

In the best interests of the child

Conceptualisation and guidelines in the context of education



Trynie Davel

Introduction

The fact that the decision of a court concerning a child has to be in the best interests of that specific child, has for some time been an established common-law principle in a number of private law disputes.¹ It has even been termed the golden thread that runs through the law relating to children.² Gradually the application of this principle was extended far beyond private law disputes by judicial decisions.³

International law also obliges state parties to adhere to the best interest standard when children are involved. Article 3(1) of the *United Nations Convention on the Rights of the Child* (1989)⁴ describes the best interests of the child as a basic consideration.⁵ The *African Charter on the Rights and Welfare of the Child* (1990)⁶ phrases it in even stronger terms in article 4(1) because it is not merely termed a basic consideration, but *the* basic consideration.⁷

The Constitution of the Republic of South Africa, 1996 raised this standard to a principle of paramountcy in section 28(2).⁸ The Constitutional Court has decided in *Minister of Welfare and Population Development v Fitzpatrick*⁹ that section 28(2) extends beyond and creates a right independent of the other rights listed in section 28(1).¹⁰ This approach has been followed by the courts in many instances, for example, to justify an expansive interpretation of the High Court's review jurisdiction of a protection order in terms of the Domestic Violence Act,¹¹ in maintenance matters,¹² regarding the law of succession,¹³ in decisions on medical treatment notwithstanding the refusal of the minor's parents to consent to such treatment¹⁴ and in decisions regarding a child's participation in religious activities in a particular church.¹⁵ It has also been found that section 28(2) of the Constitution has direct application in the education context and in every situation in which a learner is involved.¹⁶

It is against this backdrop that the best interests of the child should be conceptualised. The question has to be addressed whether it is a right, or a standard, or both in the context of education.

The best interests of the child as a fundamental right

Every child has the right that his or her best interests are of paramount importance in every matter concerning him or her.¹⁷ This clearly means that children are afforded a specific right, like

all the other specific rights of children in section 28 of the Constitution, which guarantees the paramountcy of his or her best interests. Like all the other specific rights of children, this best interest right is a fundamental right endorsed in the Bill of Rights in chapter 2 of the Constitution. This right, like all other fundamental rights, will have vertical¹⁸ and horizontal applications.¹⁹ This right, like all other fundamental rights, is not an absolute right, because the Constitution itself provides for the limitation of fundamental rights in section 36.²⁰ Lastly, this right, like all the other rights will have to be demarcated in a process where it is balanced with the fundamental and other rights of all the various role players.²¹

However, in the education context a multiplicity of intersecting constitutional values and interests will frequently occur – sometimes overlapping and sometimes competing.²² 'Our Bill of Rights, through its limitation clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing', was said by Sachs J in the Constitutional Court.²³ Demarcating rights and limiting rights are therefore not necessarily different processes. Demarcation inevitably entails limitation and limitation itself requires a 'balancing exercise' to arrive at a 'global judgment on proportionality'.²⁴ In the education context, children's rights should not be seen as a negative pursuit juxtaposed against the rights of educators, parents or other learners.²⁵ Children's rights and the implications they raise need not be seen in terms of necessarily challenging, undermining or conflicting with the rights of others or their authority.²⁶ Instead, schools should be a microcosm where the rights of everyone are recognised and respected. Schools are not the only microcosm where this sensitive demarcation of rights takes place. Neighbour law abounds with examples²⁷ and so do many other areas of the law.²⁸

From a practical point of view, the balancing of rights seems inevitable. In the education context the Constitutional Court provided us with a clear guideline: '[T]he standard to be applied is the nuanced and contextual one required by [section] 36 and not the rigid one of strict scrutiny.'²⁹ This test was applied in *Christian Education South Africa v Minister of Education* and it was found that the paramountcy of children's best interests outweighs their parents' right to religious freedom.³⁰ Likewise, the best interests of the child could mean that the Minister of Education exceeded the power conferred upon him by section 3(4) of the National Education Policy Act,³¹ when he dealt with the age requirements

for admission to independent schools.³² The best interests of learners could entail not setting aside the decision of the head of the education department to declare a school a dual-medium one even though the conduct was administratively unfair.³³ It could also mean that a pregnant learner should be allowed to complete her education.³⁴ The best interests of learners could also restrict learners' rights to property,³⁵ for instance to curtail the use of cell phones or their privacy³⁶ when a group is searched for weapons or other dangerous objects.

The conclusion could even be reached that where several constitutional rights are vying for position and consequent protection, section 28(2) of the Constitution has a casting vote so that the best interests of the child will have to be referred back to.³⁷ However, although it was not specifically decided,³⁸ the judgment in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*³⁹ sounded a warning in this regard. Section 28(2) of the Constitution does not 'trump' other provisions of the Bill of Rights.⁴⁰ This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.⁴¹ It can therefore not necessarily be assumed that the best interests of children will *always* outweigh the constitutional rights of parents, educators or other learners.

The best interests of the child as a standard

For many years, and regardless of whether a court uses its common-law or statutory powers, the standard in determining any matter regarding guardianship, custody or access has been the best interests of the child. What exactly is in a child's best interest, is obviously a factual question that has to be determined according to the circumstances of each case.⁴² The judiciary has been laying down guidelines in this regard for many years. Thus in *Van Deijl v Van Deijl*⁴³ it was held that in deciding on the best interests of the child the following facts have to be considered:⁴⁴

The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be taken into account and in the case of older children their wishes in the matter cannot be ignored.

Subsequently valuable guidelines were added, for instance that a feeling of safety, stability and security are important factors to be considered.⁴⁵ The most comprehensive list of factors was proposed in *McCall v McCall*⁴⁶ but unfortunately those factors are specifically designed for resolving custody disputes and therefore less relevant in the education context.⁴⁷

A statutory list of factors to ascertain the best interests of the child was for the first time in South Africa provided in the Natural Fathers of Children Born out of Wedlock Act.⁴⁸ Those factors were designed to establish the best interests of the child when a court considers the father's application for access, custody or guardianship of his extra marital child,⁴⁹ and have therefore little or no bearing on the education context, as well. However, some guidance might be found in the list now provided in the new Children's Act.⁵⁰



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Contact

Mrs Frances Ferreira, Director

NAMCOL
Private Bag 15008
Katutura, NAMIBIA

Tel: (+264-61) 320 5241

Fax: (+264-61) 320 216987

Email: Mensah@namcol.com.na



www.namcol.com.na



The new Children's Act⁵¹ makes it very clear that the best interests is a *standard*⁵² to be adhered to and mentions at least fourteen factors that must be taken into consideration in determining the best interests of the child when considering the provisions of the Act.⁵³ The Children's Act goes much further than issues relating to guardianship, custody and access and therefore those factors should be scrutinised to establish their application in the educational context.

Relevant factors to consider as applied to education

If the best interest of the child is to be a standard in education law and policy, the relevant factors that should be considered in that context need to be identified to provide greater consistency and clarity in the law. In compiling a list of factors to be taken into consideration in applying this standard to learners, the very first factor should underpin and enhance the primary function of all schools, being:

- (a) the need to create and maintain a culture of teaching and learning.⁵⁴

At the root of this factor, is the fundamental right of learners to basic education⁵⁵ and to realise this basic right a school has to be a place conducive to harmonious and coordinated education.⁵⁶ Once agreement has been reached that a school is a place to realise the right of children to basic education, the next step would be to ascertain the major aims and objectives of education and to acknowledge that the standard of the best interest of a child can only be achieved if due consideration is given to these aims, being:⁵⁷

- (b) the development of the child's personality, talents, mental and physical abilities to their fullest potential;⁵⁸
- (c) the development of respect for human rights, fundamental freedoms and the maintenance of peace;⁵⁹
- (d) the development of respect for parents, national values and the natural environment;⁶⁰ and
- (e) the development of active participation in a free society in the spirit of mutual tolerance and respect for the civilisation, cultures and religions.⁶¹

In applying the best interests of the child standard, the child's disposition is of the utmost importance and therefore the following factors must be taken into consideration, namely –

- (f) the child's –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;⁶²
- (g) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;⁶³
- (h) any disability that a child may have;⁶⁴
- (i) any chronic illness from which a child may suffer;⁶⁵

- (j) 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;⁶⁶

The list of factors will not be complete unless it is also acknowledged that the voice of the child should be heard.⁶⁷ In applying the best interests of the child standard, the following fact must therefore also be taken into consideration, namely –

- (k) the child's opinion on the particular issue.⁶⁸

Finally, the list should be non-exhaustive to include the facts and circumstances of the particular case and therefore the last factor should be –

- (l) any other fact relevant to the particular case.⁶⁹

Vague or depending on the circumstances?

The best interests of the child standard has been criticised for being vague or indeterminate.⁷⁰ Once agreement is reached on the factors that must be considered in applying the standard, there will be more clarity on the contents of the best interest standard.⁷¹ However, the best interest standard must be determined considering the facts and circumstances of each case. It is therefore impossible to compile an exhaustive list of all the factors which must be considered when a court has to decide on a child's best interests. Laymen might perceive the difference in the outcome as vague, but jurists are familiar with applying a particular standard in different cases resulting in different outcomes due to varying circumstances.

An example can be found in the reasonable person standard that is applied to establish negligence in the law of delict. The reasonable person or *bonus paterfamilias* is a concept created by the law to have a workable objective norm for conduct in society.⁷² The reasonable person is not an exceptionally gifted or developed person; neither underdeveloped, reckless or without prudence.⁷³ Thus the reasonable person serves as the legal personification of those qualities which the community expects from its members.⁷⁴ The reasonable-person test is not static.⁷⁵ It is a well-known fact that the fictitious reasonable person adapts with changing circumstances⁷⁶ and furthermore, it is also self-evident that the outcome of the reasonable-person test may only be evaluated in the light of all the relevant circumstances of a particular case.⁷⁷

If these principles are applied to a hypothetical situation, one would argue that the reasonable person will keep left when driving here in South Africa. Our courts even expect the reasonable person to keep on driving on the left of the road if a wasp⁷⁸ or bee⁷⁹ stings him or her while driving. But put the same reasonable person in a motorcar driving down Chapman's Peak when a few rocks suddenly tumble down on the road.⁸⁰ The reasonable person will immediately swerve to the right to escape

disaster.⁸¹ The result will be that a reasonable person in this situation, and given these facts, will not be driving on the left hand side of the road. Does this mean that the reasonable-person test is vague, or is its application merely dependent on the circumstances and the facts in each individual case?

Returning to the best interest standard and the education context it can therefore be argued that the application of this standard will differ from time to time and most definitely also depend on the facts and the circumstances of each individual case. The best interest of the child standard sets a workable objective norm for conduct when dealing with children.

Conclusion

The best interests of the child are both a right, a specific children's right enshrined in the Constitution and a standard against which conduct must be measured. This right, like any other right is not absolute in any way. It is limited by the Constitution itself and demarcated by the rights of other learners, the rights of educators and parents. The best interest standard on the other hand necessitates full knowledge of all the facts and circumstances of the case with due consideration of the right to education itself, the main aims and objectives to be achieved in schools while respecting the fundamental rights of all the other role players. Acknowledging the best interests of children as both a specific children's right and a standard in the education context will enhance education and realise the rights of children in South Africa.

Endnotes

- 1 E.g. regarding custody after divorce for many years already: *Fletcher v Fletcher* 1948 1 SA 130 (A) 134 144-145; *Tromp v Tromp* 1956 4 SA 738 (N) 746B-C; *Shawzin v Laufer* 1968 4 SA 657 (A) 662H 666D; Segal v Segal 1971 4 SA 317 (C) 323-324. See Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985-1995" in Keightley (ed) *Children's Rights* (1996) 98.
- 2 See Kaiser v Chambers 1969 4 SA 224 (C) 228F where the court considered all the facts and then decided that the weight that should be given to the best interests of the children should result in granting the maternal grandparents interim custody in spite of the father's rights in this regard: 232D-E. Cf Clark "A 'Golden thread?' Some aspects of the application of the standard of the best interest of the child in South African Law" 2000 *Stellenbosch Law Review* 3.
- 3 E.g. in *Lovell v Lovell* 1980 4 SA 90 (T) the court decided that it is in the best interests of the minor children to remove a father from the family home pending divorce proceedings: 93A. See *S v F* 1989 1 SA 460 (Z) where the best interests of a young offender was considered in a criminal case; Müller and Tait "The best interest of children: A criminal law concept" 1999 *De Jure* 322-329. Cf Davel and Jordaan *Law of Persons* (2005) 57 and the cases referred to in fn 41 on the importance of s 28(2) and the approach of the courts in that regard.
- 4 Which South Africa ratified on 16 June 1995, referred to as the CRC in footnotes. This remarkable document has been ratified by every country in the world with the exception of Somalia and the United States of America. See Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in Alston (ed) *The Best Interests of the Child – Reconciling Culture and Human Rights* (1994) 1 et seq on the best interests principle as articulated in art 3 (1) of the CRC and in general, Hamilton "Implementing children's rights in a transitional society" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 13 19.
- 5 Also see the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (CEDAW) art 5(b) and art 16(1)(d). This document has been ratified by South Africa during December 1995.
- 6 Which South Africa ratified on 7 January 2000, referred to as the ACRWC in footnotes.
- 7 See Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 214 224 and Davel "The African Charter on the Rights and Welfare of the Child, family law and children's rights" 2002 *De Jure* 281 283 on the fact that the Charter increases the level of protection for children when compared to the CRC in a number of important respects.
- 8 S 28(2): "A child's best interests are of paramount importance in every matter concerning the child." Cf s 30(3) of the Interim Constitution, 1993 for a similar provision.

- 9 2000 3 SA 422 (CC) 428C-D, [2000] 7 BCLR 713 (CC) par 18 with reference to *Fraser v Naude* [1998] 11 BCLR 1357 (CC).
- 10 S 28(1): "Every child has the right –
 - (a) to a name and nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provoke services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years, and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict."
- 11 116 of 1998. See *Narodien v Andrews* 2002 3 SA 500 (C) 506F-507C. See *Swartz v Swartz* 2002 3 SA 451 (T) 462D-H in connection with a removal order in terms of s 12(1) of the Child Care Act 74 of 1983 and the best interests standard.
- 12 *Bannatyne v Bannatyne* 2003 2 SA 363 (C) (effective mechanisms for the enforcement of maintenance obligations); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 2 SA 56 (C) (extending the duty of support to a child born out of wedlock's paternal grandparents); *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C) (order securing payment of child's future maintenance from pension funds).
- 13 *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).
- 14 *Hay v B* 2003 3 SA 492 (W).
- 15 *Kotzé v Kotzé* 2003 3 SA 628 (T) 630-631.
- 16 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 176.
- 17 Per Goldstone J in *Minister for Welfare and Population Development v Fitzpatrick* par 18: "Section 28 requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."
- 18 Thus the state has an obligation to ensure that the learner's constitutional rights are protected: *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), [2000] 10 BCLR 1051 (CC) par 12/1057F-G.
- 19 *Motala v University of Natal* [1995] 3 BCLR 374 (D).
- 20 S 36: "(1) The rights in the Bill of Rights may be limited only in terms of a 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." See *S v Lawrence*; *S v Negal*; *S v Solberg* [1997] 10 BCLR 1348 (CC) paras 142 165 and 166; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) par 55.
- 21 See *V v V* 1998 4 SA 169 (C) 189 where Foxcroft J pointed out that "situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights"; Joubert and Prinsloo "The educator and learner discipline" in *Education Law: A Practical Guide for Educators* (2001) 118 120.
- 22 *Christian Education South Africa v Minister of Education* par 15/768B.
- 23 *Christian Education South Africa v Minister of Education* par 30/776B.
- 24 *S v Manamela* 2000 3 SA 1 (CC), 2000 1 SACR 414, [2000] 5 BCLR 49 par 32 (in a criminal case).
- 25 Parker-Jenkins "Children's Rights" in *Sparing the Rod: Schools, Discipline and Children's Rights* (1999) 127 158.
- 26 Parker-Jenkins 156.
- 27 Neethling, Potgieter and Visser *Law of Delict* (edited and translated by Knobel) (2006) 107-108.
- 28 E.g. in labour law: Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) 6 and in private law: Van Heerden et al *Boberg's Law of Persons and the Family* (1999) 2.
- 29 *Christian Education South Africa v Minister of Education* par 31/777C.
- 30 Par 41/781A-B.
- 31 27 of 1996.
- 32 *Harris v The Minister of Education* case no 30218/2000 of 19 January 2001 (TPD) confirmed by *Minister of Education v Harris* 2001 4 SA 1297 (CC).
- 33 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).
- 34 *Mfolo v Minister of Education, Bophuthatswana* [1994] 1 BCLR 136 (B).



- 35 S 25(1) of the Constitution provides that no one may be deprived of property.
- 36 S 14 of the Constitution provides that everyone has a right to privacy, which includes the right not to have their person or property searched.
- 37 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 178C in the words of Bertelsmann J: “[E]k [is] die mening toegedaan dat art 28(2) inderdaad die fundamentele reg van elke kind vestig om in die opweging van strydende partye se botsende belange – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan – in die eerste gelid te staan.”
- 38 Par 54.
- 39 2004 1 SA 406 (CC) 432A-C.
- 40 Par 55.
- 41 Per Langa DCJ, par 55.
- 42 *Van Oudenhove v Gruber* 1981 4 SA 857 (A) 868C; *Godbeer v Godbeer* 2000 3 SA 976 (WLD) 9811.
- 43 1966 4 SA 260 (R) in a matter concerning custody and guardianship.
- 44 261H.
- 45 *French v French* 1971 4 SA 298 (W) 298H.
- 46 1994 3 SA 201 (C) 205B-G.
- 47 For the application of this checklist and the principles underpinning the Constitution, see *Krasin v Ogle* [1997] 1 All SA 557 (W) 567i-569e.
- 48 86 of 1997.
- 49 S 2(5).
- 50 38 of 2005.
- 51 Previously known as the Children’s Bill (B 70D of 2003), and still only part of the envisaged Children’s Act. It has been dealt with as a section 75 (of the Constitution) Bill, i.e. functional area of national legislative competence. This Act was assented to and signed by the President on 8 June 2006. The Department of Social Development is now free to table the Children’s Amendment Bill, containing the matters which apply to the provincial government only. The Amendment Bill will complete the Children’s Act by inserting the provisions which deal with service delivery and further protection of families and children: “Explanatory summary of Bill” published in GG 25346 of 13 August 2003.
- 52 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” (own emphasis). This provision reiterates s 28(2) of the Constitution. Cf s 8(1) that the rights conferred on children in terms of the Act supplement the rights which children have in terms of the Bill of Right. All organs of state in any sphere of government and all officials, employees and representatives of state must respect, protect and promote the rights of children contained in the Act: s 8(2). The Act binds both natural and juristic persons: s 8(3).
- 53 S 7(1).
- 54 Joubert and Prinsloo “The educator and learner discipline” in *Education Law: A Practical Guide for Educators* (2001) 118 128 133.
- 55 S 29(1)(a) of the Constitution; s 8(2) of the South African Schools Act 84 of 1996; art 28 of the CRC; a 11(1) of the ACRWC; *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* (referred to as *Guidelines*) GN 776 of 1998 GG 18900 of 15 May 1998 pars 1.1 1.4 4.7.1 4.7.4; Joubert and Prinsloo 119.
- 56 Joubert and Prinsloo 129.
- 57 *In Re: The School Education Bill of 1995 (Gauteng)* [1996] 4 BCLR 537 (CC) par 53; Nowak “The right to education” in Eide et al *Economic, Social and Cultural rights: A Textbook* (1995) 189 195.
- 58 Art 29(1)(a) of the CRC; art 11(2)(a) of the ACRWC; art 26(2) of the *Universal Declaration of Human Rights* (UDHR); *Guidelines* par 4.3 and 5.5.
- 59 Art 29(1)(b) of the CRC; art 11(2)(b) of the ACRWC; art 26(2) of the UDHR; Preamble of the South African Schools Act 84 of 1996; Novak in Eide et al *Economic and Social Cultural Rights: A Textbook* 189 193; *Guidelines* par 3.2 and 4.1.
- 60 Art 29(1)(c) and (e) of the CRC; art 11(2)(e) and (g) ACRWC; *Guidelines* par 4.6.
- 61 Art 29(1)(d) of the CRC; art 11(2)(c) and (d) of the ACRWC art 26(2) of the UDHR; Preamble of the Constitution and see Bekker “The right to education in the South African Constitution: An introduction” in Mashava (ed) *A Compilation of Essential Documents on the Right to Education* I fn I on the importance of the preamble in the interpretation of the Constitution; *Guidelines* par 1.4.
- 62 S 7(1)(g) of the Children’s Act 38 of 2005 and see par 3 above.
- 63 S 7(1)(h).
- 64 S 7(1)(i) and see 11(1) and 11(3).
- 65 S 7(1)(j) and see 11(2) and 11(3).
- 66 S 7(1)(l).
- 67 *Christian Education South Africa v Minister of Education* par 53.
- 68 Art 12(1) of the CRC; art 4(2) of the ACRWC; *McCall v McCall* 205F; a 2(5)(d) of the National Fathers of Children Born out of Wedlock Act 86 of 1997; s 10 of the Children’s Act 38 of 2005 and see Barrat “The best interest of the child” – Where is the child’s voice” in Burman (ed) *The Fate of the Child* (2003) 145-157.
- 69 The importance of this last factor will be highlighted in par 5 below.
- 70 Par 1 above and see Mnookin “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy” 1975 *Law and Contemporary Problems* 226 260; Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 THRHR 95; 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 *Stellenbosch Law Review* 3 15. Parker “The best interests of the child – principles and problems” in Alston *The Best Interests of the Child – Reconciling culture and human rights* 26 29 explores the indeterminacy and focuses on the role localised conventions on values play in providing a degree of predictable application.
- 71 Bekink and Bekink “Defining the standard of the best interest of the child: Modern South African perspective” 2004 *De Jure* 21 40.
- 72 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 387 (A) 411; Neethling, Potgieter and Visser *Law of Delict* (2006) 120.
- 73 *Herschel v Mrupe* 1954 3 SA 464 (A) 490: “The concept of the *bonus paterfamilias* is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.” Cf Neethling, Potgieter and Visser 120.
- 74 Neethling, Potgieter and Visser 121.
- 75 *Loc cit*.
- 76 Neethling and Potgieter “Section 49 of the Criminal Procedure Act 51 of 1977, private defence and putative private defence” 2004 *TSAR* 602 607; Neethling, Potgieter and Visser 121.
- 77 Neethling, Potgieter and Visser 133.
- 78 *S v Lombard* 1964 4 SA (T).
- 79 *S v Erwin* 1974 3 SA438 (K).
- 80 This is exactly what happened in *Graham v Cape Metropolitan Council* 1999 3 SA 356 (C).
- 81 The principle accepted here is the so-called “doctrine of sudden emergency”, see *Samson v Winn* 1977 1 SA 761 (C).

Biographical notes

Professor Trynie Davel is Director of the Centre for Child Law and Professor of Private Law, University of Pretoria, South Africa.