the best interests of the child.

10 Bekink “Parental religious freedom and the rights and best interests of children” 2003 *THRHR* 255.

11 Davel and De Kock 2001 *De Jure* 274.

12 Also see par 6 below.

13 Bekink and Bekink 2004 *De Jure* 25.

14 Adopted by the General Assembly on 20 November 1989, it entered into force on 2 Sept 1990. Hereafter “the Convention”.

15 It entered into force on 29 Nov 1999. Hereafter “the Charter”.

rected towards the protection of (inter alia) children in accordance with the standards of international declarations and conventions.¹⁶

3 INTERNATIONAL INSTRUMENTS

3.1 The Convention and the best interests of the child

An important international instrument that has to be consulted when determining the best interests of a child is the Convention,¹⁷ which has been hailed as a watershed in the history of children.¹⁸ Its importance is underscored by the unprecedented “rapidity with which States have ratified or acceded to it and by the sheer number of States Parties which it has attracted”.¹⁹ The Convention is a comprehensive treaty on the rights of the child and the most universally accepted human rights document in history.²⁰ It places the child²¹ at the centre of the spread of human rights generally.

Since its introduction, the Convention has become the international standard against which legislation and policies are measured.²² It has been ratified by 192 countries, with only 2 member states yet to do so.²³ South Africa became a signatory to the Convention on 29 January 1993 and ratified it on 16 June 1995.²⁴ This means that South Africa must comply with the obligations the Convention imposes on States Parties.²⁵

The best interest of the child forms one of the foundation stones of the Convention.²⁶ The Preamble recognises that children are entitled to the same basic set of human rights as every person, but that children are also entitled to special care and assistance. Article 3(1) of the Convention seems to place the best interests standard at the heart of international children’s rights law.²⁷ In terms of this article the best interests of the child shall be a primary consideration in all ac-

16 Nicholson and Politis “The life and death lottery: Tipping the scales in favour of the child’s best interests” 2001 *De Jure* 594.

17 See fn 14 above.

18 Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law” 1995 *SAJHR* 401.

19 Alston “The best interests principle: Towards a reconciliation of culture and human rights” in Freeman (ed) *The international library of essays on rights: Children’s rights* Vol 2 (2004) 183–184. Sloth-Nielsen 1995 *SAJHR* 402 explains that no other treaty has been ratified by so many states within so short a period of time.

20 Todres “Emerging limitations on the rights of the child: the UN convention on the rights of the child and its early case law” in Freeman (ed) 146–147.

21 A child is defined in a 1 as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

22 *Brandt v S* [2005] 2 All SA 1 (SCA) 7.

23 These states are Somalia and the United States of America. According to Simon “United Nations convention on wrongs to the child” in Freeman (ed) 311 two issues that have held up the United States’ ratification of the Convention are abortion and the death penalty.

24 In terms of a 47, South Africa could not become a party to the Convention through signature alone. Subsequent ratification was also required.

25 Cronjé and Heaton *South African family law* (2004) 263; Sloth-Nielsen 1995 *SAJHR* 419.

26 Clark “A ‘golden thread’? Some aspects of the application of the standard of the best interest of the child in South African family law” 2000 *Stell LR* 3.

27 Parker “The best interests of the child – Principles and problems” 1994 *Int J of Law and the Family* (*IJLF*) 26.

tions concerning children.²⁸ Article 3(1) is of fundamental importance to the whole Convention because it contains the general standard which underpins the application of the rights guaranteed.²⁹

The Convention does not provide any definitive statement of how an individual child's interests would best be served in a given situation. It contains no definition or list of factors that would indicate the best interests of the child,³⁰ but provides "a number of signposts capable of guiding those seeking to identify what is in the best interests of the child".³¹ These are participation (children should participate in decisions affecting their destiny and should participate in community life and play an active role in society), protection (against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation), prevention (of harm to children, the development of preventative health care and the prevention of child abduction) and provision (children have a right to have their basic needs met, for example education, health care, and access to justice).³² All of these principles are to be applied with the best interests of the child as a primary consideration.³³

3 2 The Charter and the best interests of the child

The Convention was an inspiration for the Charter,³⁴ another international instrument that deals with the best interests of the child.³⁵ After the Convention, it is the second global and the first regional binding instrument that identifies the child as a possessor of certain rights.³⁶ South Africa signed it on 10 October 1997 and ratified it on 7 January 2000.

The Convention and the Charter are complementary and both of them provide the framework through which children and their welfare are increasingly discussed in Africa,³⁷ but this separate Charter for Africa was born out of frustration with the United Nations' drafting process.³⁸ The failures of the Convention, ac-

28 A 3(1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authoritative or legislative bodies, the best interests of the child shall be a primary consideration."

29 McGoldrick "The United Nations convention on the rights of the child" in Freeman (ed) 82.

30 Bekink and Bekink 2004 *De Jure* 27.

31 Alston "The best interests principle: Towards a reconciliation of culture and human rights" 1994 *IJLF* 19.

32 Van Bueren in Davel (ed) 203; Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1998 *Michigan J of Race & Law (MJRL)* 345. In *M v S* 2007 12 BCLR 1312 (CC) 1322B the guiding principles were described as survival, development, protection and participation.

33 A 3.

34 See fn 15 above.

35 Davel "The African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights" 2002 *De Jure* 282.

36 Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" 2002 *The Int J of Children's Rights (IJCR)* 157.

37 Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 128.

38 Viljoen "Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 205.

ording to Viljoen,³⁹ were threefold, namely, underrepresentation of Africans during the drafting process; the omission of potentially divisive and emotive issues in the search for consensus between states from diverse backgrounds; and, in order to reach a compromise, specific provisions on aspects peculiar to Africa were left out.⁴⁰

More so than on other continents, African children are in an extremely vulnerable position when it comes to the violation of their human rights, owing to such issues as poverty, famine and HIV/AIDS. The Charter has a specifically “African” flavour.⁴¹ Compared to the Convention, it increases the level of protection for children,⁴² and its strength lies in the fact that it expressly proclaims its supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter.⁴³ Article 1(1) obliges States to recognise the rights, freedoms and duties enshrined in the Charter, while article 4 deals with the best interests of the child. It declares that in all actions concerning the child the best interests of the child shall be the primary consideration.⁴⁴

4 BEST INTERESTS: PRIMARY OR PARAMOUNT?

4.1 Introduction

If we consider the wording of the various instruments discussed above that relate to the best interests of the child, it is apparent that the vocabulary that is used when referring to this issue is not consistent. The Convention makes the best interests of the child *a primary consideration*.⁴⁵ In terms of the Charter the best interests of the child has to be *the primary consideration*,⁴⁶ while the Constitution demands that the best interests of the child are *of paramount importance* in every matter concerning the child.⁴⁷ The following paragraphs interpret the language used in the different documents.

4.2 Different phraseology – different meanings?

According to McGoldrick⁴⁸ it was specifically decided to use the words *a primary consideration* in the Convention because there were strong reservations in the Working Group of the United Nations Human Rights Commission about a proposal to make the best interests of the child *the primary consideration* - it was noted that there were situations in which competing interests should be of at least equal, if not greater, importance than the interests of the child. Alston says that the objective of the word *a* was to ensure that there is sufficient flexibility to en-

39 *Idem* 199.

40 *Idem* 205.

41 *Idem* CILSA 211.

42 Viljoen “The African charter on the rights and welfare of the child” in Davel (ed) 224.

43 A 1(3); Chirwa 2002 *IJCR* 158.

44 A 4(1): “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”. See also par 4 below where the meaning of the concept in the Convention and the Charter is analysed.

45 A 3(1) – see fn 28.

46 A 4(1) – see fn 44.

47 S 28(2) – see fn 8.

48 McGoldrick in Freeman (ed) 108 fn 41.

able interests other than those of the child to prevail.⁴⁹ However, according to Todres⁵⁰ this desire for flexibility has created a loophole in the Convention, in that it allows judges to consider the child's best interests and then to make a decision that may not reflect those interests. Freeman believes that this dilutes the paramountcy principle.⁵¹ In my view, this leaves the best interests of a child open to abuse.

When the drafters of the Charter decided to make the best interests of the child *the* primary consideration, more emphasis was placed on the best interests of the child than is the case in the Convention. This is so because the word *the* is obviously stronger than *a* as used in the Convention.⁵² Compared to the Convention, the Charter thus offers increased levels of protection for the child's best interests.⁵³

I have already shown that the use of the definite article *the* is stronger than the indefinite article *a*. The next step is to determine whether the protection offered to children by the Constitution as far as their best interests are concerned is equally or more comprehensive than that of the two international instruments discussed above.

The use of the word *paramount* in the Constitution is emphatic.⁵⁴ To determine whether there is a difference in meaning with regard to the terms *primary* and *paramount*, a look at the *Oxford Student's Dictionary*⁵⁵ shows that *primary* is defined as "of the first importance, chief", while the adjective *paramount* means "more important than anything else". Arguably then, the word *primary*, which is used in both the Convention and the Charter, is weaker than the word *paramount* (which is the term used in the Constitution).⁵⁶ Applied literally, children's interests in the Constitution would trump all other rights and interests, but Bonthuys⁵⁷ believes such an interpretation would be unpalatable. It would then become pointless to even consider the rights and interests of other parties.⁵⁸ This, in my opinion, is the correct interpretation. Obviously no interests can be so strong that they are protected at all costs,⁵⁹ but the importance of the best interests of a child must never be downplayed or overlooked.

This is also the view of the Constitutional Court. In both *Minister of Welfare and Population Development v Fitzpatrick*⁶⁰ and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*⁶¹ the court held that section 28(2) is

49 Alston 1994 *IJLF* 13.

50 Todres in Freeman (ed) 176.

51 Freeman "Future of children's rights" in Freeman (ed) 300.

52 Parker "The best interests of the child – principles and problems" in Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 28.

53 Davel 2002 *De Jure* 283; Chirwa 2002 *IJCR* 160.

54 This was confirmed in *M v S supra* 1324G.

55 Allen and Delahunty *Oxford student's dictionary* (2002) 739.

56 Parker in Alston (ed) 28. This is also clear from the way these terms are defined, as discussed above.

57 Bonthuys "The best interests of children in the South African Constitution" 2006 *Int J of Law, Policy and the Family (JLPPF)* 23.

58 *Idem* 34.

59 This viewpoint does not in any way minimise the importance of the best interests of the child.

60 *Supra* 428F–429A.

61 2004 1 SA 406 (CC) 432A–B.

capable of limitation. In *M v S*⁶² Judge Sachs held that the word “paramount” is emphatic,⁶³ and that if this principle “is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting” its objective.⁶⁴ The court further held that just because the best interests of the child are paramount, it does not mean that they are absolute.⁶⁵ It is always important to take into account the facts of each individual case when making a decision about the best interests of a child. Giving his view of the application of section 28(2) Judge Madala, in his minority judgement, held that a child’s best interests must prevail *unless* the infringement of those rights can be justified in terms of section 36 of the Constitution.⁶⁶ I believe that this is a sensible solution.

There can be no doubt about the importance of children’s rights and particularly the best interests of the child. Section 28(2) raises the best interests standard to “a principle of paramountcy”⁶⁷ in every matter concerning the child. It is necessary to ensure that this strong protection that is offered to children is actually applied.

5 CRITICISM OF THE BEST INTERESTS STANDARD

5.1 Introduction

The best interests standard is notoriously vague and indeterminate.⁶⁸ Furthermore, it is not possible to know incontrovertibly what is in a child’s best interests,⁶⁹ and its relevance in a country where customary law plays a major role has been questioned.⁷⁰

5.2 Validity of the criticism of the best interests standard

The best interests standard has failed in the past to provide a reliable or determinate standard.⁷¹ It has been said that the vagueness and indeterminacy are a result of the subjective application of the standard and the difficulty in providing an objective assessment, given the rapidly changing social values, standards and customs of our time.⁷² Parker⁷³ cautions against the assumption that there is only one best interests standard. It has been argued, and this is also my view, that the concept “best interests of the child” cannot have a fixed meaning and content

62 *Supra*.

63 1324G.

64 1325B–C.

65 1325G–H.

66 *M v S supra* 1352D–E.

67 Davel “General principles” in Davel and Skelton (eds) *Commentary on the Children’s Act* (2007) 2–6.

68 Bennett 1999 *Obiter* 155; Bennett *Human rights and African customary law under the South African Constitution* (1999) 100; Bonthuys “Of biological bonds, new fathers and the best interests of children” 1997 *SAJHR* 636; Mosikatsana 1998 *MJRL* 391; Parker 1994 *IJLF* 26.

69 According to Thomas and O’Kane “When children’s wishes and feelings clash with their ‘best interests’” 1998 *IJCR* 138.

70 See Mosikatsana 1998 *MJRL*.

71 Currie and De Waal *The Bill of Rights handbook* (2005) 618.

72 Clark 2000 *Stell LR* 15.

73 Parker 1994 *IJLF* 27.

that are valid for all communities and all circumstances, but should always remain flexible.⁷⁴ The meaning will be determined by the facts and circumstances of each case.⁷⁵

Heaton makes the important point that this indeterminacy is present in other legal concepts, such as the *boni mores*, but that it can be applied despite this indeterminacy.⁷⁶ In *Minister of Welfare and Population Development v Fitzpatrick* the court held that the best interests standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child.⁷⁷ Flexibility is necessary to take account of all the relevant circumstances of each case and to ensure that, practically, the final outcome is in the best interests of the child concerned.⁷⁸ In fact, the Constitutional Court recently held⁷⁹ that it is precisely this inherent flexibility of section 28 that constitutes the source of its strength, and that “indeterminacy of outcome is not a weakness”.⁸⁰

Although it is clear that there must be some limit to the scope of the operation of the best interests of the child,⁸¹ what is in a child’s best interests requires a value judgement that cannot be determined in abstract or in advance.⁸² There are, however, two major stumbling blocks in reaching a decision on a child’s best interests. They are the inability to predict the consequences of alternative outcomes and the lack of consensus on what criteria to use in evaluating the alternatives.⁸³ No decision can truly serve the best interests of the child.⁸⁴ Any decision can merely be aimed at serving the interests of the child as well as is possible under the specific circumstances. All the options must be known, all the possible outcomes of each option must be known, the probabilities of each outcome occurring must be known and the value attached to each outcome must be known to determine what would be in the best interests of the child.⁸⁵ Determining the best interests of a child in a particular case involves a value judgement based on the facts,⁸⁶ and all relevant factors have to be taken into account.⁸⁷ Furthermore,

74 Heaton *The meaning of the concept “best interests of the child” as applied in adoption applications in South African law* (LLM diss UNISA 1988) 16.

75 *Lubbe v Du Plessis* 2001 4 SA 57 (C) 66E–F; Van Heerden “Judicial interference” in Van Heerden *et al Boberg’s Law of persons and the family* (1999) 526; Bekink 2003 *THRHR* 261.

76 *Supra* 428–429; Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 *THRHR* 98.

77 *Supra* 428F–429A.

78 Bekink and Bekink 2004 *De Jure* 39.

79 *M v S supra*.

80 At 1324F–G.

81 Bekink and Brand “Constitutional protection of children” in Davel (ed) 195. (This is also the view of the Constitutional Court – see *Minister of Welfare and Population Development v Fitzpatrick supra*; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division supra*; *M v S supra*.) Although the authors use the word *principle*, they also use the term *rule* in the same contribution. There has been much confusion about the correct term to use when describing the best interests of a child. This is also evident from court decisions.

82 *K v M* [2007] 4 All SA 883 (E) 891d–e; *P v P* 2007 5 SA 94 (SCA) 99D–E; Bekink and Bekink 2004 *De Jure* 40.

83 Clark 2000 *Stell LR* 18.

84 *Ex parte H* 1963 80 MN (NSW) 732 as quoted in Heaton 1988 *LLM* 17.

85 Heaton (fn 74 *supra*) 11. This approach is also adopted by Parker 1994 *IJLF* 29.

86 *P v P supra* 99D–E.

87 *K v M supra* 891e–f.

members of various professions dealing with matters concerning children have different perspectives on the best interests of the child,⁸⁸ and the value systems of the decision-makers may also influence the interpretation of the best interests.⁸⁹

Mosikatsana believes that a key question for the success of section 28 is whether its child-centred regime is compatible with the communalism of African culture.⁹⁰ I believe that it is indeed compatible. It must be emphasised though that, irrespective of section 28's acceptance by followers of customary law, there is no choice whether the best interests standard has to be applied or not. After all, the paramourcy of the best interests of the child is a constitutional imperative.

6 DETERMINING THE BEST INTERESTS OF THE CHILD

6.1 Introduction

It has been established that it is not an easy task to determine what the best interests of a child are. Determining these interests will always be a relative task where factors such as age, culture and other individual circumstances have to be considered and judgements made.⁹¹ It is important that *all* relevant factors are taken into consideration to determine the best interests of the child, otherwise a warped picture of these interests may be obtained.⁹² The question now is which factors should be taken into account in this process.

6.2 Factors to be considered

Although the determination of the best interests of the child has always been and still is complicated, the court, for the first time in South African legal history, in 1994 in *McCall v McCall*⁹³ provided a comprehensive, open-ended list⁹⁴ of fac-

88 Lambiase and Cumes "Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?" 1987 *SALJ* 706–707; Mudie "Custody and access determination in divorce: A family and developmental approach" 1989 *De Rebus* 686.

89 Alston 1994 *IJLF* 21. In this context we also have to keep in mind Eekelaar's distinction between objectivisation and dynamic self-determinism – see Eekelaar "The interests of the child and the child's wishes: The role of dynamic self-determinism" 1994 *IJLF* 46.

90 Mosikatsana 1998 *MJRL* 346–347.

91 Ryburn *Open adoption: Research, theory and practice* (1994) 77.

92 *K v M supra* 891e–f.

93 1994 3 SA 201 (C) 204J–205F. These factors are:

- “(a)[T]he love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;

continued on next page

tors to be taken into account and which serve as a guide to determine the best interests of the child in custody cases. Although this list only served as a guide, never enjoyed statutory recognition in South African law, and could not be regarded as a *numerus clausus*,⁹⁵ these factors have greatly assisted courts and have been referred to in many cases dealing with children. Recently, parts of the Children's Act⁹⁶ were implemented,⁹⁷ and these sections significantly affect the best interests of the child and its application.

6.3 The Children's Act

The South African Law Reform Commission began researching and developing a new Children's Act in 1997. On 1 July 2007, ten years later, some sections of the Children's Act were implemented.⁹⁸ This Act includes numerous references, and affords great significance and recognition, to the best interests of the child in the Preamble,⁹⁹ section 2(a)(iv),¹⁰⁰ section 7¹⁰¹ and section 9,¹⁰² all of which came into operation on 1 July 2007.

The Preamble confirms that every child has the rights set out in section 28 of the Constitution, and shows the commitment of the South African legislature to the values and principles of international instruments which protect the best interests of the child. One of the objects of the Children's Act as set out in section 2¹⁰³ is to give effect to four constitutional rights of the child.¹⁰⁴ These are the

-
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
 - (j) the desirability or otherwise of keeping siblings together;
 - (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
 - (l) the desirability or otherwise of applying the doctrine of same sex matching . . . and
 - (m) any other factor which is relevant to the particular case with which the Court is concerned."

94 This refers to the last factor, (m).

95 Bekink and Bekink 2004 *De Jure* 24. Any other relevant factors may be brought before the court.

96 Act 38 of 2005.

97 Proclamation 13 in GG 30030 of 29 June 2007. Ss 1–11, 13–21, 27, 30, 31, 35–40, 130–134, 305(1)(b) and (c), 305(3)–(7), 307–311 and 313–315, and the second, third, fifth, seventh and ninth items of Schedule 4 of the Children's Act came into operation on 1 July 2007.

98 See fn 97.

99 It states that every child has the rights set out in s 28 of the Constitution, which of course include the best interests of the child in s 28(2).

100 S 2 describes the objects of the Act – see fn 103 below.

101 This section contains the factors that must be considered when applying the best interests of the child standard – see fn 108 below.

102 S 9: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

103 S 2, which came into effect on 1 July 2007. "The objects of this Act are–

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely–
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and

continued on next page

right to family care or parental care or appropriate alternative care when removed from the family environment; social services; protection from maltreatment, neglect, abuse or degradation; and that the best interests of the child are of paramount importance in every matter concerning the child. In other words, these four rights are singled out and protected by the Children's Act. The paramountcy of the best interests of the child is thus of the utmost importance in the context of this Act.

Section 9 of the Act, which is in line with section 28(2) of the Constitution, confirms the importance of the best interests of the child, by making the best interests of the child paramount in all matters concerning the care, protection and well-being of a child. A further development that emphasises the rights of the child in the Children's Act, is the use of the term "parental responsibilities and rights"¹⁰⁵ instead of the traditional term "parental authority", thus shifting the emphasis with regard to the relationship between parents and children. Whereas parental authority referred to the rights, powers, duties and responsibilities parents had in respect of their minor children and those children's property,¹⁰⁶ parents now have responsibilities as well as rights with regard to children, which include, but are not restricted to, the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child, and to contribute to the maintenance of the child.¹⁰⁷ This again places more emphasis on the best interests of the child by placing the responsibility on the parent to care for the child.

Apart from emphasising the paramountcy of the best interests of the child, section 7 of the Act provides a list of 14 factors that have to be taken into consideration when the best interests of the child standard has to be applied.¹⁰⁸ Each factor

-
- (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
 - (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
 - (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
 - (e) to strengthen and develop community structures which can assist in providing care and protection for children;
 - (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
 - (g) to provide care and protection to children who are in need of care and protection;
 - (h) to recognise the special needs that children with disabilities may have; and
 - (i) generally, to promote the protection, development and well-being of children." The Child Care Act does not set out its objects.

104 S 2(b). See the preceding fn.

105 As referred to in s 18 of the Act, which came into operation on 1 July 2007.

106 Cronjé and Heaton 265.

107 S 18(2).

108 S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

- (a) the nature of the relationship between—
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards—

continued on next page

must be taken into consideration where relevant, and it is up to the court to determine which factors are relevant. This list is the first of its kind included in legislation in South Africa. Despite some shortcomings,¹⁰⁹ such a list of factors is long overdue and without a doubt a welcome inclusion in the Children's Act. It goes a long way in assisting with the application of the best interests of the child, by providing guidelines about what to consider when deciding what these best interests are. These clear guidelines make the task of determining the best interests of the child much easier.

Although the list of factors in section 7 is welcomed, it is unfortunate that the list is not an open-ended one. Davel¹¹⁰ points out this shortcoming of section 7. Whereas the list in *McCall v McCall* makes provision for the possibility that the court could consider "any other factor which is relevant to the particular case with which the Court is concerned",¹¹¹ section 7 contains no such provision. It

-
- (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
 - (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
 - (f) the need for the child—
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
 - (g) the child's—
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
 - (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - (i) any disability that a child may have;
 - (j) any chronic illness from which a child may suffer;
 - (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by—
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

109 See the discussion in the next paragraph.

110 Davel in Davel and Skelton (eds) 2–8.

111 Factor (m).

should be obvious that there can never be a truly complete list of factors that could point to what is in the best interests of every child in every circumstance. Davel has a valid, realistic suggestion to overcome this problem. She argues that judicial officers can and should use their inherent discretion to consider other factors where relevant,¹¹² and I certainly hope and trust that they will. However, this might not be enough. In my opinion, it is not in the best interests of the child to leave such an important decision to court officials. This omission/oversight¹¹³ could be detrimental to the best interests of a child. I believe that the Act should provide for circumstances where other relevant factors that could play a part in determining the best interests of the child may be considered. It is hoped that the legislature will soon realise that there can never be an all-encompassing list that makes provision for all factors that could be considered to determine the best interests of the child, and amend the section to include as part of section 7 the possibility that the court may consider any factor which may in the specific case be relevant to determine the best interests of the child.

7 CONCLUSION

The best interests of a child are not easily determined. These interests are a contentious issue that will be debated for as long as decisions about children have to be taken. However, the protection of the best interests of the child is clear. The Children's Act not only complies with the Constitution as far as the protection of the best interests of the child is concerned, it exceeds its requirements and those of the Convention and the Charter. The Children's Act has undoubtedly taken the protection of the best interests standard in South Africa to an increased level and provided us with greater clarity regarding the factors that are relevant in determining the child's best interests.¹¹⁴ Ultimately, the best interests of the child need to be protected, and I can only reiterate that a decision about the best interests of a child has to be made by considering all relevant factors and circumstances, whatever these may be at the time. The child's present and future best interests must remain uppermost in an evaluator's mind.¹¹⁵

112 Davel in Davel and Skelton (eds) 2–8.

113 It is hoped that it was only an oversight which will be rectified in the near future.

114 Davel in Davel and Skelton (eds) 2–12.

115 Strous "Post-divorce relocation: In the best interests of the child?" 2007 *SA J of Psychology* 239.