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An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context[1]

Abstract

This contribution deals with the approach that should be adopted when applying the concept of "the best interests of the child" and evaluating the individual factors that are used in determining what is in the child's best interests. Section 28(2) of the *Constitution of the Republic of South Africa, 1996* and Constitutional Court decisions are used as the main sources of guidance on the correct approach. The submission is made that an individualised, contextualised and child-centred determination of the child's best interests is required. In view of our constitutional values of tolerance of and respect for diversity and pluralism, it is further submitted that we must move away from a mainly Judaeo-Christian, Eurocentric interpretation of "the best interests of the child" to an approach that takes the cultural and religious circumstances, interests and needs of the individual child into account. It is concluded that all factors that are shown to be relevant because they have, or could have, a negative or positive impact on the individual child should be taken into account in a contextualised child-centred way without reducing other constitutionally-protected rights and interests to nothing.

'n Geïndividualiseerde, gekontekstualiseerde en kinder-gesentreerde benadering tot die kind se beste belange en die implikasies van sodanige benadering in die Suid-Afrikaanse konteks

Hierdie bydrae handel oor die benadering wat aangewend moet word wanneer die begrip "die beste belang van die kind" toegepas word en die individuele faktore wat gebruik word om te bepaal wat in die kind se beste belang is oorweeg word. Artikel 28(2) van die *Grondwet van die Republiek van Suid-Afrika, 1996* en uitsprake van die Konstitusionele Hof word gebruik as die hoofaanduidings van wat die korrekte benadering is. Daar word aan die hand gedoen dat 'n benadering wat geïndividualiseer en gekontekstualiseer is en waarin die kind sentraal is, toegepas moet word wanneer die kind se beste belang bepaal word. In die lig van ons grondwetlike waardes van verdraagsaamheid ten opsigte van en respek vir diversiteit en pluralisme word daar verder aan die hand gedoen dat ons moet weg beweeg van 'n hoofsaaklik Judaeo-Christelike, Eurosentriese uitleg van

1 This is an amended form of a paper presented at a conference entitled *Children and the Law: International Approaches to Children and their Vulnerabilities* held at Monash University in Prato, Italy, 7-10 September 2009. The financial assistance of the University of South Africa which enabled the author to deliver the paper is gratefully acknowledged.

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"die beste belang van die kind" na 'n benadering wat die individuele kind se kulturele en godsdienstige omstandighede, belange en behoeftes in ag neem. Die slotsom is dat alle faktore wat relevant is omdat hulle 'n negatiewe of positiewe uitwerking op die individuele kind het of kan hê, in ag geneem moet word op 'n manier wat die kind sentraal plaas sonder om ander grondwetlik beskermde regte en belange tot niet te maak.

1. Introduction

The concept of "the best interests of the child"[2] has been described as "[a] golden thread which runs throughout the whole fabric of our law relating to children".[3] This statement was made long before the paramountcy of the child's best interests was first entrenched in section 30(3) of the *Constitution of the Republic of South Africa* 200 of 1993 (the interim Constitution).[4] Section 30(3) provided that, for purposes of the children's-rights clause of the Constitution, the child's best interests were paramount in all matters concerning the child. Although "the best interests of the child" was by no means unfamiliar at the time when it was constitutionalised, the constitutionalisation of the concept elevated its status and extended its reach. When the *Constitution of the Republic of South Africa, 1996*[5] replaced the interim Constitution, the "best interests of the child" gained even greater prominence and protection, for section 28(2) of this constitution entrenched the best interests of the child as being of paramount importance in every matter concerning the child, not just in every matter relating to the children's-rights clause.

Furthermore, on 1 July 2007, the general provisions of the *Children's Act*[6] with regard to the best interests of the child came into operation.[7] Section 6 of the Act establishes a child-centred approach in respect of all legislation,

2 A child is a person below the age of 18 years: section 17 of the *Children's Act* 38 of 2005; see also section 28(3) of the *Constitution of the Republic of South Africa, 1996*.

3 *Kaiser v Chambers* 1969 (4) SA 224 (C). See also *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C) (also reported as *Petersen v Maintenance Officer and Others* [2004] 1 All SA 117 (C), 2004 (2) BCLR 205 (C)): para 20. In terms of the common law, the high court as upper guardian of all minors has a broad inherent power to make any order it deems to be in the best interests of the child: see eg *Bam v Bhabha* 1947 (4) SA 798 (A); *September v Karriem* 1959 (3) SA 687 (C); *M NO v M* 1962 (2) SA 114 (GW); *Seetal v Pravitha and Another* NO 1983 (3) SA 827 (D); *Kastan v Kastan* 1985 (3) SA 235 (C); *Du Preez v Conradie and Another* 1990 (4) SA 46 (B); *O v O* 1992 (4) SA 137 (C); *Ex parte Kedar and Another* 1993 (1) SA 242 (W); *Bethell v Bland and Others* 1996 (2) SA 194 (W); *Vista University, Bloemfontein Campus v Student Representative Council, Vista University and Others* 1998 (4) SA 102 (O) (also reported as *Vista University (Bloemfontein Campus) v Student Representative Campus Vista and Others* 1998 (4) BCLR 514 (O)); *P v P* 2002 (6) SA 105 (N); *Hay v B and Others* 2003 (3) SA 492 (W).

4 Chapter 2 of the *Constitution of the Republic of South Africa* 200 of 1993 contained the first Bill of Rights. This constitution operated between 27 April 1994 and 3 February 1997, when it was replaced by the *Constitution of the Republic of South Africa, 1996*.

5 Unless specifically indicated otherwise, all references hereafter to "the Constitution" are to the *Constitution of the Republic of South Africa, 1996*.

6 Act 38 of 2005.

7 Sections 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

proceedings and state measures regarding children. The section sets out general principles which must guide the implementation of legislation as well as proceedings, actions and decisions by organs of state relating to a specific child or children in general.[8] Among these is the principle that — subject to lawful limitation — all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's fundamental rights (in other words, the rights contained in the Bill of Rights) and the best interests of the child as set out in section 7 of the Act.[9] Section 7 lists fourteen factors that must be taken into account when the "best interests of the child" must be applied. In addition, section 9 requires that the "standard" that the child's best interests are of paramount importance must be applied in all matters concerning a child's care, protection and well-being.

In view of the abovementioned developments, the importance of "the best interests of the child" can hardly be overstated. The purpose of this contribution is to determine the approach that should nowadays be adopted when applying "the best interests of the child" and evaluating the individual factors that are used in determining what is in the child's best interests. Section 28(2) of the Constitution and decisions by the Constitutional Court are used as the main sources of guidance with regard to the determining the correct approach.

The discussion starts with comments on some of the implications of section 28(2) of the Constitution and the specific wording of the section. Then the list of factors in section 7 of the *Children's Act* is briefly dealt with. Some issues regarding the interpretation of "the best interests of the child" and application of factors relating to the best interests of the child are set out next. The penultimate part of the discussion focuses on the role of culture and religion in the context of determining the best interests of the child. The contribution ends with a conclusion on the way in which the best interests of the child should be approached in view of the Constitution and the new South African constitutional ethos.

2. The implications of section 28(2) of the Constitution

2.1 Extension of the field of application of the concept of "the best interests of the child"

Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." The first implication of this provision is that the field of application of the best interests of the child has been expanded from family law and children's rights to "every matter concerning the child". Instead of taking the child's best interests into account only in respect of issues such as care,[10] contact and adoption, the

4 of the *Children's Act* came into operation on 1 July 2007: Proclamation 13 Government Gazette 30030 of 29 June 2007.

8 Section 6(1).

9 Section 6(2)(a).

10 Section 1(1) of the *Children's Act* replaced the terms "custody" and "access" with "care" and "contact" and extended the scope of "care".

child's best interests must now be central in all fields of South African law. Thus, for instance, since the coming into operation of section 28(2), the courts have taken the best interests of the child into account in sentencing a parent who had been convicted of a crime,[11] and in deciding whether to detain a father pending his possible deportation.[12]

2.2 The "paramountcy" of the child's best interests

Another point regarding the wording of section 28(2) of the Constitution is that in selecting the word "paramount" the drafters of the Constitution imposed a stricter requirement than that which applies in terms of article 3(1) of the *United Nations Convention on the Rights of the Child*[13] and article 4(1) of the *African Charter on the Rights and Welfare of the Child*.[14] These articles respectively render the child's best interests "a primary consideration" and "the primary consideration" in all actions concerning the child. A "primary consideration" bears less weight than something which is of "paramount importance". This is so because the word "paramount" refers to something that is more important than anything else or superior to everything else, while "primary" signifies something that is first in rank or of principal importance.[15] Section 28(2) thus elevates the child's best interests to the supreme issue in any matter concerning the child.

Applied literally and in isolation, the section would mean that the child's best interests must invariably prevail. However, the Constitutional Court has on several occasions made it clear that rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored, or that limitations of the child's best interests are impermissible.[16] According to the Constitutional Court's decision in *S v M (Centre for Child Law as Amicus Curiae)*,[17] the correct approach is to apply the "paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests". This statement is in keeping with earlier decisions in which the Constitutional Court had held that there is no constitutional hierarchy of

11 *S v Kika* 1998 (2) SACR 428 (W); *Howells v S* [1999] 2 All SA 239 (C); *S v M (Centre for Child Law as* Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC) (also reported as *M v S* 2007 (12) BCLR 1312 (CC)).

12 *Patel and Another v Minister of Home Affairs and Another* 2000 (2) SA 343 (D). On the extension of the best interests of the child beyond family law see further Malherbe 2008:267; Müller & Tait 1999:322; Nel 2003:97; Smit 2008:38; Visser 2007:459.

13 South Africa ratified the Convention on 16 June 1995.

14 South Africa ratified the Charter on 7 January 2000.

15 See Allen (consultant ed) 2002:640, 698; Soanes & Stevenson (eds) 2006:1038, 1139.

16 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC): para 20; *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) (also reported as *LS v AT and Another* 2001 (2) BCLR 152 (CC)): para 29; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC) (also reported as *M v S* 2007 (12) BCLR 1312 (CC)): paras 25, 26, 42. See also the *obiter* statement in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC), 2003 (2) SACR 445 (CC), 2003 (12) BCLR 1333 (CC): para 55.

17 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC) (also reported as *M v S* 2007 (12) BCLR 1312 (CC)): para 25.

rights[18] and that the limitation of constitutional rights involves the weighing up of competing interests and an assessment on proportionality.[19]

2.3 An individualised approach to the best interests of each child

In the same decision of *S v M (Centre for Child Law as Amicus Curiae)*, the Constitutional Court also held that "[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved".[20] In view of this *dictum* and because section 28(2) demands that the child's best interests must be paramount "in *every* matter concerning the child",[21] the question arises whether a totally individualised determination of the best interests of the child is required in each and every matter, to the extent that fixed, general legal rules must be deviated from if deviation would be in the best interests of a particular minor.

To illustrate the potential implications of a wholly individualised approach to the best interests of the child, Alfred Cockrell[22] refers to the 1978 decision in *Sesing v Minister of Police and Another*.[23] In this case a minor instituted an action for damages for bodily injuries he had sustained when the police had allegedly unlawfully shot him. His mother was an alcoholic with whom he had apparently lost contact. His father still played a part in his life, but the minor was free from parental control and earned his own income, which he spent as he wished. The minor was not assisted by either of his parents when he instituted the claim against the Minister of Police. The Minister successfully raised the special plea that the plaintiff lacked capacity to litigate as he was an unassisted minor. The general rule which gives a minor only limited capacity to litigate has the broad object of protecting minors from their own immaturity, inexperience and lack of judgment.[24] However, this rule did not serve the best interests of the particular minor in this particular case. Cockrell concludes that section 28(2) would not require a different approach if a similar case were to be heard today.[25] He argues that section 28(2) does not mandate a differential application of fixed rules simply to cater for the circumstances of a particular minor in a particular matter. He submits that the phrase "every matter concerning the child" must be interpreted as referring only to matters which involve the exercise of discretionary powers.

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18 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC): para 55; *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC), 2009 (8) BCLR 751 (CC): para 19.

19 See eg *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC): para 104; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC): para 35; *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC), 2009 (8) BCLR 751 (CC): para 24.

20 Para 24.

21 Emphasis added.

22 Cockrell 1998: para 3E22.

23 1978 (4) SA 742 (W).

24 Cockrell 1998: para 3E22; Heaton 1998: para 3C14.2; Heaton 2008:85.

25 Cockrell 1998: para 3E22.

It is my view that section 28(2) indeed requires a wholly individualised approach to each minor's best interests in each case, and not only in those instances where a discretionary power has to be exercised. However, the limitation of an individual child's best interests by general rules, such as those relating to limited capacity to litigate, would frequently be justifiable in terms of section 36 of the Constitution,[26] and the rules would therefore not have to be deviated from. I submit that the limitation of the best interests of an individual child in a case such as *Sesing*'s would be justifiable *inter alia* because the limitation serves an important purpose, namely protecting minors in general, as vulnerable members of society, from their own immaturity, inexperience and lack of judgment. Furthermore, the nature and extent of the limitation is not serious because the limitation can be overcome fairly easily: The minor can either obtain parental assistance to the litigation or, if the minor does not have a parent or if the parent unreasonably refuses to give assistance, a curator can be appointed to assist the minor.[27] On one occasion, the High Court has even relied on its powers as upper guardian of all minors and itself assisted minors in litigation.[28]

3. The list of factors in the *Children's Act*

The aspects of the *Children's Act* that indicate its emphasis on the child's best interests are far too many to mention in this contribution. The focus will fall solely on the Act's clarification of the factors that are to be considered in determining the best interests of the child, and the issue of how the list of f ors should be applied in the diverse and pluralistic South African context in view of the Constitution and pronouncements by the Constitutional Court.

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26 Section 36 of the Constitution permits a limitation of a right that is contained in the Bill of Rights "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(*a*) the nature of the right;
(*b*) the importance of the purpose of the limitation;
(*c*) the nature and extent of the limitation;
(*d*) the relation between the limitation and its purpose; and
(*e*) less restrictive means to achieve the purpose."

27 See eg *Ex parte Oppel and Another* 2002 (5) SA 125 (C) (also reported as *Ex parte Oppel and Another: In re Appointment of Curator ad Litem and Curator Bonis* [2002] 1 All SA 8 (C)).

28 *Vista University, Bloemfontein Campus v Student Representative Council, Vista University and Others* 1998 (4) SA 102 (O) (also reported as *Vista University (Bloemfontein Campus) v Student Representative Campus Vista and Others* 1998 (4) BCLR 514 (O)). In this case an order was sought interdicting all students who were enrolled at Vista University's campus in Bloemfontein from committing certain acts which interfered with, prevented, or disrupted the normal functioning of the university. The court assumed that the majority of the students were minors, resulting in their having limited capacity to litigate. The minors had however not been cited as duly assisted by their guardians. In order to protect those students who wanted the normal functions of the university to continue, the court assumed responsibility for assisting all the minors in the litigation and made the order sought.

The concept of "the best interests of the child" has been widely criticised for its vagueness and indeterminacy.[29] Section 7(1) of the *Children's Act* partly addresses this criticism by listing fourteen factors that must be taken into account whenever the best interests of the child must be determined. These factors are the following:

(a) the nature of the personal 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—
  (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;

29 See eg Bekink & Bekink 2004:22; Bennett 1995:100; Bennett 1999:155, 156; Clark 2000:15; Davel & De Kock 2001:274; Heaton 1990:95; Mosikatsana 1998:391; Van Heerden 1999:503; Van Zyl 1997:8.

(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.

Section 7(1) states that the listed factors must be considered when a provision of the *Children's Act* requires the best interests of the child standard to be applied. However, because section 6(2)(a) of the Act requires that the standard of the best interests of the child be respected, protected, promoted and fulfilled in all proceedings, actions or decisions in a matter concerning a child, section 7(1) applies to all proceedings, actions or decisions in a matter concerning a child.

A major objection to the list is that it is closed; in other words, the listed factors are supposedly exhaustive of what could be relevant in determining the best interests of the child. It is unthinkable, however, that if another factor were to be relevant in respect of determining the best interests of a particular child, the court would refuse to take that factor into consideration. Such a refusal would, in any event, contravene section 28(2) of the Constitution as it would not render the child's best interests of paramount importance and one would be extremely hard-pressed to find a constitutionally justifiable reason for exclusion of the factor.[30]

4. Interpreting "the best interests of the child" and applying factors relating to the best interests of the child

Although a list such as the one in section 7 of the *Children's Act* is undoubtedly of great assistance to all bodies and persons who have to apply "the best interests of the child", no list of factors can ever remove the risk of the concept of "the best interests of the child" being manipulated to reflect the subjective views or values of the body or person who has to apply the concept.[31] A related difficulty is that historical, political, social, economic and other factors

30 Section 36 of the Constitution prescribes when a limitation of a right that is contained in the Bill of Rights is justifiable. The section is quoted in fn 25 above.

31 See eg Davel & De Kock 2001:288; Malherbe 2008:284; Van Heerden 1999:503, 543, 544.

can be incorporated into the determination of the child's best interests.[32] This criticism can be illustrated by reference to a pre-Constitution example. Under Apartheid, section 40(b) of the *Child Care Act*[33] provided that:

> [A] child shall not be placed in or transferred to the custody of any person whose classification in terms of the Population Registration Act[34] ... is not the same as that of the child, except where such person is the parent or guardian of the child.

This provision was based on the politically dictated assumption that it was not in the best interests of the child to be in the care of somebody who belonged to a different race. Section 40(b) was repealed three years before the coming into operation of the first constitutional provision regarding the paramountcy of the child's best interests.[35] Now, of course, anti-racialism is one of the founding constitutional values,[36] and section 9 of the Constitution expressly provides that neither the state nor anybody else may unfairly discriminate against anyone on the ground of race.[37]

The criticism relating to subjective views or values, and historical, political, social, economic and similar factors being incorporated into the child's best interests can be properly addressed only if the bodies and persons who have to determine the child's best interests approach the determination in a contextualised, individualised and child-centred manner. Every body or person who has to determine the child's best interests must evaluate each individual case or situation in light of the individual child's position and the effect that the individual child's circumstances are having or will probably have on the child. Thus, for example, a judge who has to decide a care dispute should not unquestioningly apply prevailing social, cultural or religious norms or social theories on what is best for children in general; nor should he or she simply apply his or her personal views, or those of society or (one of) the child's parents.

This is not to say that social theories and norms, cultural and religious values and rules and so forth must be disregarded in determining the child's best interests — quite the opposite. All of these, and more, could be relevant in terms of a contextualised approach to determining the best interests of the child. However, the focus of using such factors must be their relevance for and impact on the individual child. Each factor must be related to the specific child and his or her interests in the specific case. Thus, for example, race could still be considered, but the body or person who takes race into account would have

32 See eg Bonthuys 2001:342; Davel 2007:§7; Mosikatsana 1998:391; Van Heerden 1999:503.

33 The *Child Care Act* will eventually be replaced by the *Children's Act*: see Item 4 of Schedule 4 of the *Children's Act*, which has not yet come into operation.

34 Act 30 of 1950.

35 Section 40(b) of the *Child Care Act* was repealed by section 14 of the *Child Care Amendment Act* 86 of 1991. The first constitutional provision regarding the paramountcy of the child's best interests was contained in section 30(3) of the *Constitution of the Republic of South Africa* 200 of 1993: see above.

36 Section 1(b) of the Constitution.

37 Section 9(3) and (4) of the Constitution; see also section 7 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

to indicate that placing the particular child with the particular person, allowing contact between the particular child and the particular person, allowing the particular person to adopt the particular child, and so on is not in the particular child's best interests. It is unthinkable that, in the new South Africa, it would be concluded that the mere fact that the child placement, contact, adoption, etcetera would be interracial shows that it is not in the best interests of the child. Furthermore, a generalised conclusion that no interracial placement could ever be in the best interests of a child would not be constitutionally tenable.

The same approach must be applied in respect of taking sexual orientation, sex, gender, religious convictions, cultural beliefs, personality, conduct, and so forth into account. These matters should be considered only if, and to the extent that they are shown "*by reliable means*"[38] to impact — either negatively or positively — on the particular child in the particular case.

5. The role of culture and religion

The role of culture and religion in the context of determining the child's best interests deserves special attention in the context of our diverse and pluralistic society. In modern, Westernised societies or segments of society the child's individuality is usually emphasised, while in traditional communities (especially traditional African communities), the child's position as part of an extended family, tribe or community is emphasised and the child is not necessarily viewed as an individual whose interests must be served apart from those of his or her family, tribe or community.[39] This point is very relevant in a multicultural country like South Africa. The issue is not purely one of race, for it would be a complete fallacy to allege that all (or only) White South Africans are modernised and/or Westernised. Some African South Africans live modern, Westernised, urban lives, while others belong to traditional rural communities. The same applies to the so-called Indian and Coloured population of South Africa.[40] And many South Africans live according to a mixture of Western and traditional norms.[41] Furthermore, culture is not a "single unified entity that can be studied and defined from outside",[42] for persons who belong to one culture adopt different practices[43] and "[a]ny single member of a culture will seldom observe all those practices that make up the cultural milieu, but will choose those which she or he feels are most important to her or his own relationship to and expression of that culture".[44]

38 Van Heerden 1999: 546. Emphasis in the original.
39 Bekker 2008:396; Bennett 1995:96; Bennett 1999:149; Goolam 1998:372-374; Knoetze 2002:353; Mosikatsana 1998:346-347.
40 Human 1998:339-340.
41 Bekker 1991:2-3; Bekker 2008:397.
42 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 54.
43 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 54.
44 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 66.

The multi-faith element of South African society compounds the difficulty of interpreting "the best interests of the child". Although some South Africans are wholly secular, many subscribe to *inter alia* the Christian, Hindu, Muslim, Buddhist, Jewish, and traditional African faiths. To complicate matters even further, different branches of religious thought and different schools of religious law are followed within each religious persuasion.[45]

There is also sometimes an overlap between culture and religion. As the Constitutional Court held in *MEC for Education: KwaZulu-Natal and Others v Pillay*:[46]

> [R]eligious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.

One must therefore not assume that a person's culture is completely distinguishable from his or her religion.

It must also be borne in mind that many South Africans do not fit neatly into specific racial, religious and/or cultural categories, for example, because they were born of interracial, intercultural and/or inter-faith or inter-denominational parents. They might also be in an interracial, intercultural and/or inter-faith or inter-denominational relationship, or they might have chosen not to belong to any specific religion or culture or to adopt a combination of faiths and/or cultures.

The Constitution recognises the diversity of the South African society,[47] and the Constitutional Court has repeatedly held that our constitutional values include tolerance of and respect for diversity and pluralism.[48] Tolerating and respecting

45 For example, Christian believers are Roman-Catholic, Protestant or Orthodox. The Protestant persuasion includes, among others, the Methodist, Anglican, Dutch Reformed, Reformed, Apostolic, Baptist, Lutheran, and Presbyterian churches, while the Orthodox persuasion includes, among others, the Greek, Russian and Ethiopian Orthodox believers. Jews belong to Orthodox, Reform, Conservative or Reconstructionist Judaism, while Muslims are *Sunnis* or *Shi'as*. On the various religious movements and the different schools of religious law within them see Bekker, Rautenbach & Goolam (eds) 2006: chapter 11; Ethiopian Orthodox Tewahedo Church in South Africa 2009: http://ethiopianorthodox.03.free.bm; Krüger, Lubbe & Steyn 1996:12-14, 92-94, 107-108, 227-228; Russian Orthodox Church of Saint Sergius of Radonezh in Johannesburg, RSA 2009: http://en.www.st-sergius.info/cgi-bin/client/display.pl?did=60; The Orthodox Christian Directory of South Africa 2009: http://www.orthodox.org.za. For statistics on the religious affiliation of South Africans see Du Plessis 2008:379-380; South Africa Info 2009. http://www.southafrica.info/about/people/population.htm; Statistics SA 2001: http://www.statssa.gov.za/PublicationsHTML/Report-00-91-012004_26.html.

46 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 47.

47 The Preamble of the Constitution refers to the South African people being "united in our diversity".

48 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC): paras 23, 24; *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC): paras 49, 79; *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC): para 54; *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,*

diversity and pluralism demand a contextualised approach to "the best interests of the child" in which aspects such as the religion and culture in which the individual child is growing up must be taken into account. As the High Court stated in *Ryland v Edros*:[49] Under the new constitutional dispensation "it is quite inimical to all the values of the new South Africa for one group to impose its values on another". We must therefore move away from a mainly Judaeo-Christian, Eurocentric interpretation of "the best interests of the child" to an approach that takes the cultural and religious circumstances, interests and needs of the individual child into account.[50] The list of factors in section 7(1) of the Children's Act recognises this by expressly referring to the child's need to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family, extended family, culture or tradition, the child's social and cultural development and, particularly, the child's background.[51]

However, a balanced approach has to be adopted with regard to incorporating cultural and religious rules and practices when determining the child's best interests. A body or person who has to determine the child's best interests should not blindly apply cultural and/or religious dictates.[52] Abandoning the child to cultural and/or religious rules and practices might be the easy way out, but it would not be in keeping with the Constitution. As the Constitutional Court held in *Bhe and Others v Magistrate, Khayalitsa, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*:[53] It may in certain circumstances be in the child's best interests that customary law be applied, but "[t]here must be a balancing exercise"[54] in the sense that "respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members

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Amici Curiae); *Lesbian & Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC): paras 59, 60; *Bhe and Others v Magistrate, Khayalitsa, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC): para 235; *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 76.

49 1997 (2) SA 690 (C): 707G, 1997 (1) BCLR 77 (C): 90F-G.

50 See also Bennett 1999:157 who warns against using Western conceptions of what is in the child's best interests as if those conceptions constitute "universally valid propositions about proper child-rearing", for "this type of thinking abstract[s] children from the social milieu in which they will have to live" and "constructs a 'scientific' reality that may be at odds with established cultural practices".

51 See section 7(1)(f), (g) and (h).

52 See also section 12 of the *Children's Act*, which applies to social, cultural and religious practices. This section is not yet in operation. Section 12(1) affords every child the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being, while section 12(2)-(10) expressly prohibits and/or regulates certain social, cultural and religious practices such as circumcision, female genital mutilation and virginity testing.

53 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC). In this case the court declared the customary-law rule of male primogeniture unconstitutional.

54 Paras 234 and 235.

of the family".[55] The challenge thus is to respect cultural and religious values and/or rules without compromising the best interests of the child.[56]

Instead of bemoaning the fact that the outcome determined by application of the concept of "the best interests of the child" in, for instance, a parental care dispute regarding an urban, Westernised White Protestant child will not necessarily be the same as that of a parental care dispute regarding an urban, Indian, Muslim child whose parents have raised the child in a traditional and very religious way or a parental care dispute regarding a Zulu child who has grown up in a traditional and rural setting, the difference in outcomes should be accepted as being in keeping with our new constitutional ethos.[57] It is,

55 In this particular case, the court identified the minor children and other dependants of the deceased as the "vulnerable members".

56 See also Knoetze 2002:355. And see clause 11 of the *Muslim Marriages Bill*. Clause 11(1) provides that when making an order regarding guardianship, care or contact as between a child's parents the court must consider the best interests of the child "with due regard to Islamic law". In awarding guardianship or care to another person, the court must similarly give "due regard to Islamic law": clause 11(3). The latter clause is subject to clause 11(1). The Bill was drafted by the South African Law Reform Commission and is attached to its report on *Islamic Marriages and Related Matters Project 106* (2003). In para 241 of its report, the commission indicates that clause 11 requires the court to "consider the detailed rules of Islamic law ... in assessing what is in the best interests of minor children on a case by case basis". The Bill has, in general, been criticised as an attempt to impose one version of Muslim personal law on all Muslims: Manjoo 2008:126. However, since clause 11 does not specify the content of any rules of Islamic law it is not subject to this criticism.

57 The following are examples of the different customary and religious rules regarding care of a child that all operate in South Africa: One statement of the Prophet Mohammed that is relied on in the Muslim religion is that a child's mother has a "right" to obtain care of her child after divorce until the child attains a particular age, provided that she does not marry someone whom the child is not prohibited from marrying, while another statement affords the child the right to choose which parent should have care. The age at which the child must be passed to his or her father in terms of the first statement apparently differs among the schools of religious thought. On the various rules in Muslim personal law see Goolam 1998:375-378; Goolam 2001:208-210; Goolam 2006:224-225; Goolam 2009:2, 5-18; Goolam, Badat & Moosa 2006:265-266; Moosa 1998:489-490. In terms of Hindu law, the party who caused the divorce normally does not get care, but exceptions are apparently made in favour of the father: Gokul 2006:241. It seems that neither the Islamic nor the Hindu religion phrases the rules regarding care in the language of "the best interests of the child". In terms of Judaism, care is awarded according to parental duties and the best interests of the child. The traditional view is that all children below the age of six years are to be placed in their mother's care. Boys are passed to their father's care at the age of six. These rules may however be varied if the best interests of the child require this. See Bilchitz 2006:251-252. In traditional African customary law, awarding care to one of the parents is an unfamiliar notion, for payment of lobolo determines which family the child "belongs" to and who has legal control over the child. Despite this rule, children — especially young ones — are frequently left in the care of their mother: Bekker 2008:403-404; Bekker & Van Zyl 2002:128; Bennett 1999:146-148; Jansen & Ellis 1999:47-48; Knoetze 2002:352-353. Moreover, there seems to be general agreement that the concept of "the best interests of the child" was imported into customary law many years ago: see *Hlope v Mahlalela and Another* 1998 (1) SA 449 (T): 458H; Bennett 1995:106;

however, important to reiterate that the body or person who makes the care determination must not blindly apply customary and/or religious rules, but must determine the individual child's best interests with reference to, amongst all other relevant factors, the child's cultural and religious background.

It is not being suggested that the child's cultural and religious background should bear more weight than any of the other factors that must be taken into account. My submission is simply that, in view of our constitutional values of tolerance of and respect for diversity and pluralism, the child's best interests must be determined in a manner that takes cognisance of and is sensitive to culture and religion. Like all other factors, culture and religion must be viewed in a child-centred manner. The focus should be the role that culture and religion play in the child's life. Thus, for example, the child's parents' or extended family's cultural or religious values or preferences should not simply be imposed on the child as if it is self-evidently in the child's best interests that the particular cultural or religious rules or values should be perpetuated.

Finally, it must be conceded that it might sometimes be difficult to ascertain the customary or religious rules that are to be taken into account as part of the child's background. This is so for three reasons. First: South African customary and religious laws are largely unwritten and/or uncodified.[58] Second: religious and, particularly, cultural systems of law continually change and evolve. Third: there are many different tribal differences and/or schools of thought within each culture and religion. In *Alexkor Ltd and Another v Richtersveld Community and Others*[59] the Constitutional Court dealt with these difficulties within the context of customary law. The principles the court set out can be applied to determining the content of religious law too. The court pointed out that customary law is traditionally unwritten, and held that the content of customary law:

> may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that were foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.[60]

In a subsequent decision, *Shilubana and Others v Nwamitwa*,[61] the court reiterated its reservation about relying on historical records because of their "distorting tendency". It also stated that it is "important to respect the right of

Bennett 1999:145, 147, 148. For a discussion of some of the African customs that might be taken into account when deciding what is in the child's best interests see Bekker & Van Zyl 2002:122-129; Knoetze 2002:355-357.

58 In KwaZulu-Natal, Zulu customary law has been partly codified in the *KwaZulu Act on the Code of Zulu Law* 16 of 1985 and the *Natal Code of Zulu Law* Proclamation R151 Government Gazette 10966 of 9 October 1987.

59 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).

60 Para 54.

61 2009 (2) SA 66 (CC) (also reported as *Shilubana and Others v Nwamitwa and Others* 2008 (9) BCLR 914 (CC)): para 44.

communities that observe systems of customary law to develop their law".[62] As regards religious laws one can in addition have regard to comparative law. However, rules that apply in foreign countries should not uncritically be imported into local law, for differences between the context and circumstances in South Africa and the countries which are being used for comparative purposes must be borne in mind.[63]

6. Conclusion

In view of the wording of section 28(2) of the Constitution and the pronouncements of the Constitutional Court, one can conclude that it is no longer acceptable uncritically to apply general rules, presumptions or preferences, unquestioningly to rely on social theories and norms or historical, political or economic factors, to invoke the cultural and religious values of only one segment of the South African society, or to use personal prejudice or opinion when applying the concept of "the best interests of the child". What is required is an individualised and contextualised evaluation of the position of each child from the point of view of how each factor affects the child. All factors that are shown to be relevant because they have, or could have, a negative or positive impact on the individual child should be taken into account in a contextualised, child-centred way "without unduly obliterating other valuable and constitutionally-protected interests".[64]

62 Para 45.

63 See eg *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC): paras 132-133; *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC): para 33; *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC): para 49.

64 *S v M (Centre for Child Law as* Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC) (also reported as *M v S* 2007 (12) BCLR 1312 (CC)): para 25.

Bibliography

ALLEN R (CONSULTANT ED)
2002. *The Penguin English Dictionary*. London: Penguin Books.

BEKINK B AND BEKINK M
2004. Defining the standard of the best interest of the child: Modern South African perspectives. *De Jure* 27(1):21-40.

BEKKER JC
1991. Interaction between constitutional reform and family law. *Acta Juridica*: 16(287):1-17.

2008. Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa. *Obiter* 29(3):395-405.

BEKKER JC, RAUTENBACH C AND GOOLAM NMI (EDS)
2006. *Introduction to legal pluralism in South Africa*. 2nd ed. Durban: LexisNexis Butterworths.

BEKKER JC AND VAN ZYL GJ
2002. Custody of Black children on divorce. *Obiter* 23(1):116-131.

BENNETT TW
1995. *Human rights and African customary law under the South African Constitution*. Cape Town: Juta & Co, Ltd.

1999. The best interests of the child in an African context. *Obiter* 20(1):145-157.

BILCHITZ D
2006. Jewish law. In Bekker *et al* 2006:243-252.

BONTHUYS E
2001. Epistemological envy: Legal and psychological discourses in child custody evaluations. *South African Law Journal* 118(2):329-346.

CLARK B
2000. A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African Family Law. *Stellenbosch Law Review* 11(1):3-20.

COCKRELL A
1998. The law of persons and the Bill of Rights. In *Bill of Rights Compendium*. Durban: LexisNexis Butterworths:3E-1–3E-59.

DAVEL CJ AND SKELTON AM (EDS)
2007. *Commentary on the Children's Act*. Cape Town: Juta.

DAVEL T
2007. General principles. In Davel and Skelton (eds) 2007:2-1–2-27.

DAVEL T AND DE KOCK P
2001. In 'n kind se beste belang. *De Jure* 34(2):272-291.

DU PLESSIS L
2008. Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action? *African Human Rights Law Journal* 8(2):376-408.

EEKELAAR J AND NHLAPO T (EDS)
1998. *The changing family. International perspectives on the family and family law*. Oxford: Hart Publishing.

ETHIOPIAN ORTHODOX TEWAHEDO CHURCH IN SOUTH AFRICA
2009. History of the Church. http://ethiopianorthodox.03.free.bm (accessed on 16 August 2009).

GOKUL R
2006. Hindu law. In Bekker *et al* (eds) 2006:231-243.

GOOLAM N
1998. Constitutional interpretation of the "best interests" principle in South Africa in relation to custody. In Eekelaar and Nhlapo (eds) 1998:369-379.

2001. Gender equality in Islamic family law: Dispelling common misconceptions and misunderstandings. *Stellenbosch Law Review* 12(2):199-214.

2006. Islamic law. In Bekker *et al* 2006:221-227.

2009. Interpretation of the best interests principle in Islamic family law in (*sic*) as it relates to custody issues. *Potchefstroom Electronic Law Review* 9(1):1-18. http://search.sabinet.co.za/WebZ/images/ejour/perblad/perblad_v1_2005_a2.pdf?sessionid=01-61091-1341312635&format=F (accessed on 21 August 2009)

GOOLAM NMI, BADAT JGH AND MOOSA N
2006. Islamic law. In Bekker *et al* 2006:252-267.

HEATON J
1990. Some general remarks on the concept "best interests of the child". *Journal of Contemporary Roman-Dutch Law* 53(1):95-99.

1998. Family law and the Bill of Rights. In *Bill of Rights Compendium*. Durban: LexisNexis Butterworths:3C-1–3C-86.

2007. Parental responsibilities and rights. In Davel and Skelton (eds) 2007:3-1–3-45.

2007. *The South African law of persons*. 3rd ed. Durban: LexisNexis.

HUMAN CS
1998. *Die invloed van die begrip kinderregte op die privaatregtelike ouer-kind verhouding in die Suid-Afrikaanse reg*. Unpublished LLD. University of Stellenbosch.

JANSEN RM AND ELLIS AJ
1999. The South African common law and *lobolo* — another perspective. *Journal for Juridical Science* 24(2):41-57.

KNOETZE E
2002. The role of custom in the interpretation of the child's "best interests" principle. *Obiter* 23(2):348-358.

KRÜGER JS, LUBBE GJA AND STEYN HC
1996. *The human search for meaning*. Pretoria: Via Afrika.

MALHERBE R
2008. The constitutional dimension of the best interests of the child as applied in education. *TSAR* (2):267-285.

MANJOO R
2008. Making rights real: Facing the challenges of recognising Muslim marriages in South Africa. In Sloth-Nielsen and Du Toit (eds) 2008:119-128.

MOOSA N
1998. Muslim personal laws affecting children: Diversity, practice and implications for a new children's code for South Africa. *South African Law Journal* 115(3):479-492.

MOSIKATSANA TL
1998. Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution. *Michigan Journal of Race and Law* 3(2):341-393.

MÜLLER K AND TAIT M
1999. The best interests of children: A criminal law concept? *De Jure* 32(2):322-329.

NEL JY
2003. The constitutional rights of children and the *Prevention of Organised Crime Act* 121 of 1998. *Journal for Juridical Science* 28(1):97-119.

RUSSIAN ORTHODOX CHURCH OF SAINT SERGIUS OF RADONEZH IN JOHANNESBURG, RSA
2009. Orthodoxy today. http://en.www.st-sergius.info/cgi-bin/client/display.pl?did=60 (accessed on 16 August 2009).

SLOTH-NIELSEN J AND DU TOIT Z (EDS)
2008. *Trials and tribulations, trends and triumphs. Developments in international, African and South African child and family law*. Cape Town: Juta.

SMIT MH
2008. Language rights and the best interests of the child. *THRHR* 71(1):38-53.

SOANES C AND STEVENSON A (EDS)
2006. *Concise Oxford English Dictionary*. Revised 11th ed. Oxford: Oxford University Press.

SOUTH AFRICA INFO
2009. Religions in South Africa. http://www.southafrica.info/about/people/population.htm (accessed on 24 August 2009).

SOUTH AFRICAN LAW REFORM COMMISSION
2003. *Islamic Marriages and Related Matters Project 106 Report*. Pretoria: Government Printer.

STATISTICS SA
2001. Religion. http://www.statssa.gov.za/PublicationsHTML/Report-00-91-012004/html/Report-00-91-012004_26.html (accessed on 24 August 2009).

THE ORTHODOX CHRISTIAN DIRECTORY OF SOUTH AFRICA
2009. The demographics of the Orthodox Church of South Africa. http://www.orthodox.org.za (accessed on 16 August 2009).

VAN HEERDEN B
1999. Judicial interference with parental power: The protection of children. In B van Heerden, A Cockrell and R Keightley (eds.) *Boberg's Law of persons and the family*. 2nd ed. Kenwyn: Juta & Co, Ltd:497-656.

VAN HEERDEN B, COCKRELL A AND KEIGHTLEY R (EDS)
1999. *Boberg's Law of persons and the family*. 2nd ed. Kenwyn: Juta & Co, Ltd.

VAN ZYL L
1997. *Divorce mediation and the best interests of the child*. Pretoria: HSRC.

VISSER PJ
2007. Some ideas on the "best interests of a child" principle in the context of public schooling. *THRHR* 70(3):459-469.