THE ROLE OF SCHOOL GOVERNING BODIES IN PROMOTING THE BEST INTERESTS OF THE CHILD IN SCHOOLS

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DECLARATION

I, Baloyi Amukelani hereby declare the dissertation tilted "**The role of School Governing Bodies in promoting the best interests of the child in schools"** has not previously been submitted for a degree at this university or any other university and this is my own work in design and execution. All references materials contained therein have been duly acknowledged.

Baloyi A

Signature: _____ Date:_____

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DEDICATION

I dedicate this research project to my beloved family and four daughters, Hloniphani, Vuako, Amukelo and Xikongomelo. I also dedicate it to all children of school-going age, whose best interests need to be given primary consideration by the School Governing Bodies and other decision-makers in the South African schools.

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ABSTRACT

The "best interests of the child" principle is recognised in many international human right instruments. For instance, the United Nations Convention on the Rights of the Child[1] (CRC) and African Charter on the Rights and Welfare of the Child (ACRWC) both of which are leading instruments on the rights of children make provision for it. In terms of both the CRC and ACRWC, the "best interests of the child" are to be given primary consideration in all dealings with children.[2] Both instruments have been signed and ratified by South Africa. The Constitution of the Republic of South Africa,1996 has incorporated the "best interests of the child" providing under its section 28(2) that the "child's best interests are of paramount importance in every matter concerning the child".[3]

Despite such universal recognition of the principle, a legislative framework that regulates the South African schooling system is silent on the "best interests of the child", giving priority rather to the school's best interests. School Governing Bodies (SGBs), which are the highest decision-making organs in school governance, are required by the South African Schools Act[4] (SASA) to promote the best interests of their schools.[5] Unfortunately what is in the best interest of the school may not always be in the "best interests of the child". The SASA's silence on the principle, therefore, raises constitutional challenges in the entire schooling system of South Africa. In the past years, SGBs adopted school policies which in their views, were in the best interest of their schools, only to be rejected later by the courts for their inconsistence with the Constitution.

For instance in *Pillay v KZN Minister of Education and Others*[6] the school refused to allow a learner to wear a nose-stud to express her religion. The Constitutional Court had to decide whether the learner was discriminated against by the school's code of

[1] The CRC was adopted in 1989 and is regarded as the main legal instrument on the protection of children. On the 16th of June 1995 South Africa ratified CRC.
[2] Article 3 (1) of CRC and Article 4 (1) of ACRWC.
[3] Constitution of the Republic of South Africa, 1996. (Hereafter referred as 'Constitution').
[4] South African Schools Act 84 of 1996. (Hereafter referred as 'SASA').
[5] Sect 20(1) (a) of the SASA.
[6] 2008 (2) BCLR 99 (CC).

conduct. The Court held that the learner was discriminated against by the on religious and cultural grounds. It was held that schools are obliged to affirm and accommodate diversity in a reasonable manner. In *Head of Department of Education, Free State Province v Welkom High School and Others*[7], two high schools in the Free State adopted policies which excluded pregnant learners. The Court had to determine the legality of these pregnancy policies. Consequently, it was found that they violated section 28(2) of the Constitution, which explicitly provides that "a child's best interests are of paramount importance in every matter concerning the child".

The above examples illustrate the nature of constitutional challenges in the schooling system caused by the SGBs' failure to accord due recognition to the "best interests of the child" due to the SASA's silence on the principle. The study discussed the role of SGBs in promoting the "best interests of the child" in schools. In the absence of a clear legislative framework mandating SGBs to promote the "best interests of the child" in schools, the research will analyse the nature and scope of the "best interests of the child" principle as contained in international treaties, the Constitution, legislation and case law in order to assess whether an obligation rests on SGBs to promote the "best interests of the child" in schools.

[7] 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC).

ACRONYMS

SASA- South African Schools Act

SGB- School Governing Body

SMT- School Management Team

GBF- Governing Bodies Foundation

CRC- Convention on the Rights of the Child

ACRWC- African Charter on the Rights and Welfare of the Child

ICJ- Statute of the International Court of Justice

CEDAW-Convention on the Elimination of All Forms of Discrimination Against Women

CRC- Committee on the Rights of the Child

ACERWC- African Committee of Experts on the Rights and Welfare of the Child

OAU- Organisation of African Unity

UN- United Nations

HOD- Head Of Department

MEC- Member of Executive Committee

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CHAPTER 01: BACKGROUND OF THE RESEARCH AND PROBLEM STATEMENT

1.1. Introduction

The emergence of democracy in South Africa has brought about political changes and extensive changes in the education dispensation.[8] Political changes were followed by the adoption of the 1996 Constitution of the Republic of South Africa[9] which gave the "best interests of the child"[10] a constitutional status. In the same year, the SASA[11] was adopted and initiated an innovative period for national education, especially at public school level. The South African Schools Act is seen as an important document that deals with SGBs[12]. The SASA mandated the establishment of SGBs comprising of parents, educators and pupils. The governing bodies adopt the necessary school policies and programs. These school policies guide the management and create a conducive environment for the right to a basic education to be realised in schools. The SASA gave the SGBs considerable powers, including the determination of the school's admission policy.[13]

Section 20(1)(a) of the SASA provides that one of the SGBs' functions is to promote the "best interests of the school". Essentially, in terms of this section, the SGBs are mandated to promote their schools' best interests. Since section 28(2) of the Constitution provides that the "best interests of the child are of paramount importance in every matter concerning the child,"[14] it would be expected that SGBs, as the organs

[8] The creation of SGBs represents democratisation of public education as whole and significantly, decentralisation of power in the South African schooling system.
[9] The Constitution of the Republic of South Africa is described as "a cornerstone of democracy". The substantive content of all laws and policies are guided by the Constitution through its Bill of Rights.
[10] Courts and other institutions use the "best interests" principle as the common law in making decisions affecting children.
[11] The SASA is crafted to ensure that regardless of race, social status or ethnicity, all children at school-going age have access to quality education. Most importantly, it makes schooling compulsory for all children between seven and fifteen years.
[12] T Bisschoff & T Phakoa 'The status of minors in governing bodies of public secondary schools' 1999(2) South African Journal of Education 89.
[13] Sect 5(5) of the SASA.
[14] M Reyneke 'Realising the Child's Best Interests: lessons from the Child Justice Act to Improve the South African Schools Act.' 2016 Potchefstroom Electronic Law Journal (PELJ) 10.

of the state, also have constitutional obligations to promote the "best interests of the child". The SASA, unfortunately, does not expressly mandate SGBs to promote the "best interests of the child"[15] and no provision is made regarding this principle despite its international and national recognition.

Since the SASA[16] was promulgated, SGBs have been confronted by court disputes over the issues of language, admission, religion, and pregnancy policies. Many cases were triggered by SGBs' failures to consider the "best interests of the child". SGBs excessively exercised their statutory powers and failed to give regard to the "best interests of the child". The courts were not convinced by SGBs' arguments that they were acting in the interests of their schools and were vested with powers by the Schools Act. For example in *Matukane and others v Laerskool Potgietersrus*[17] the court held that race, tradition or culture cannot be used as mechanisms in schools to exclude learners. This was after black pupils were refused admission by a primary school which adduced that black pupils who wanted to learn in English language would not respect the Afrikaans culture of the school. The school was ordered by the Court to admit the affected pupils.

The above case is a typical example of SGBs' failures to consider the "best interests of the child" in their decision-making processes. Thus, SGBs are taken to courts because their decisions are conflicting with the "best interests of the child". The SASA's silence on the "best interests of the child" is problematic in schools. SGBs serve as the custodians of their schools' best interests, yet, fail to consider what are in the best interests of an individual learner or group of learners. This research will examine the nature of the legal framework in place and whether this framework mandates SGBs to ensure the "best interests of the child" are promoted in schools.

[15] The "best interest of the child" is regarded as a child rights principle and is derived from Article 3 of CRC, which says that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"

[16] This Act placed the SGBs in central roles in the schooling system as majority of governance issues are decided by these democratically elected structures.

[17] (1996) 1 All SA 468 (T).

1.2. Problem statement

The SASA gave SGBs[18] considerable powers including the determination of pregnancy policies, language policies and admission policies. This Act expressly states that SGBs "must promote the best interests of the school".[19] However, the Act is silent on SGBs' role in fostering "best interests of the child" in schools. Therefore, questions arise- is the SASA crafted to promote and safeguard the best interests of the schools or the "best interests of the child"? Secondly, does the SASA ensure that the "best interests of the child" are given due attention by SGBs? Lastly, is there a need for a review of the Schools Act, mainly in relation to the application of the "best interests of the child" principle?

1.3. Aims and objectives

The aim of the study is to investigate the role of SGBs in promoting the "best interests of the child" in schools.

The following are the objectives of the study:

- To examine the "best interests of the child" under international and national law.
- To examine the legal framework on the "best interests of the child" in South Africa.
- To analyse critically the important court decisions which dealt with the "best interests of the child" in the education context.
- To suggest recommendations on a review of the SASA in order to safeguard the "best interests of the child'" in schools.

[18] The creation of SGBs is regarded by Woolman and Fleisch "as a legitimate sphere of government that ensure the creation of effective social networks and improve democracy". Both authors conclude "that SGBs possess the authority to make community-based decisions on governance issues in schools". (S Woolman & B Fleisch 'The Constitution in the Classroom: Law and Education in South Africa, 1994-2008 (2009) 216).

[19] Sect 20(1) (a) of the SASA.

1.4. Research questions

The research questions to be addressed in this study are as follows:

1.4.1. Main research question

What is the role of School Governing Bodies in promoting the best interests of the child in schools?

1.4.2. Sub-research questions

1.4.2.1. What is the nature and scope of the "best interests of the child" principle under international human rights law?

1.4.2.2. What is the nature and scope of the "best interests of the child" principle under South Africa's national laws, particularly in the education context?

1.4.2.3. What is the courts' approach in dealing with the "best interests of the child" principle in the context of schools?

1.4.2.4. Is there a need for a review of the SASA to safeguard the "best interests of the child" in schools?

1.7. Literature review

According to Bray, SGBs function within the ambit of their demarcated (statutory) powers.[20] These powers are stipulated in the provisions of the SASA. Bray is correct on the point that SGBs function within the ambit of their statutory powers, but there are circumstances where SGBs are required to perform their functions outside the ambit of their powers demarcated by legislation, mainly in relation to the application of the "best interests of the child". In other words, SGBs can effectively perform their functions outside their scope in order to fulfil their constitutional obligations. For instance, the SGB might be vested with statutory powers to draft school policies, but a situation might also arise where the SGB is required to act beyond its scope in

[20] E Bray 'Codes of conduct in public schools: a legal perspective' 2005 South African Journal of Education 138.

promoting the "best interests of the child" as required by the Constitution. In such instances the SGB by drafting school policies will be fulfilling its legislative obligation (i.e. SASA) and it may at the same time be expected from the SGB to ensure that learners' rights are not compromised by those policies. The SGB will, therefore, function outside its demarcated powers in order to promote the "best interests of the child" which is outside its demarcated functions and it has no clear mandate from SASA to do so.

Xaba opines that the main function of the SGB is "to promote the educational interests of the school and learners".[21] He adds that in promoting the best interest of the school, SGBs adopt admission, language and religious policies; and the code of conduct in the school for learners.[22] Xaba has dealt comprehensively with the role of the SGB in promoting the schools' and learners' best interests, but the question on the role of the SGB in promoting the "best interests of the child" remain unanswered. Contrary to Xaba's views on the core function of the SGB, in this research it will be argued that the "best interests of the child" should be accorded due recognition and provision so that SGBs should not focus exclusively on the promotion of the school's interests.

Bray[23] argues that the "SGB, as a functionary of the public school, should always perform its duties in the school's name and in doing so it must put at heart the best interests of the school". Bray's arguments raise so many constitutional challenges in the education context. For instance; if the SGB considers only the school's best interests in decision-making, learners' rights could be violated. For example, the SGB may find itself adopting policies on issues such as pregnancy to foster the best interest of the school but to the detriment of the best interests of individual learners. This would consequently be unconstitutional. In this research, it will be argued that SGBs must consider the "best interests of the child" in all school-based decisions. The "best interests of the child" are of great importance whenever decisions are made about learners and all decision-makers including SGBs need to consider the "child's best interests".

[21] M I Xaba 'Governors or watchdogs? The role of educators in school governing bodies' 2004 South African Journal of Education 313.
[22] Xaba (note 21 above) 313.
[23] Bray (note 20 above) 137.

Woolman and Fleisch share the same view that SGBs have the "necessary authority to take community-based decisions on issues of school governance".[24] Governance issues include admission, code of conduct, language policies, and pregnancy policies. Authors are, however, silent on the application of the "best interests of the child" by SGBs' decision-making processes. It is noteworthy that community-based decisions taken without taking into consideration the "best interests of the child" could be questionable as they may fail to be in line with the international and national framework on the "best interests of the child."

Visser observed that the "best interests of the child standard is not sufficiently recognised and applied in the South African public school system".[25] Visser's opinions are supported by Bray who argues that the "best interests of the child" "is still a controversial topic, because it has not yet provided a reliable and determinate standard".[26] This research concurs with these authors' views regarding the controversial nature of the "best interests of the child" in the South African schooling system as well as its application in the school context. As Visser observed, there is no doubt that the current schooling system does not give the "best interests of the child" standard sufficient recognition.

Visser unfortunately does not provide a logical explanation on why the principle has not yet been sufficiently recognised in school context. This research will highlight that the SASA's silence on the "best interests of the child" principle makes it difficult for SGBs to give proper attention to it when decisions are taken about learners in schools. The current framework of SASA has placed SGBs in a position to act in their schools' best interests than in the best interests of an individual learner or group of learners. In addition, Visser and Bray did not specifically deal with the role of the SGBs in promoting the "best interests of the child". This study will address the role of SGBs in schools, mainly in relation to the application of the "best interests of the child".

[24] S Woolman & B Fleisch 'The Constitution in the Classroom: Law and Education in South Africa, 1994-2008 (2009) 175.
[25] PJ Visser, 'Some Ideas on the Best Interests of a Child Principle in the Context of Public Schooling' (2007) (70) THRHR 468.
[26] W Bray Foundations of law and education law (2000) 65.

With the current legislative framework in education, it is very complex to define and to make determination of what is exactly in the "best interests of the child", as nothing is stipulated about the principle in the SASA. Ferreira argues that "making determination of what is in the best interest of the child is not an easy task".[27] There could be widely different views on a "child's best interests" in the school system.[28] Davel suggests that relevant factors should be considered, if the "best interests of the child" is to be made a standard in education.[29] He adds that the relevant factors will "ensure that there is greater consistency and clarity in the law". SGBs are the organs of the state and have responsibilities to promote and respect the learners' rights (including "best interests of the child") in all their decisions that affect learners. Davel cautions that the children rights in the "education setting should not be seen as a negative pursuit juxtaposed against the rights of educators, parents or other learners".[30]

Bonthuys observes that surrounding circumstances of the child are considered in the current applications of the "best interests of the child".[31] According to Reyneke, "the best-interests standard should be flexible in order to take account of all the relevant circumstances of each case"[32]. The flexibility of the "best interests' standard" as Reyneke opines will "ensure that the final outcome is, in practice, in the best interests of the child or children concerned".[33] It makes sense for the decision-makers to apply certain measures of flexibility when making decisions that are in the "best interests of child". In the South African schooling system, SGBs should also consider all relevant circumstances and factors at the time before making decisions about the "best interests of the child". Relevant circumstances and factors will assist SGBs to have a proper balance between the schools' best interests and the "best interests of the child".

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[27] S Ferreira 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) (73) THRHR 9.
[28] Visser (note 25 above) 461.
[29] T Davel In the best interests of the child: Conceptualisation and guidelines in the context of education (2007)224.
[30] Davel (note 29 above) 222.
[31] E Bonthuys 'The best interests of children in the South African Constitution' (2006) International Journal of Law, Policy and the Family 25.
[32] M Reyneke 'Realising the Child's Best Interests: lessons from the Child Justice Act to Improve the South African Schools Act.' 2016 Potchefstroom Electronic Law Journal (PELJ) 275.
[33] Reyneke (note 32 above) 275.

1.8. Research methodology

This study adopts a doctrinal research methodology. Doctrinal research is defined by Salter and Mason as "a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine".[34] Singhal and Malik regard doctrinal research as 'one of the methodologies employed by those undertaking research in law'.[35] Doctrinal research methodology will address the legal question of this study effectively. According to Hutchinson and Duncan a doctrinal research methodology is simply about "locating the law or doctrine and then analysing the texts".[36]

According to Singhal and Malik a doctrinal research is "more concerned with analysis of the legal doctrine and how it has been developed and applied".[37] Doctrinal research "is defined by its emphasis on primary legal material (for example, cases and legislation) and on secondary material".[38] Since this study will be based on the doctrinal method, the international treaties, the Constitution of the Republic of South Africa, the SASA, the Children's Act and case law will be relied upon in order to achieve the set aims and objectives. Secondary materials such as relevant textbooks and journal articles will also be useful in the study.

[34] M Salter & J Mason Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (2007) 31.
[35] A K Singhal & I Malik 'Doctrinal and socio-legal methods of research: merits and demerits' Educational Research Journal (2012) 2(7) 254.
[36] T Hutchinson & N Duncan 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin LR 116.
[37] Singhal & Malik (note 35 above) 254.
[38] C Dent 'A law student-oriented taxonomy for research in law' (2017) 48 VUWLR 377.

1.9. Overview of chapters

The study comprises of five chapters that are outlined as follows:

1.9.1. Chapter One is about the background of the study.

1.9.2. Chapter Two focus on the International human rights framework on the "best interests of the child".

1.9.3. Chapter Three focus on the legal framework on the "best interests of the child" in South Africa.

1.9.4. Chapter Four deal with courts' application of the "best interests of the child" in the education context.

1.9.5. Chapter Five is about the conclusion and recommendations.

1.10. Limitations of the study

Empirical research taking the form of interviews could have been useful to enrich this research. However, these are not conducted because of the sensitive nature of the topic to interviewees such as SGBs. However, this challenge was ameliorated by conducting detailed analysis of primary and secondary sources on the subject.

CHAPTER 2: THE PRINCIPLE OF THE "BEST INTERESTS OF THE CHILD" UNDER INTERNATIONAL LAW

2.1. Introduction

The "best interests of the child" is an internationally recognised principle, which is entrenched in many international human rights treaties. The principle is widely accepted and has been incorporated to the Constitutions of many states. South Africa has ratified many international instruments which make provisions for the "child's best interests", and for that reason, is not an exception to the principle. South Africa is one of the few states that uses hybrid-approach in domesticating international law. It is noteworthy that international law plays a central role in the South African municipal law system. The most important international legal treaties which entrench the "child's best interests" have been ratified by South Africa. By ratifying the international instruments, South Africa accepted its international obligation of ensuring that the "child's best interests" are safeguarded. This chapter will focus on the "best interests of the child" under the international human rights law. The first part of this chapter will briefly deal with sources of international law and the reception of international law in the South African municipal law. The second part will then highlight the international instruments that expressly make important provisions regarding the "best interests of the child".

2.2. International law

International law is defined by Jennings et al as "the body of rules which are legally binding on states in their intercourse with each other".[39] States are the main subjects of international law and possess international legal personality. International law includes those rules and norms that regulate the conduct of states and other that entities possess international personality. It is noteworthy that international law does not only regulate the conduct of the states, but also impose sanctions. According to Beckman and Butte, international law "consists of the rules and principles of general

[39] R Jennings et al Oppenheim's International law (1996) 23.

application dealing with the conduct of States and of international organisations in their international relations with one another".[40]

2.3. Sources of the "best interests of the child" in the international law

In the realm of international law there are various sources of the "best interests of the child". The treaties, custom and general principles of law are the most accepted sources of international law as provided in Article 38 of the Statute of the International Court of Justice.[41] As observed by Ferreira et al, "Article 38 of the Statute of the International Court of Justice (ICJ) reproduces almost identically the text of Article 38 of the Statute of the Permanent Court of International Justice".[42] It is worth noting that the sources are not ranked according to their importance. Thirlway[43] observed that there is not, "any indication of a hierarchy between treaties and custom".[44] Thirlway's observations are correct due to the fact that treaties and customs are not ranked in the context of the ICJ Statute. Arguably, drafters of the Statute of the ICJ did not have any intention of creating a hierarchy between the sources listed under Article 38. However, it is a general practice amongst scholars to consider any applicable treaty rules before looking into custom and general principles. The practice has created a myth of the existence of a hierarchy between the sources in the ICJ Stature.

2.3.1. Treaties as sources of international law

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[40] R Beckman & D Butte *Introduction to International Law*. https://www.ilsa.org/jessup/intlawintro.pdf (accessed on 01 August 2019).

[41] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[42] Ferreira et al 'Formation and Evidence of Customary International Law' (2013)1 UFRGSM UN/ UFRGS Model UN J 193 p184.

[43] Thirlway argues that the "order in which the sources are presented is not to be perceived as hierarchical, although treaties and custom are usually considered to be in a more prominent position than general principles of law, since the latter were included in the list in order to provide a 'fall-back source of law' for cases in which no conventional or customary norm could be found".

[44] H Thirlway 'The Sources of International Law', in M. D. Evans (ed.) International Law (2010)113.

International convention is generally referred to as treaty. A treaty is an important formal and conscious source of international law creating legal obligations on the states which have agreed to its terms. A treaty refers to "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[45] Some authors define treaties as "written agreements between States that are governed by international law".[46] The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are some of the examples of treaties which serve as sources of the "best interests of the child".

Beckman and Bute hold the same view that *pacta sunt servanda* is the "basic principle underlying the law of treaties" and this means that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".[47] By ratifying the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, South Africa has accepted the provisions of both treaties to have binding effect on it and also have international obligations to incorporate the provisions of both treaties into its municipal law.[48]

2.3.2. Custom as source of international law

The second source of international law listed in Article 38 (1) of the Statute of the International Court of Justice is "international custom, as evidence of a general practice accepted as law". It is placed on the same footing with international conventions as a primary source of international law. A custom generally refers to "an established pattern of behaviour that can be objectively verified within a particular social setting i.e., what has always been done and accepted by law".[49] The "best interests of the child" has received sufficient recognition in the international community both as a general practice and as accepted law. Many nations have promoted and

[45] The Vienna Convention on the Law of Treaties, 1969, Art. 2.
[46] Beckman and Butte (note 40 above).
[47] Beckman and Butte (note 40 above).
[48] South Africa ratified the United Nations Convention on the Rights of the Child on the 16th of June 1995. On the 7th of January 2000 it ratified the African Charter on the Rights and Welfare of the Child.
[49] Custom in Law, Wikipedia (accessed from: http://en.wikipedia.org/wiki/custom(law). (accessed on 10 August 2019).

safeguarded the “best interests of the child” and over time the protection of the “best interests of the child”, arguably, became their mutual obligations. It can be argued further that the “best interests of the child” has over the years evolved to a custom due to its general usage and its acceptance as law.

A custom “binds all the members of the international community, or of a regional group, in the case of a regional custom”.[50] According to Cassese customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation”.[51] This was also expressed by International Court of Justice (ICJ) in the *Nicaragua case*[52], where it was held “that custom is constituted by two elements, the objective one of a general practice, and the subjective one accepted as law, the so-called *opinio juris”*. In the *Continental Shelf case*[53], it was held that “the substance of customary international law must be looked for primarily in the actual practice and opinio juris of States”.

2.3.3. General principles of law as sources of international law

The general principles of law are listed as a source of international law[54] and these principles according to Beckman and Butte[55] are “applicable in cases of disputes arising under international law where no treaty provision or clear rule of customary law exists”. Bassiouni observed that “general principles are, first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the PCIJ and ICJ”.[56]

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[50] Ferreira (note 43 above) 186.
[51] A Cassese ‘International Law’ (2nd Ed) (2005)156.
[52] The Republic of Nicaragua v. United States of America (1986) ICJ 1. This case was concerning the United States’ military and paramilitary activities carried against Nicaragua. The ICJ found that the USA had violated “international law by supporting the Contras in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors”. The USA was ordered by the ICJ to make payment of reparations to Nicaragua.
[53] *Libya v. Malta* (1985) ICJ 13.The case was concerning the Continental Shelf.
[54] Article 38 (1) (c) of the ICJ.
[55] Beckman and Butte (note 40 above).
[56] MC Bassiouni ‘A Functional Approach to "General Principles of International Law’, (1990)11 Mich. J. Int'l L. 768.

The general Principles are referred to by Schlesinger as "a core of legal ideas which are common to all civilised legal systems".[57] Jalet is of the view that general principles are "principles that constitute that unformulated reservoir of basic legal concepts universal in application".[58] Jalet opines that these principles "exist independently of the institutions of any particular country and form the irreducible essence of all legal systems".[59] According to Bin Cheng the "general principles serve as the source of various rules; as the guidelines or framework for the judiciary and as norms".[60] As the "best interests of the child" is provided for in most international treaties and arguably developed into a custom, the general principles cannot be considered as sources of the "best interests of the child". It is safe to argue that the "best interests of the child" was used in the past as a general principle before there were treaties governing it.

2.3.4. Subsidiary means for the determination of the "best interests of the child"

Beckman and Butte share the same view that subsidiary means "are not sources of law, but evidence that can be used to prove the existence of a rule of custom or a general principle of law".[61] These are ancillary sources, which some scholars refer to as secondary sources. Under Article 38 of the ICJ, "teachings of the most highly qualified publicists and judicial decisions of the international and national tribunals" on international law issues are listed as the only two subsidiary means. The United Nations General Assembly's resolutions are recommendations and have no binding effect. Resolutions adopted at major international conferences have no binding effect and they are also considered as recommendations. Such recommendations as Beckman and Bute observed "may be subsidiary means for determining custom".[62] There are many subsidiary means that assist the determinations of the "best interests

[57] RB Schlesinger 'Research on the General Principles of Law Recognized by Civilized Nations', (1957).51 AM. J. INT'L L. 734, 739.
[58] F Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations' (1963)10 U.C.L.A. L. REV. 1041, 1044.
[59] "as above".
[60] B Cheng General Principles of Law as Applied by International Courts and Tribunals Volume 2 Grotius Classic Reprint Series (2006) 390.
[61] Beckman and Butte (note 41 above).
[62] Beckman and Butte (note 41 above)

of the child" at the level of the international law. For example, general comments are published from time to time, and they serve as subsidiary means to interpret the provisions of the "best interests of the child" under the CRC.

2.4. Domestication of international law into South African municipal law

International law is accorded constitutional recognition in a number of provisions[63] by the South African Constitution.[64] The South African Constitution does not only accord constitutional recognition to international law, but also has provisions that deal with the domestication of international law into South African municipal law. The Constitution makes important provisions on the standing of international law in the South African law and the conclusion of international agreements. The Courts are also empowered to take into consideration international law when the Bill of Rights is interpreted.

It is safe to argue that the National Assembly and National Council of Provinces play an important role when international law is domesticated into the South African municipal law. The National Assembly and National Council of Provinces are both placed in the position of authority by the Constitution in the domestication of International law in the Republic of South Africa. Both parliamentary houses are required to approve international agreements before they can be binding on the Republic of South Africa. By requiring parliamentary approval on international

[63] Section 231 of the Constitution provide as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[64] Constitution of the Republic of South Africa Act 108 of 1996.

agreements, the Constitution is clearly in line with the dualist approach on the application of international law into South African municipal law. Dualist approach according to Tiyanjana "perceives international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character".[65] In other words, international law does not automatically become the South African municipal law, unless domesticated through legislative process and parliament has approved that such international law be binding and become part of municipal law. The "best interests of the child" as provided for under international law (i.e. CRC and ACRWC) has been incorporated into the South African municipal law through legislative process and has binding effect on South Africa.

The signing and ratification of international agreements which does not require the parliamentary approval to be binding in the South African municipal law is regulated by Section 231(3) of the Constitution of South Africa. In terms of Section 231(3), these international agreements "bind the Republic without approval by the National Assembly and the National Council of Provinces". In most cases, these international agreements are of "a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive".[66] Although parliament does not have active roles in the domestication of these international agreements, the Constitution requires that these agreements be tabled within a reasonable period of time in the Assembly and the Council. It can be argued that by including Section 231(3), the drafters of the Constitution wanted some treaties of international law to become part of South African municipal law without parliamentary approval. This approach is referred to as monism and in the application of international law essentially involves the direct observance of international law as part of the laws of the state without the necessity of domesticating the enabling treaty or convention.[67] The CRC and the ACRWC make provisions on the "best interests of the child" and these international treaties have been domesticated with a legislative process as they require ratification, and they are not of "technical or administrative

[65] T Maluwa, 'The *role* of *international law* in the *protection* of *human rights under* the *Malawi Constitution*', (1995) 3 A.Y.B.I.L. 53.
[66] Section 231(3) of the Constitution of South Africa.
[67] W Mutubwa 'Monism or Dualism: The dilemma in the application of international agreements under the South African Constitution' (2019) 3(1) Journal of CMSD 27.

nature". It is indisputable that there is no international treaty making provision for the "best interests of the child" that is based on the monist approach.

The Constitution expressly provides that "any international agreement becomes law in the Republic when it is enacted into law by national legislation".[68] This implies that international agreements domesticated into South African municipal law have the same binding status like any other Act. The Constitutional Court in the *Glenister case*[69] held that "an international agreement that has been ratified by resolution of parliament is binding on South Africa on the international plane".[70] The Court confirmed that "an international agreement that has been ratified by Parliament under section 231(2) does not become part of our law until and unless it is incorporated into our law by national legislation". Finally, it was confirmed that "an international agreement that has not been incorporated in our law cannot be a source of rights and obligations".[71] The CRC and the ACRWC have been incorporated into South African law, and are considered a source of rights and obligations. Importantly, these leading international treaties have imposed South Africa with an international obligation to ensure that the "best interests of the child" are given primary recognition by all decision-makers, including the SGBs who make decisions affecting learners in schools.

The Constitution provides that, "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law".[72] The text of the Section 39(1)(b) evidently empowers the courts and other forums to apply international law when the Bill of Rights are interpreted. This confirms that the South African Constitution is international law-friendly, as international law is applied even by judicial organs such as courts and tribunals. It is noteworthy that all courts, tribunals or forums are required by the Constitution to "promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law".[73] In *S v Makwanyane and Another*[74] the Constitutional Court held that "international law,

[68] Section 231(4) of the Constitution of South Africa.
[69] *Glenister v President of South Africa and Others*
[70] Glenister para. 92.
[71] Glenister para. 92.
[72] Section 39(1)(b) of the Constitution of South Africa.
[73] Section 39(2) of the Constitution of South Africa.
[74] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para. 35.

within the meaning of section 39(1)(b) of the Constitution, includes both binding and non-binding law". The decision-makers (i.e. courts, tribunals, forums) have constitutional obligation to consider the international law when they interpret the Bill of Rights. As the "best interests of the child" is part of international law, decision-makers like the SGBs are under the constitutional obligation to consider it when they interpret the Bill of Rights.

2.5. Definition of the "best interests of the child"

The "best interests of the child" is undoubtedly an important doctrine associated with children, and "has become widely used in various common law and civil law jurisdictions".[75] Kopelman defines the "best interests of the child" as a "widely recognised guidance principle" which can be used by decision makers to make "choices for children and other persons who lack capacity to make decisions".[76] Thompson refers to the "best interests" principle as "a fundamental principle stemming from western law, which governs disputes affecting children and encompasses all the human rights of children".[77] The research concludes that the "best interest of the child" in practice imposes a legal obligation to all decision-makers to consider whether their decisions and actions benefit children involved in the best possible way.

It is worth mentioning that before the principle was codified in the international human rights instruments, its application was limited in scope. The "best interests" standard was applied in "family related matters such as custody and adoption; and also in the administration of criminal justice when children come into conflict with the law".[78] Nykanen opines that the "best interests of the child" principle clearly "acknowledges that the child is an agent and has rights".[79] The usage of the "best interests of the child"

[75] DI Supaat 'Establishing the best interests of the child rule as an international custom' (2014) 5(4) International Journal of Business, Economics and Law 109.
[76] LM Kopelman 'Using the Best Interests Standard to Decide Whether to Test Children for Untreatable, Late-Onset Genetic Diseases' (2007) 32(4) Journal of Medicine and Philosophy 378.
[77] B Thompson Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism (1992) 41 ICLQ 435.
[78] Supaat (note 75 above) 109.
[79] E Nykanen 'Protecting Children? The European Convention on Human Rights and Child Asylum Seekers' (2001) 3(34) European Journal of Migration and Law 322.

"has reached a universal level in various child-related matters, due to its clear benefit in safeguarding children's welfare and interests".[80] It is also argued that this principle meets the requirements of customary international law.[81]

The "best interests of the child" became a fundamental standard in many issues concerning children. However, in practice the application of the principle is still problematic. As Funderburk observed, "the principle does not lead to a neutral investigation that points to an obvious result but involves decision-makers who are interested in the best outcomes for children".[82] It is sometimes employed "to express goals about what is ideal and sometimes to make practical judgments about what is reasonable given the circumstances".[83]

The "best interests of the child" is a noble concept[84] but defining and putting it into practice is complicated. It is difficult to make determination of what is in the "best interests of the child", as there is no closed-list of specific factors that must be considered by the decision-makers. The determination of "child's best interests" requires each decision maker to interpret the child's situation before making a decision about that particular child. Despite its ambiguity, as observed by Supaat, the "best interests of the child" has been applied "in a multitude of children-related issues including custody, family relations, alternative care, healthcare, criminal justice, disabled children, education, and survival".[85]

The "best interests of the child" is "a dynamic concept that encompasses various issues which are continuously evolving".[86] For example; in the schooling context, the "child's best interests" may include being taught in one's own language, being allowed to express one's own religion, not to be subjected to discrimination, and not to be

[80] Supaat (note 75 above) 109.
[81] L Schafer *Child Law in South Africa: Domestic and International Perspectives* (2011)154.
[82] C Funderburk 'Best Interest of the Child Should Not Be an Ambiguous Term', (2013) 33 *Children's Legal Rights Journal* (CLRJ) 229.
[83] Kopelman (note 76 above) 378.
[84] DA Prescott 'The AAML and a New Paradigm for "Thinking About" Child Custody Litigation: The Next Half Century, (2011) 24 Journal of the American Academy of Matrimonial Lawyers 107.
[85] Supaat (note 75 above) 113.
[86] General Comment No. 14 (2013) "The right of the child to have his or her best interests taken as a primary consideration, para 11".

denied education. Although the principle is widely used to protect children, there is no concrete definition of this elusive standard.[87] As the contents of the principle remain vague, it has hardly been subjected to comprehensive studies.[88] Some authors observed that "the issue of the best interests of the child and the determination of its test remain problematic in spite of its embodiment in international, African and domestic laws".[89]

2.6. International instruments that influenced the development of the "best interests of the child"

The development of the "best interests of the child" was influenced by both the declarations and conventions. The declarations were non-binding in nature, while the conventions were binding on member states to those international human rights instruments. The 1924 Geneva Declaration of the Rights of the Child and the 1959 Declaration of the Rights of the Child are some of the international non-binding human rights instruments that contributed to the development of the "best interests of the child" in the mid-1920s and late-1940s respectively. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child are the most important international binding instruments that developed in the late-1970s, late-1980s and early-1990s respectively, and importantly contributed significantly in the growth of the "best interests of the child". The above stated international instruments will be discussed in the subsections below.

2.6.1. The 1924 Geneva Declaration of the Rights of the Child

In 1924 the Geneva Declaration of the Rights of the Child[90] was adopted by the League of Nations, and significantly reflected what Degol and Dinku call "the concerns

[87] Wayne, RH 'The Best Interests of the Child: A Silent Standard – Will You Know It When You Hear It?' (2008) 2(1) Journal of Public Child Welfare 33-49.
[88] J Zermatten 'The Best interests of the child from the Literal Analysis to the Philosophical Scope' (2003) Working Report Institut International Des Droits de L'Enfant 4.
[89] A Degol and S Dinku 'Best Interest of the child' (2011) 5(2) Mizan Law Review 320.
[90] Geneva Declaration of the Rights of the Child was adopted on 26 September 1924.

related to the rights of children that were grossly violated during WWI and its aftermath".[91] The adoption of the Geneva Declaration of the Rights of the Child was the first organised effort to recognise the rights of children. Importantly, children's rights were mainly seen as measures to be taken against the societal problems affecting children such as child trafficking, prostitution of children, child slavery, and child labour. It emphasised the children's material needs and declared that children must have the requisite means for their formal development. It is noteworthy that the children rights and the adults' responsibilities towards children were recognised and affirmed in this historic international document for the first time**.** In its preamble, the following is stated:

> "by the present Declaration of the Rights of the Child, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty …"[92]

The wording of the preamble evidently highlights the significance of the interests of the child and the duties of the adults towards children. Children are entitled to 'the best that mankind can give' and this implies that in actions concerning children, their interests must be taken into consideration by the adults. The Declaration undoubtedly initiated a perception where the protection of children was regarded as a primary concern in every matter. Furthermore, the document simply maintained that "the child must be the first to receive relief in times of distress"[93], and this was a clear indication of how the international community wanted the "best interests of the child" to be given protection.

2.6.2. The 1959 United Nations' Declaration of the Rights of the Child

[91] Degol and Dinku (note 89 above) 322.
[92] Preamble of the 1924 Geneva Declaration of the Rights of the Child.
[93] Principle III of the 1924 Geneva Declaration of the Rights of the Child.

In 1959 the United Nations General Assembly adopted the Declaration of the Rights of the Child[94]. The Declaration[95] placed more emphasis on the need for special protection and care of the child. It also affirmed "the principle that mankind owes to the child the best it has to give". It is noteworthy that the same principle was recognised in the 1924 Geneva Declaration of the Rights of the Child. The Declaration of the Rights of the Child was the only international document dedicated solely to the general subject of children's rights. In the document, there was a complete shift of "ideology from the idea of mere child protection, to rights for children".[96] For the first time, the principle "best interests of the child" was expressly affirmed in an international instrument. However, this international instrument was non-binding in nature, but importantly sparked discussions about the rights of children and their wellbeing.

The general principles for the care and protection of children[97] were announced in the Declaration of the Rights of the Child. As provisions were made regarding the general "principles" for the children's protection, it is undisputable that the Declaration is one of the great international human rights instruments on the rights of children. Freeman opines that the 1959 UN Declaration of the Rights of the Child was broader in scope as the protection and welfare of the child were emphasised.[98] This was due to the fact that the 1959 Declaration was more focused on the interests and rights of children in the international community. Children's rights were for the first time documented in an international instrument by the United Nations and this signifies the positive attitude of the international community in safeguarding the rights of children and their interests. Unlike the 1924 Declaration, the 1959 UN Declaration of the Rights of the Child[99]

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[94] It was unanimously adopted by 78 member states of the UN General Assembly on the 20th of November 1959 in Resolution 1386 (XIV).

[95] Article 2 of the declaration provides as follows:

> "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount considerations."

[96] J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 South African Journal on Human Rights (SAJHR) 402.

[97] WH Bennett Jr 'A Critique of the Emerging Convention on the Rights of the Child' (1987) 20(1) Cornell International Law Journal 18.

[98] M Freeman *(*Ed*) Children's Rights: A Comparative Perspective* (*1996)* 3.

[99] The Declaration of the Rights of the Child laid down the following ten principles:

> "1. The right to equality, without distinction on account of race, religion or national origin.

regarded children as possessors of their own legal rights and was more detailed on the rights of children. The 1959 Declaration of the Rights of the Child in Principle 2 asserts that:

> "... the child shall enjoy special protection and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

The wording of the above section undoubtedly creates a moral obligation on decision-makers to give the 'best interests' principle the 'paramount consideration'. This section affirms that children must be protected by laws and other means in order to develop physically, mentally, morally, spiritually and socially. The law-makers, in enacting the laws are obliged to take into consideration what is best for children.

The Declaration affirmed that children were to receive to free and compulsory at the "elementary stages" education.[100] It was stressed that children were be provided with education to develop their abilities in order for them to become useful members of society. This is relevant to the "best interests of the child" principle because to attain their right to education is indisputably in the children's best interests. The right to receive education and the "child's best interests" are relative because school administrators are always confronted with situations where decisions are to be taken about the education future of children and the administrators are guided by the best interest principle in taking decisions.

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2. The right to special protection for the child's physical, mental and social development.
3. The right to a name and a nationality.
4. The right to adequate nutrition, housing and medical services.
5. The right to special education and treatment when a child is physically or mentally handicapped.
6. The right to understanding and love by parents and society.
7. The right to recreational activities and free education.
8. The right to be among the first to receive relief in all circumstances.
9. The right to protection against all forms of neglect, cruelty and exploitation.
10. The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, and universal brotherhood."

[100] Principle 7 of the 1959 Declaration on the Rights of the Child.

2.6.3. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

On the 18th of December 1979 the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women[101]. The preamble of the Convention expressed concern over extensive discrimination against women that continued to exist. The Convention took an important place among international human rights treaties in addressing concerns of women's rights. The Convention was evidently women-focused and attempted to address discrimination of all forms against women, and inequality that manifested in society. However, this international instrument invoked the principle of the "best interests of the child".

The CEDAW mentions that the children's interests need to be given "a primordial consideration in all cases".[102] CEDAW explicitly asserts that "best interests of the child shall be the paramount consideration to ensure that man and women have the same rights and responsibilities as parents in matters relating to their children".[103] The text of Article 16 (1) (d) (f) clearly shows that the "best interests of the child" is the yardstick in respect of the child-related issues.

Although the CEDAW was generally about women and focused on eliminating discrimination and inequality affecting women, this instrument arguably played a noticeable role in the development of the "best interests of the child". It was one of the binding international human rights treaties to recognise the need for safeguarding the children's rights and their interests in post Second World War era. The recognition of the principle in the CEDAW accelerated discussions about a need to develop international instruments focused on the protection of children's rights and their best interests.

[101] The General Assembly adopted Convention on the Elimination of All Forms of Discrimination against Women in resolution 34/180. The resolution was well accepted by member states of the United Nations General Assembly and about 130 member states voted in support of the resolution, with 10 abstentions.
[102] South Africa signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in January 1993 and ratified it on 15 December 1995, without any reservations.
[103] Article 16 (1) (d) (f) of CEDAW.

2.7. International and Regional Instruments on the "best interests of the child"

2.7.1. The 1989 Convention on the Rights of the Child (CRC)

On the 20th of November 1989 the United Nations Convention on the Rights of the Child[104] was unanimously adopted by the United Nations General Assembly. The adoption of the CRC "signalled the beginning of an era of concrete efforts by nations of the modern world to give legal recognition and protection to the rights of children."[105] The CRC[106] is the "most universally accepted human rights document in history"[107]. The CRC[108] is arguably the most ratified international legal instrument, and ratification of this instrument by most states show the commitment of the international community in safeguarding children's rights and their interest in post Second World War. It has been commended "as the most progressive of the treaties" on the rights of children.[109]

Unlike other international legal instruments, the CRC is a binding international legal instrument that incorporates the wide range of the rights of the children. By ratifying the treaty, member states commit themselves to protect children's rights and to be accountable to the international community. Kalverboer et al hold the same view that "states that have signed and ratified the CRC are legally bound by the content of the treaty".[110] The learned authors further state that member states of the CRC "have to refrain from acting in contravention of the CRC and that they have to strive for the implementation of the CRC in the domestic legal orders".[111]

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[104] On the 2nd of September 1990 the CRC came into force. With about 196 ratifications, the CRC became the most ratified international human rights convention. Somalia and the USA were the only two countries which have not ratified the CRC.

[105] D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 The International Journal of Children's Rights 127.

[106] The CRC is made up of 54 articles that set out rights of the children and how they should achieved by State Parties to all children in respective nations.

[107] Ferreira (note 42 above) 203.

[108] On the 16th of June 1995 South Africa ratified the CRC and its first report was submitted to the Committee in 1998. In 2000 South Africa received the concluding observations from the Committee.

[109] G Van Bueren 'International Law of the Rights of the Child' (1995) 402.

[110] M Kalverboer et al. 'The best interests of the child in cases of migration: Assessing and determining the best interests of the child in migration procedures' (2017) 25(1) In: International Journal of Children's Rights 117.

[111] Kalverboer et al. (note 110 above) 117.

The “best interests” principle is one of the four main principles of the CRC. “Non-discrimination”;[112] “right to life, survival and development”;[113] and “the views of the child”[114] are other principles in the Convention. It is worth mentioning that the right to non-discrimination is not an inactive obligation that prohibits discrimination of all forms in the enjoyment of rights provided for under the CRC. The right to “non-discrimination” in the CRC “requires appropriate active measures by the member states in order to ensure that there are effective equal opportunities for all children to enjoy the rights under the CRC”.[115] This may possibly necessitate “positive measures aimed at redressing a situation of real inequality”.[116] The right to non-discrimination “entitles each child to immediate assistance and support while the situation of the child and his or her best interests are being assessed”.[117]

The principle of right to life, survival and development requires the member states to create an environment where human dignity is respected. When assessing and determining the child’s best interests, the State “must ensure full respect for his or her inherent right to life, survival and development”.[118] These rights are important and also related to the child’s physical survival, security and health. To safeguard this important principle “requires that due attention and equal importance be given to the physical, psychological and social rights and needs of the child”.[119] The child’s right to life, survival and development is paramount when the “child’s best interests” are assessed and determined.

The “views of the child” principle is more about the right of the child to be heard. The right to be heard[120], is related to other articles under the CRC. These articles include in particular the “child’s right to seek, receive and impart information”[121] and other civil

[112] Article 2 of the CRC.
[113] Article 6 of the CRC.
[114] Article 12 of the CRC.
[115] Committee on the Rights of the Child, General Comment No. 14 (2013), par. 41.
[116] Committee on the Rights of the Child, General Comment No. 14 (2013), par. 41.
[117] R Hodgkin & P Newell, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, United Nations Children‘s Fund, 2002, p. 19.
[118] Committee on the Rights of the Child, General Comment No. 14 (2013), par. 41.
[119] This section draws significantly on the UNHCR Guidelines on the Formal Determination of the Best Interests of the Child, p. 36.
[120] Article 12 of the CRC.
[121] Article 13 of the CRC.

rights concerning "the freedom of thought, conscience and religion"[122] and the "freedom of association".[123] The principle imposes a legal obligation on member states to ensure that the child who is capable of forming his or her views has the "right to express those views in all matters affecting him or her, and that these views are given due weight in accordance with the age and maturity of the child".[124] Assessment of a child's best interests "must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child".[125] The right of the child to have his or her views heard depends on language and communication.

The Convention on the Rights of the Child that asserts that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[126]

The above cited article arguably does not construct specific rights or obligations but establishes an interpretation principle which must be taken into consideration by the decision makers in all actions and decisions that concern children. This is supported by Van Buren who argues that "article 3(1) of the CRC merely serves as a principle of interpretation which needs to be considered in all child-related matters".[127] The above cited article undoubtedly protect children to have their best interests considered in all actions or decisions that concern them, irrespective of whether they are made by public or private bodies. The "best interests of the child" must be given primary consideration in all child-related matters, not only by organs of the state, but even the private institutions. The provision above is unquestionably clear and created in unambiguous terms.

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[122] Article 14 of the CRC.
[123] Article 15 of the CRC.
[124] Article 12 embraces children's participation in social and political matters (Article 12.1) as well as in judicial and administrative proceedings (Article12.2).
[125] Committee on the Rights of the Child, General Comment No. 14 (2013), par. 43.
[126] Article 3(1) of the CRC.
[127] Van Buren '(note 109 above) 203.

Article 3(1) evidently requires all organs of state, legislative, administrative and judiciary and private institutions to take into consideration the “best interests of the child” in all child-related matters. The provision reflects “the seriousness with which the law treats children’s interests”.[128] Reference to "a primary consideration" denotes that the “child's best interests” are “not the overriding factor to consider, but should be considered amongst other competing or conflicting interests”.[129] It is important to stress that “Article 3(1) should be read together with other relevant rights, giving recognition to the universal, indivisible, interdependent and interrelated nature of the human rights of children”.[130]

Moyo argues that “the CRC states that the best interests of the child shall be ‘a’ primary consideration in order to avoid the elevation of the paramountcy principle beyond the reach of other important interests”.[131] The author further argues that the phrasing of article 3 of CRC shows that the “best interests of the child” will not “always be the single overriding factor as there may be [other] competing or conflicting human rights interests … between different groups of children and between children and adults”.[132] The principle cannot be considered in isolation but in the context of all the provisions of the CRC.[133]

Importantly, a reference is explicitly made to the “best interest of the child” in article 9;[134] article 10;[135] article 18;[136] article 20;[137] article 37(c);[138] and article 40(2)(b)(iii) of the Convention.[139] The CRC also refers to the “child's best interests” in the “Optional Protocol to the Convention on the sale of children, child prostitution and child

[128] A Moyo “Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child” (2012) AHRLJ143
[129] P Mabery ‘United Nations Convention on the Rights of the Child’ (2009) 319.
[130] Paragraph 6 of General Comment No 14.
[131] Moyo (note 128 above) 147.
[132] Moyo (note 128 above) 147.
[133] Hodgkin & Newell (note 116 above) 37.
[134] This article deals with issues of separation from parents.
[135] The article deals with issues of family reunification.
[136] Parental responsibilities issues are provided in the article.
[137] The issue of deprivation of family environment and alternative care is addressed in this article.
[138] The article makes provision on issues of separation from adults in detention.
[139]This article significantly focuses on issues of “procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law”.

pornography"[140] and in the "Optional Protocol to the Convention on a communications procedure".[141]

(a) Enforcement mechanisms of the Convention on the Rights of the Child (CRC)

The adoption of the CRC by the United Nations General Assembly brought with it the enforcement mechanism. The rights provided in the CRC are enforced by the Committee on the Rights of the Child, a treaty body established by the CRC. It is noteworthy that the functions and mandates of the Committee on the Rights of the Child are defined by the CRC. The treaty body is made up of experts from different state parties. In the paragraphs below, the functions and mandates of the treaty body serving as enforcement mechanism of the CRC will be discussed.

Committee on the Rights of the Child

The Committee on the Rights of the Child was established under Article 43 of the CRC to scrutinise progress made by member states to the CRC to achieve the realisation of their obligations. It is comprised of ten high standing experts who are specialists in the areas covered by the CRC. The Committee members work in their personal capacity and are elected by member states from among their nationals. The principal legal systems and equitable geographical distribution are taken into considerations when the Committee members are elected.

The Committee members are elected for a four-year term and can be re-elected only if they are re-nominated. The Committee is empowered to establish its own rules of procedure[142] and to elect officers of the Committee for a two years' period.[143] The Secretary-General of the United Nations has the responsibility to "provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention".[144] The Committee members usually meet every

[140] Preamble and Art 8 of the CRC.
[141] Preamble and Arts, 2 & 3 of the CRC.
[142] Article 43(8) of the CRC.
[143] Article 43(9) of the CRC.
[144] Article 43(11) of the CRC.

year and their meetings are held at United Nations Headquarters. In some cases, the Committee members can meet at any convenient place they deem fit.

Reports are submitted to the Secretary-General of the United Nations. The member states are required to submit reports "to the Committee on the measures they have adopted which give effect to the rights recognised by the Convention and on the progress made on the enjoyment of those rights".[145] The member states are obliged to submit their first reports within the period of two years after ratifying the CRC and other regular reports must be submitted after the end of every five years. In terms of Article 44(2), the reports must "indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations". Furthermore, the reports must also have necessary information in order to provide the Committee with a complete understanding of the implementation of the CRC in the country concerned.

The Committee is empowered by the CRC "to request from States Parties further information relevant to the implementation of the Convention".[146] It is the responsibility of the Committee to submit "reports on its activities, every two years, to the General Assembly, through the Economic and Social Council".[147] After the Committee submitted reports to the General Assembly, the States Parties are required to publish their reports to the members of the public in their own countries. Reports are not limited to states' activities on the implementation of the CRC. In some instances, reports may show the measures taken by the member states to ensure that the "best interests of the child" is safeguarded in their countries.

The Committee is permitted to call the specialised agencies, the UN Children's Fund and other competent bodies to give expert advice on the CRC's implementation. The invitation of the specialised agencies by the Committee is a way of fostering the implementation of the CRC in an effective manner and also to encourage co-operation by member states in the areas covered by the CRC. Furthermore, the Committee is empowered to call the "specialised agencies, the United Nations Children's Fund and other United Nations organs to submit reports on the implementation of the Convention

[145] Article 44(1) of the CRC.
[146] Article 44(4) of the CRC.
[147] Article 44(5) of the CRC.

in areas falling within the scope of their activities".[148] The Committee is allowed to make recommendations "to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child".[149] The Committee on the Rights of the Child is considered an effective enforcement mechanism of the rights protected under the CRC and including the "best interests of the child". This committee is empowered to hold the member states accountable for failing to ensure that rights provided under the CRC are protected and the "best interests of the child" is given primary recognition by all decision-makers when decisions affecting children are made. It is indisputable that the Committee on the Rights of the Child also serves as a watchdog on the protection of children's rights under the CRC.

2.7.2. The African Charter on the Rights and Welfare of the Child

On the 11th of July 1990 the Organisation of African Unity (OAU)[150] adopted the African Charter on the Rights and Welfare of the Child.[151] There were many factors that led to the adoption of the African Charter on the Rights and Welfare of the Child[152] by the OAU.[153] The United Nations Convention on the Rights of the Child played a notable role in the development of the ACRWC[154] during the late 20th century. Although the UNCRC was praised as a historic international instrument which explicitly recognised the "best interests of the child" principle and contained many provisions about children's rights, the instrument was seen as being too Western in its ideology, and therefore inadequate in addressing unique problems of African children.

In the African context, the CRC received criticisms for "carrying Eurocentric values, particularly regarding the obvious dependence on the Eurocentric idea of the

[148] Article 45(a-b) of the ACRWC.
[149] Article 45(c) of the ACRWC.
[150] On the 29th of November 1999, ACRWC came into effect. Shockingly, this international instrument waited for 9 years to be operational as African member states were reluctant to ratify it, despite the fact that is regarded as the most progressive human right instrument that address the rights of children.
[151] The African Charter on the Rights and Welfare of the Child was also referred as Children's Charter.
[152] African Charter on the Rights and Welfare of the Child is abbreviated as "ACRWC".
[153] In 2001 the Organisation of African Unity (OAU) was renamed the African Union (AU).
[154] On the 10th of October 1997 South Africa signed the ACRWC and ratified it on the 7th of January 2000.

family".[155] The instrument was failing to adequately safeguard children's interests in the African context. As Olowu observed, it was "difficult to rely solely on the CRC for regulation of the protection and care of the child in the African context".[156] As a result, "it became an essential part of transformation to introduce an instrument that would deal specifically with issues pertaining to children in the African context", which Kaime terms "culturalisation".[157]

The desire by African states for the culturalisation of the rights of children and reflection of African cultural values and heritage led to the adoption of the ACRWC. Teshome suggests that "the need for a "more elaborate" legal regime and for "an African touch to the overall concept of child rights" necessitated the adoption of the ACRWC.[158] The ACRWC is regarded as "the second international and the first regional binding instrument that acknowledges children as bearers of special rights".[159] The ACRWC as observed by some scholars "is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children in 48 articles".[160] It can be argued that the ACRWC and the CRC are the two most important international human rights instruments that cover the whole range of legal rights.

The ACRWC and the CRC supplement each other and both essentially make provisions for the safeguard of the "best interests of the child" and the well-being of children. The ACRWC lists children's rights and also specifies protections which state parties should provide for the child's welfare. The ACRWC undoubtedly signifies a diverse way of viewing African children and the relations between children and the society. This regional instrument as observed by Amoh was "intended to take into account the economic, social, political, cultural and historical experience of African

[155] RT Nhlapho 'International protection of human rights and the family: African variations on common theme (1989) 3(1) IJLPF 2.
[156] Olowu (note 105 above) 128.
[157] T Kaime The African Charter On The Rights And Welfare Of The Child A Socio-Legal Perspective (2009) 2.
[158] T Teshome 'The African Charter on the Rights and Welfare of the Child' (1999) unpublished article 8.
[159] DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 IJCR 157.
[160] CO Amoh 'The Uniqueness of the African Charter on the Rights and Welfare of the Child' https://www.academia.edu/10017380/The_Uniqueness_of_the_African_Charter_on_the_Rights_and_Welfare_of_the_Child (accessed on 11 August 2019).

children, and provide a distinctively African framework for the protection and promotion of children's rights".[161] Some authors[162] have observed that the ACRWC deviates from the UNCRC in many respects, such as the age of conscription into the army.[163]

In literature, the ACRWC has been described as "one of the most progressive of the treaties on the rights of the child".[164] The ACRWC is a "region-focused instrument and is crafted in a manner that it can address the problems of African children".[165] Chirwa regards the ACRWC as the first regional binding human rights instrument that recognises a child as a holder of special rights.[166] Examples of the special rights include the right to life, freedom of expression, and right to freedom of thought, conscience and religion. In the preamble of the ACRWC, it is acknowledged that "most of the African children remain under critical situations due to the unique factors of children's socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger". Furthermore, the preamble maintains that African children need special safeguards and care. There is no doubt that the authors of the ACRWC were successful in producing a document "which is very unique and original, recognising any important document that could protect the African child".[167]

The African Charter is based on four fundamental principles which are; "non-discrimination";[168] "best interests of the child";[169] "right to life, survival and development";[170] and "the views of the child".[171] It is worth mentioning that the four fundamental principles assist with the interpretation and implementation of the ACRW as a whole. Article 4 (1) African Children's Charter establishes this expression: "in all

[161] Amoh (note 160 above) 1.
[162] Degol and Dinku (note 89 above) 330.
[163] Article 22(2) of the Charter prohibits any act of recruitment of a child to an armed conflict, while Articles 38(2) and 38(3) of the UNCRC allow the participation of children aged 15 to take part in armed hostilities.
[164] Olowu (note 104 above) 130.
[165] A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) the International Journal of Children's Rights 180.
[166] Chirwa (note 159 above) 157.
[167] Amoh (note 160 above) 7.
[168] Article III of the ACRWC.
[169] Article IV of the ACRWC.
[170] Article V of the ACRWC.
[171] Article IV (2) of the ACRWC.

actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

The use of the word "*the primary consideration*" in the above cited article shows that the "best interests of the child" is offered better protection in the African Charter on the Rights and Welfare of the Child. The ACRWC is more firm than the CRC because it provides that the "best interests of the child" shall be "*the primary consideration*",[172] while the convention provides that the "best interests of the child" shall be "*a primary consideration*".[173] The use of "*the primary consideration*" and not "*a primary consideration*" places more weight on the "best interests of the child". Mezmur opines that the "best interests of the child" is not one consideration amongst others, but is the primary consideration.[174] Numerous writers have commented on the difference in the wording between the ACRWC and the CRC. As Chirwa observed, "the ACRWC uses the words 'the primary consideration' in all child-related matters, the CRC states that children are 'a primary consideration'".[175] The "best interests of the child" is "identified as the criterion against which a state party has to measure all aspects of its laws and policy regarding children".[176]

The provision of Article 4(1) evidently illustrates the broad application of the "best interests of the child", as all decision makers are morally obliged to apply the principle in all matters affecting children. There is no doubt that the principle gives superior protection to children. Furthermore, the usage of the phrase 'the primary consideration', basically implies that in all matters about children's interests, the "best interests of the child" is to be considered. It is fairly established in human rights discourses that an obligation states assume in connection with the "best interests of the child" involves "all branches of government' at the executive, legislative and judicial levels".[177]

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[172] Article 4(1) of ACRWC.
[173] Article 3(1) of the CRC.
[174] BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game' (2008) *SAPR/PL* 18.
[175] Chirwa (note 159 above) 28.
[176] F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C Davel (Ed) Introduction to Child Law in South Africa (2000) 219.
[177] Committee on the Rights of the Children, General comment No.14, note 85, para.14, 25.

(a) Enforcement mechanisms of the African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child (ACRWC) has enforcement mechanism. The rights provided in the ACRWC and the obligations imposed on the state parties are enforced by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), a treaty body created in terms of the provisions of the ACRWC. The functions and mandates of the ACERWC are defined by the ACRWC, and importantly the treaty body has tools for ensuring that there is compliance by the state parties on the provisions of the treaty. The ACERWC is undoubtedly an effective enforcement body of the rights protected under the ACRWC and including the "best interests of the child". The member states to the ACRWC are held accountable by the ACERWC for failing to ensure that rights provided under the ACRWC are safeguarded. It is safe to argue that the member states are held accountable by the ACERWC for their failure to ensure that the "best interests of the child" is given primary recognition by all decision-makers when decisions affecting children are made. The paragraphs below will discuss the functions and mandates of the ACERWC, as a treaty body of the ACRWC.

African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was created under Article 32 of the African Charter on the Rights and Welfare of the Child "to promote and protect the rights and welfare of the child".[178] It is comprise of "11 members of high moral standing, integrity, impartiality and competence in matters

[178] In terms of Article 42(a) of the ACRWC, in promoting and protecting the rights enshrined in the Charter, the Committee perform the following functions:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

of the rights and welfare of the child, who serve in their personal capacity".[179] The Assembly of Heads of State and Government elect Committee members through a secret ballot from people nominated by the State Parties to the ACRWC.[180] The elected members are permitted to serve only for a period not more than five years. It is of note mentioning that the Committee members are eligible to stand for re-election.

The Committee members when executing their duties enjoy "the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation of African Unity".[181] This is to ensure that they execute their duties without fear and favour. The Committee is responsible in monitoring the implementation of the ACRWC. The protection of the rights enshrined in the ACRWC is monitored by the Committee. The Committee may interpret the provisions of the ACRWC when requested to do so by the State Parties.[182] In some cases the Committee members may be required to perform other task entrusted to them by Assembly of Heads of State and Government or other organs of the OAU or the United Nations.

The Committee receives reports through the Secretary-General of the OAU from State Parties to the ACRWC. The State Parties are required to submit their first reports within two years after rectifying the ACRWC and thereafter to submit their regular reports every three years. State Parties in their reports show on the measures they "have adopted which give effect to the provisions of the Charter and on the progress made in the enjoyment of these rights".[183] Every report submitted to the Committee must contain necessary information about the implementation of the Charter and "indicate factors and difficulties, affecting the fulfilment of the obligations contained in the Charter".[184] This is to ensure that the Committee is provided with complete understanding about how the State Parties implement the ACRWC.

[179] Article 33(1-2) of the ACRWC.
[180] Article 34 of the ACRWC.
[181] Article 41 of the ACRWC.
[182] Article 42(c) of the ACRWC.
[183] Article 43(1) of the ACRWC.
[184] Article 43(2) of the ACRWC.

The communication to the Committee can be submitted by any person, group, and non-governmental organisations. It is worth mentioning that the organisations that are permitted to submit communication to the Committee, are those recognised by the OAU, State Party, or the UN. Every communication submitted to the Committee must show the details of the author, and is treated with confidentiality.[185] Unlike the Committee on the Rights of the Child, the ACERWC allows individual complaints of human rights violations and for that reason, it can be described as the most accessible enforcement treaty body of children's rights protection in the African continent.

The Committee is empowered under Article 45, "to use appropriate method of investigating matters falling within the domain of the Charter". The Committee is empowered to make request for any information relevant from State Parties to the implementation of the ACRWC. The Committee is also empowered to choose any suitable method to investigate the measures that the State Party has adopted to implement the ACRWC. After every two years, the Committee is obliged to submit a report about its activities and communications made under Article [44] of the ACRWC, "to each Ordinary Session of the Assembly of Heads of State and Government".[186] The report is published by the Committee after the Assembly of Heads of State and Government has considered it. The State Parties have responsibilities publish reports members of the public in their respective countries.

2.8. Conclusion

The "best interests of the child" is a well-known legal principle and documented in several human rights instruments. The "best interests of the child" is codified in both binding and non-binding international legal treaties, and plays a central role in protecting the rights of children. The ratification of the Convention on the Rights of the Child by almost all member states in the United Nations General Assembly except Somalia and the United States of America is a strong indication of the universal acceptance of the "best interests of the child" principle. Since the principle is

[185] Article 44(2).
[186] Article 45(2).

universally recognised and applied in all actions and decisions concerning children, one can argue that the principle should be regarded as a customary international law.

CHAPTER 3: THE LEGAL FRAMEWORK ON THE "BEST INTERESTS OF THE CHILD" IN SOUTH AFRICA

3.1. Introduction

In the post-apartheid South Africa, the "best interests of the child" is afforded constitutional and legislative protection. The incorporation of the "best interests of the child" principle in the 1996 Constitution[187] signifies the prominence of this widely recognised principle. The Children's Act 38 0f 2005 has incorporated the "best interests of the child". The Children's Act prescribes important factors that must be taken into account by the decision-makers. However, the Children's Act applies to family-related matters, and many factors recommended in the Act unfortunately cannot find practical application in the education context. The SASA is silent on the "best interests of the child", but makes provisions for the "best interests of the learner" and the "best interests of the school". The SASA is unclear on the standard that must be applied by the SGBs to determine the "best interests of the learner" and the "best interests of the school". There is the distinction between a learner and a child. The word "learner" is defined as any person receiving education or obliged to receive education in terms of SASA and the word "child" refers to a person under the age of 18 years. It is noteworthy that a child may be a learner in one instance and in other instances a learner may no longer qualifies as a child and his/her best interests will not be treated as the "best interests of the child".

The South African courts have been inconsistent in applying the "best interests of the child", as some eminent Constitutional Court judges regard it as an independent right[188] while others use it as a standard[189] and a general guideline[190] that assist the courts. This chapter focuses on the legal framework on the "best interests of the child" in South Africa. The first part of this chapter will deal with the constitutional framework on the "best interests of the child". The Constitution of South Africa will be analysed and thoroughly discussed on the "best interests of the child" principle. The Courts'

[187] Constitution of the Republic of South Africa, 1996.
[188] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 17.
[189] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 18.
[190] *S v M*, para 12.

approaches on the "best interests of the child" will be critically analysed to draw a conclusion on the approach which serves the child better.

3.2. The Constitution and the "best interests of the child"

In South Africa, the "best interests of the child" was not documented in the constitutional development of the pre-apartheid and apartheid period. The post-apartheid constitutional dispensations were characterised by the recognition of the rights of children and the codifications of the "best interests of the child" as a legitimate right. The 1909 Constitution, the 1961 Constitution and the 1983 Constitution were silent on the "best interests of the child" in South Africa. The 1993 Constitution was instrumental in affording the "best interests of the child" a constitutional status and protection in the South African municipal law. The 1993 Constitution incorporated the "best interests of the child" in section 30(3) and this was an indication that the principle gained constitutional acceptance in South Africa.

The "best interests of the child" is codified in the South African law and the codification of the principle evidently shows how South Africa is committed in fulfilling its international obligation of developing legislations and policies to protect children's rights. The Constitution explicitly provides that *"a child's best interests are of paramount importance in every matter concerning the child."*[191]

At face value, the above section seems to be prescribing that in all matters about the child, the "child's best interests" need to be considered. The usage of the phrase "paramount importance" signifies that it must be the most important consideration or first thing to be considered before anything else. Even though the Constitution does not expressly specify some of the role players who must apply the "best interests of the child" in issues concerning children, the phrasing of section 28(2) implies that the "best interests of the child" must be considered by every decision-maker. A decision-maker can be a principal who performs his professional duties in a school or a member of the SGB who exercises the powers vested in a governing body by legislation. The wording of section 28(2) imposes a constitutional obligation on every decision-maker to consider what is best for the child. The use of the word "paramount" shows that the

[191] Section 28(2).

principle in the Constitution is of greatest significance, and must always be taken into account in all matters affecting children.

The term "child" refers "to a person under the age of 18 years".[192] Section 28(2) applies to every child as an individual and imposes a legal responsibility on all decision-makers to consider the "child's best interests" as a paramount consideration in individual decisions. It is worth mentioning that the word "child" does not only mean that the "best interests of the child" must be assessed individually, but also in general or as a group if a decision affects children as a group. The "best interests of the child" is applied exclusively to all children under the age of 18 years and those over 18 years are not entitled to the benefits of the principle irrespective of their circumstances. In this way, the principle is a qualified right as it is restricted to all children under 18 years.

3.3. Legislation on the "best interests of the child"

Children's Act 38 of 2005

The Children's Act[193] broadly sets out the best interests" principle and the factors to take into consideration when making a decision in the "child's best interests". One of

[192] Section 28(3) of the Constitution. It is noteworthy that the definition of the word 'child' in section 28(3) of the Constitution is same to a definition provided under section 30(3) in the Interim Constitution.
[193] Children's Act 38 of 2005.

the objects[194] of the Children's Act[195] is to give effect to the principle "that the best interests of the child are of paramount importance in every matter concerning the child"[196]. In the general principles, the Act[197] expressly states that "all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights". The "best interests of the child" standard as provided in the Children's Act needs be promoted and respected by the decision-makers in all actions about children.[198] The phraseology of the Children's Act in Section 7 undoubtedly classifies the "best interests of the child" as a standard and not as a legitimate right.

The Children's Act provides that the views of the child's family can be considered in any matter about the child provided that it is in the "best interests of the child"[199]. However, the Act is silent on whether the views of the child need be considered before a decision affecting such a particular child is taken. The Children's Act is crafted in a way that the opinion of the child's family takes precedence over the opinion of the child involved in the matter. The Children's Act does not give the child a right to be heard in

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[194] Other objects of the Children's Act are expressly stated in the following:
"(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;
(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." Sect 2(a-i)

[195] The Children's Act was signed on the 8th of June 2006. Certain sections of the Act came into operation on the 1st of July 2007 while other remaining sections came with effect on the 1st of April 2010.

[196] Section 2(b)(iv) of the Children's Act.

[197] Section 6(2)(a) of the Children's Act.

[198] Children's Act provides number of factors under section 7 that must be considered when a "best interest of the child" standard is applied.

[199] Section 6(3) of the Children's Act.

a matter affecting him/her and in this instance, no account is taken of the age of the child or his/her level of maturity. The Children's Act does not provide a precise definition of the concept "best interests of the child". However, the Act comprehensively enumerates the fourteen factors[200] that must be taken into consideration when the "best interests of the child" standard is applied.

The inclusion of the fourteen factors in the Children's Act demonstrates an effort to give the "best interests of the child" a meaningful and practical content. Despite the vagueness of the concept, the factors enumerated in the Act will serve as guidelines and definitely assist those entrusted with the authority to make decisions affecting children. It is indisputable that the factors listed in section 7 of the Children's Act will effectively promote the "best interests of the child" in the context of the family,

[200] Section 7 of the Children's Act provides the following factors:

"(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;
(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".

particularly where children are to be separated from their parents. In other words, most of the factors listed in the Act are relevant in family-related matters like divorce and cannot be applicable in most school-related matters, particularly where SGBs are to make decisions affecting learners who happen to be children. However, there are some factors that may be applicable in the schooling context and may perhaps assist the school governors and other stakeholders in schools to make school-based decisions that are in the "best interests of the child".

The "child's age, maturity and stage of development; gender; background and disability"[201] are some of the factors that may be considered in the school context by the decision-makers before making decisions that can possibly affect the child. During the school disciplinary hearings, the SGB may take into account "the nature of the personal relationship between the child and the parents"[202]; "the attitude of the parents towards the child; the exercise of parental responsibilities and rights in respect of the child"[203]; "the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs"[204] before recommending to suspend or expel the learner. It makes sense for the school governors to consider the "child's physical and emotional security and child's intellectual, emotional, social and cultural development".[205] These factors are also listed in the Children's Act and would possibly assist in schools where the school governors are required to take school-based decisions that are in the "best interests of the child".

The factors listed in the Children's Act have some similarities with the thirteen factors laid down in *McCall v McCall*[206]*.* The *McCall*[207] judgment undeniably contributed in the

[201] Section 7(g) of Children's Act.
[202] Section 7(a) of Children's Act.
[203] Section 7(b) of Children's Act.
[204] Section 7(c) of Children's Act.
[205] Section 7(h) of Children's Act.
[206] *McCall v McCall* 1994 (3) SA 201(C).
[207] In *McCall v McCall,* the court laid down the following factors:

> "(a) the 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,

formulation of the factors under Section 7 of the Children's Act. However, the factors listed in the Children's Act are not exhaustive and decision-makers ought to balance the diverse factors and competing interests when taking decisions about what are in the children's best interests.

The "best interests of the child" is a decisive factor which the court must consider before an order is made for assignment of "contact with the child or care of the child"[208].Where an agreement about parental responsibilities and rights are to be registered and made a court's order, the court and family advocate must be satisfied that such an agreement is in the "child's best interests"[209]. The fact that the court can only grant an order concerning a child after considering the "child's best interests" suggests that the principle is a conclusive factor in child-related matters. Furthermore, the "best interests of the child" is regarded as the decisive factor in making decisions about removal of children to temporary safe care by court order[210].

The insertion of the "best interests of the child" as a determining factor in numerous sections of the Children's Act shows South Africa's commitment in promoting and protecting children's rights. While the "best interests of the child" is provided in the Children's Act, SGBs will find it challenging to apply the "best interests of the child" standard in schools, as most of the factors listed in the Children's Act are irrelevant in

(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,
(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 particular circumstances the child's preference should be taken into consideration,
(l) the desirability or otherwise of applying the doctrine of same-sex matching, particularly here, whether the minor children should be placed in the custody of their father and
(m) any other factor which is relevant to the particular case with which the court is concerned".

[208] Sec 23(1)(a-b) of the Children's Act.
[209] Sec 22(5) of the Children's Act.
[210] Sec 151(8) of the Children's Act.

the school-related cases. The "best interests of the child" standard as provided in the Children's Act will be more relevant in family-related cases.

South African Schools Act 84 of 1996[211]

The SASA[212] came into force on the 15th of November 1996 and brought far-reaching changes in the entire schooling system. The preamble states that South Africa "requires a new national system for schools to redress past injustices in educational provision and to provide education of progressively high quality for all learners". The preamble further states that a new national system for schools is needed to "combat racism and sexism and all other forms of unfair discrimination and intolerance". The SASA aspires for a new education system that will "contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators". The SASA aspires further for a new education system that "will promote parents' acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State".[213] From the phrasing of the preamble, one can easily draw a conclusion that the SASA was drafted in accordance with the principles of the 1996 Constitution and wanted to advance the constitutional project of protecting and promoting the fundamental human rights entrenched in the Bill of Rights.

The SASA is applicable to "school education in the Republic of South Africa".[214] It regulates all South African public schools and non-public schools. The SASA does not list children's rights that must be prioritised in schools. It is undeniable that the SASA was promulgated to ensure the realisation of the right to education. It is questionable that the SASA was promulgated to ensure that the "best interests of the child" is realised in schools. The drafters of the SASA did not have any intention to have the "best interests of the child" promoted in schools. Their failure to make mention of the concept illustrates that they were ignorant of section 28(2) of the Constitution when

[211] Hereinafter referred to as the "SASA".
[212] The Act was assented to by former President Nelson Mandela on the 6th of November 1996.
[213] Preamble of the SASA.
[214] Section 2(1) of the SASA.

the SASA was crafted, and evidently did not have any intention to have the "best interests of the child" promoted in schools or to mandate the SGBs to promote it. The SASA[215] places a statutory obligation on parents of learners in ensuring that their learners attend school. The statutory obligation imposed by the SASA on parents[216] of learners is one of the enforcement mechanisms on the right to education.[217] The legislators should have extended this statutory obligation to members of SGBs to give the learners' right to education practical protection. It makes sense to entrust SGBs with this duty because there are many child-headed families in South Africa where children are orphans with no legal guardians to look after their best interests or where children are left alone by their parents who migrated to other parts of the country for job opportunities. It is irrefutable that if SGBs are mandated by the SASA to give the "best interests of the child" the primary consideration, they will be in a better position to ensure that their learners who are enrolled and prospective learners are attending school.

The Head of Department is obliged by the SASA to investigate and take appropriate measures in a situation where a school-going age child is failing to attend school or where such a child is not enrolled.[218] The SASA empowers the Head of Department to issue parents of the learners written notices requiring learners to be brought to school.[219] It is doubtful that the Head of Department will have capacity to issue written notices to all parents of the learners who fail to attend schools, considering the fact that some parents of these learners will be in other provinces where they work. The SASA is unclear on who must report a learner's absence to the Head of Department and the time frame within which the written notices must be served on parents by the

[215] In terms of Section 3(1) of the SASA, "every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first".

[216] The SASA define the concept 'parent' as "the parent or guardian of a learner; the person legally entitled to custody of a learner; or the person who undertakes to fulfil the obligations of a parent or legal guardian towards the learner's education at school".

[217] Other mechanism provided in the SASA is the criminalisation of conduct by any person aimed at preventing the child of school-going age from accessing compulsory education, without a valid reason. And the fact that education is compulsory for children between seven and fifteen years, also serve as enforcement mechanism on the right to education.

[218] Section 3(1))a-b) of the SASA.

[219] Section 3(1)(c) of the SASA.

Head of Department. The SASA is silent on whether a written notice must still be served on parents of a child where a child is not enrolled in a school due to problems of school policies adopted by the SGB. For example, a learner may be at home due to the fact that the SGB refused to admit her/him with dreadlocks which serve as expression of the religion of such a learner. Furthermore, the SASA is silent on whether a written notice can be served on members of SGBs who directly or indirectly caused a child not to be in school.

The SASA can serve the learners effectively if it obliges SGBs to give the "best interests of the child" the primary consideration in every matter about the enrolled learners, and prospective learners in schools. It is undeniable that the "best interests of the child" will not be compromised by SGBs if it is made their statutory obligations to ensure that all learners enrolled in their schools or children between 7 to 15 years residing where their schools are located, are attending schools regularly. The SASA should have entrusted SGBs with a duty to investigate and issue written notices on parents whose children of school-going age enrolled in their schools are failing to attend school. In situations where a parent ignores a written notice, members of SGBs could be empowered to bring the matter to the Head of Department's attention. In that way, SGBs will be meaningfully protecting the "best interests of the child" in their respective schools.

The SASA[220] makes it an offence for a parent who without a valid reason fails to subject his/her child to compulsory education after a written notice is issued for compliance by the Head of Department.[221] The SASA also makes it an offence "for any person who prevents a learner, without just cause, who is subject to compulsory attendance from attending a school".[222] The SASA imposes some form of repercussions to parents who without valid reasons fail to subject their children to compulsory education. However, the SASA does not make it an offence to members of SGBs who without a valid reason prevent children from compulsory education.

[220] The SASA state that "parent who without just cause prevent compulsory attendance of a learner is guilty and liable on conviction to a fine or to imprisonment for a period not exceeding six months".
[221] Section 3(6)(a) of SASA.
[222] Section 3(6)(b) of SASA.

The analysis of court decisions and selected media reports in the study will show that children are prevented by the conduct of SGB' members than their parents' conduct from attending schools. The study will further show that children find themselves stuck at home and not attending schools because of the conduct of SGB' members who denied them access to compulsory education by reasons related to school policies. Some reasons are not valid at all but still there are no repercussions on the members of SGBs who prevented children from compulsory education. As a matter of fact, the conducts of SGB' members in preventing children from attending compulsory education is not in their best interests and infringes their right to education. Furthermore, it can be argued that when the SGBs deny children access to compulsory education, their decisions are taken without taking into account the "best interests of the child" as required by the Constitution. Therefore, SGB members fail to satisfy their constitutional obligations of giving the "best interests of the child" the primary consideration when making decisions affecting children or learners in schools.

The SASA empowers the Head of Department "to exempt a learner entirely, partially or conditionally from compulsory school attendance if it is in the best interests of the learner".[223] Where learners are exempted from compulsory education, all names must be recorded in a register maintained by the Head of Department. The SASA does not prescribe a standard that must be considered by the Head of Department before learners are exempted from compulsory attendance. The SASA empowers the Head of Department to grant a learner exemption from compulsory attendance if "it is in the best interests of the learner". However, the SASA does not define the "best interests of the learner", and there are no factors provided, that the Head of Department must weigh before a decision about a learner's exemption is reached. It can be argued that section 4(1) is vague and its vagueness poses a risk on a learner who may be legitimately in need of exemption from compulsory attendance as a decision must be taken by the Head of Department who may not even know or understand what is best for that particular learner. The legislators in enacting the SASA should have expanded the provision in section 4(1) in order to give significant effect to the "best interests of the child".

[223] Section 4(2) of the SASA.

The SASA prohibits discrimination in public schools. In terms of the SASA, "public schools must admit learners and serve their educational requirements without unfairly discriminating in any way".[224] SGBs play central roles when learners are admitted in the public schools. SGBs are the legislators in schools and they are vested with policy-making authority by the SASA. The SASA, however, does not permit SGBs to "administer any test related to the admission of a learner in public schools".[225] The SASA prohibits SGBs from directing or authorising the school principals or any other person to administer admission tests.[226]

It is indisputable that the drafters of the SASA in enacting section 5(2) wanted to safeguard the children's best interests and to ensure that learners' right to education, equality, religion and culture among others, are not infringed by the members of SGBs who are vested with more powers on schools' admission processes and policies. Although the SASA provides that learners may not be unfairly discriminated in public schools, the SASA is silent on sanctions that may be imposed on the members of SGBs who may discriminate against learners and refuse them access to public education.

SGBs perform important functions in the South African schooling system. One of the most important functions[227] of SGBs is "to promote the best interests of their schools

[224] Section 5(1) of SASA.

[225] Section 5(2) of SASA.

[226] In terms of section 5(3) of the SASA, "no learner may be refused admission to a public school on the grounds that his or her parent (a) is unable to pay or has not paid the school fees determined by the governing body under section 39; (b) does not subscribe to the mission statement of the school; or (c) has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner".

[227] Other functions of the SGBs are to:

> "(b) adopt a constitution;
> (c) develop the mission statement of the school;
> (d) adopt a code of conduct for learners at the school;
> (e) support the principal, educators and other staff of the school in the performance of their professional functions;
> (f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;
> (g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;
> (h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;

and strive to ensure its development through the provision of quality education for all learners at their schools".[228] SGBs promote best interests of their learners and their schools by adopting admission policies, codes of conduct, language policies, religious policies, pregnancy policies and other important policies. SGBs are not duty-bound to promote the interests of children who are not enrolled as learners in their respective schools. SGBs are statutorily required to promote in best interests of their learners and their schools. It is arguable that children who may be applying for admission are not considered learners as they are not yet enrolled, and SGBs are not obliged to serve the best interests of such children in terms of the current framework of the SASA.

The SASA makes use of the "best interests of the learner" and "best interests of the school" instead of the phrase "best interests of the child".[229] SGBs have statutory obligations in terms of the SASA's provision to promote the best interests of their learners and their schools. The use of the phrases "best interests of the learner" and "best interests of the school" in the SASA without precise definitions is unfortunate in the public education and can be unjustifiably invoked by some members of SGBs to exclude learners in accessing public education. For example, the SGB may refuse to admit a child arguing that the school has reached its maximum carrying capacity and it will not be in the best interests of their learners and the school to admit additional learners. It is hard to imagine a situation where a five-year-old child is stranded at home after being rejected by the school, which was acting in its learners' best interests. Who then must promote the "best interests of the child" who is not yet admitted in a school, but legitimately seeking admission? Is the "best interests of the learner" more important than the "best interests of child"? Is the "best interests of the learner" and the "best interests of the child" the same thing? Can the "best interests of the child" be

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(i) recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 (Proclamation No. 138 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);
(j) recommend to the Head of Department the appointment of non-educator staff at the school, subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);
(k) at the request of the Head of Department, allow the reasonable use under fair conditions of the facilities of the school for educational programmes not conducted by the school;
(l) discharge all other functions imposed upon the governing body by or under this Act."
Section 20(1) (b-l).

[228] Section 20(1)(a) of the SASA.

[229] Section 4(1) of the SASA.

ignored in order to promote the best interests of the school? How does one draw a line between these competing interests?

The SASA's silence on the "best interests of the child" allows unscrupulous SGBs to exclude certain groups of children or learners from accessing education and consequently infringing their constitutional rights, particularly the right to education. SGBs are competent bodies entrusted with powers to adopt school policies in the best interests of their schools and their learners[230], but many of the provisions in their policies are not always promoting the "best interests of the child".[231] In other words, the school's best interests and learners' best interests may conflict with the principle of the "best interests of the child". The SASA's failure to expressly make provision on the "best interests of the child" makes it difficult for SGBs to take into account what is best for the child before reaching a decision which affect such a child. Evidently, there is a serious need for the "best interests of the child" to be incorporated in the SASA. The incorporation of the principle in the SASA will not only assist SGBs in making the right decisions that benefit all children in the schooling system, but will also strengthen the protection of other constitutional rights entrenched in the Bill of Rights.

3.4. Case law on the "best interests of the child"

Since the promulgation of the 1996 Constitution, section 28(2) was interpreted in number of Constitutional Court cases. The courts adopted different approaches on the meaning and application of the "best interests of the child" in the Constitution. Some courts accepted the "best interests of the child" as an independent right[232], while others interpreted it as a standard.[233] The "best interests of the child" was called a general

[230] In terms of Section 20(1)(a) of the SASA, "the SGB must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school". There is no doubt that when the SGB is promoting the best interests of the school, it also promoting learners' best interests at the school.

[231] For example, in the *MEC for Education: Kwazulu-Natal and Others v Pillay, the SGB's Code of Conduct was in conflict with Pillay's best interests to express her religion and culture by wearing a* nose stud. Another example can be found in a case of *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* where the schools' pregnancy policies adopted by the SGBs were not in the best interests of the pregnant learners.

[232] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 17.

[233] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 18.

guideline[234] that assists the courts by the majority of the Constitutional Court. In some cases, the Courts used the "best interests of the child" as both a constitutional right and a general guideline. Arguably, the "best interests of the child" is a complicated concept and the Constitutional Court is inconsistent in interpreting it and extends the confusion about the meaning of the concept in the South African constitutional context. In this section, important Constitutional Court cases that analysed the "best interests of the child" and adopted different approaches, will be briefly discussed.

Minister of Welfare and Population Development v Fitzpatrick and Others

In *Minister of Welfare and Population Development v Fitzpatrick and Others,*[235] Mr Benedict Paul Fitzpatrick and his wife, Mrs Sara Jane Fitzpatrick wanted to adopt a South African child. The couple were British citizens and had been living in South Africa for years. Unfortunately, non-South African citizens were not permitted by law to adopt children in South Africa. Section 18(4)(f) of the Child Care Act completely prohibited the non-citizens from adopting children born of South African citizens. It also prohibited adoption of children by people who have not applied for certificates of naturalisation but who possessed necessary residential documents to be granted citizenship of South African.

Mr and Mrs Fitzpatrick approached the Cape of Good Hope High Court to apply for an order to declare section 18(4)(f) as inconsistent with the Constitution and invalid. They also applied for an order to be recognised as the child's joint guardians and for an award of joint custody and control of the child. The High Court, consequently, ruled in their favour and declared section 18(4) (f) of the Child Care Act unconstitutional and invalid. The Court also made an order for the suspension of invalidity order for two years. The Court appointed both Mr and Mrs Fitzpatrick as the child's joint guardians and subsequently awarded them joint custody and control of the child. The Minister for Welfare and Population Development then approached the Constitutional Court to have the order of the High Court confirmed.

[234] *S v M*, para 12.
[235] 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).

The Constitutional Court was required to deal with two broad issues. First, the Court had to decide whether the provisions of section 18(4)(f) were conflicting with the Constitution. Second, the Court had to determine the form of order that should be made if it found that section 18(4)(f) conflicted with the constitution and, in particular, whether an order of invalidity should be suspended.

The Constitutional Court confirmed the High Court's decision that section 18(4)(f) of the Child Care Act was not consistent with the Constitution. It was confirmed by the Court that section 18(4)(f) of the Child Care Act is invalid to the extent that it constitutes an absolute proscription of the adoption of children born of South African citizens by non-citizens or people who have not applied for citizenship but qualified for naturalisation. However, the Court set aside the order of suspension of invalidity which was granted by the High Court. No order to costs was made by the Court.

The Constitutional Court analysed in great length the "best interests of the child" as provided in the Constitution. According to the majority of the Court, the "best interests of the child" in its plain meaning "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".[236] It was concluded that "the provisions of section 28(2) creates a right that is independent of those specified in section 28(1)".[237] This approach identifies the "best interests of the child" as a legitimate independent right as opposed to a standard. The "best interests of the child" as a legitimate independent right enjoys a legal status like other constitutional rights.

The "best interests of the child" was used by the Constitutional Court to declare the provisions of section 18(4)(f) of the Child Care Act as unconstitutional and invalid. As the Court observed, the provisions of section 18(4)(f) were "too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens".[238] The Court concluded that "provisions of section 18(4)(f) did not give paramountcy to the best interests of children and were inconsistent with the provisions of section 28(2) of the

[236] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 17.
[237] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 17.
[238] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 20.

Constitution and hence invalid".[239] The Court accepted that the "best interests standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law".[240] The Court recommended that the standard should be applied in a flexible way as individual circumstances will determine the factors that secure the best interests of a child. The Court adopted a different approach of recognising the "best interests of the child" as a standard, and this was contrary to the earlier approach where "best interests of the child" was accepted as an independent right.

In this case the Court adopted two approaches on the "best interests of the child". First, the Court accepted the "best interests of the child" as an independent right in the Constitution. Second, the Court accepted the "best interests of the child" as "a standard which has never been given exhaustive content in either South African law or in comparative international or foreign law".[241] Although the Court can be praised for using the "best interests of the child" to declare the provisions of section 18(4)(f) of the Child Care Act as unconstitutional and invalid, the Court's approaches cannot be celebrated. The Court was, undoubtedly, confused about whether "best interests of the child" is a constitutional right or a standard.

The Court misdirected itself by adopting two conflicting approaches on the "best interests of the child". The Court's interpretation arguably cannot assist SGBs in understanding their roles of promoting the "best interests of the child" in schools. If the "best interests of the child" is applied in schools by SGBs as a legitimate independent right, its application will carry more constitutional weight. However, if the "best interests of the child" is applied as a standard in schools by SGBs, its application will consequently carry less weight due to the following reasons. Firstly, SGBs are likely to prioritise the constitutional rights and to give the principle a second preference. Secondly, SGBs are likely to ignore the principle as it will not be carrying a constitutional status. Thirdly, parents are unlikely to resort to the costly legal battles with SGBs to protect a mere principle, of no constitutional worth. Lastly, if the "best interests of the child" is applied as a standard, it will be reduced into an empty phrase

[239] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 20.
[240] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 18.
[241] *Minister of Welfare and Population Development v Fitzpatrick and Others* para 18.

with no enforcement mechanism, and decision-makers will be more likely to disregard it when they make decisions affecting children.

S v M[242]

In 2002 M was convicted by the Wynberg Regional Court on 38 counts of fraud and four counts of theft. For the purpose of sentence, the Regional Court took all the counts together and the total amount involved was R29 158, 69. At the time of her conviction, M was aged 35 years and unmarried. She was a single mother with three children aged 8, 12, and 16 respectively. Although her attorney made strong pleas that M should not be imprisoned, the Court, consequently, sentenced her directly to four years in prison. M applied for leave to the High Court to appeal her sentence. The Regional Court refused to grant bail pending an appeal.

The Cape High Court granted leave to appeal and M was released on bail, after being in jail for three months. The High Court found that she was wrongly found guilty on a count of fraud which involved an amount of R10 000. The High Court further changed M's sentence in terms of section 276(1)(i) of the Criminal Procedure after considering that the total amount was reduced to R19 158, 69. The effect of this change was that the Commissioner for Correctional Services could authorise M's release under correctional supervision after she had served eight months' imprisonment. Dissatisfied with the decision of the High Court, M applied for leave to appeal against the sentence. Unfortunately, the High Court refused to grant her leave to appeal.

M then approached the Supreme Court of Appeal for leave to appeal against the High Court's order of imprisonment. Sadly, her request was turned down by the Supreme Court of Appeal and no reasons were given. M then approached the Constitutional Court for leave to appeal against the Supreme Court of Appeal's refusal to hear her oral argument, and against the High Court's sentence. The Constitutional Court was not interested in the first part of M's application to be given leave to appeal on the ground that the Supreme Court of Appeal had failed to provide reasons for refusing to

[242] *(CCT 53/06)* [2007] ZACC 18.

hear her oral argument. However, the Court enrolled her application for leave to appeal against the sentence imposed by the High Court.

The Constitutional Court had to deal with three material issues. First, the Court had to determine the duties of the sentencing Court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the primary caregivers of minor children are sentenced. Second, the Court had to decide whether these duties were observed by the sentencing Courts. Third, the appropriate order the Constitutional Court can make if the Court was to find that these duties were not observed.

The majority of the Constitutional Court concluded that the sentencing Court sentenced M "without giving sufficient independent and informed attention as required by section 28(2) read with section 28(1)(b), to the impact on the children of sending her to prison". The Court found that the sentencing Courts, misdirected themselves by failing to pay sufficient attention to constitutional requirements.[243] The Court reasoned that although the High Court noted that "imprisonment would be hard on M and her children, it should have gone further and made the enquiries and weighed the information gained".[244] The Constitutional Court ordered the placement of M under correctional supervision for three years in line with the provisions of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. As part of the correctional supervision M was to perform service to the benefit of the community for ten hours per week for three years; and was to undergo counselling on a regular basis, which was to be determined by the Commissioner for Correctional Services. Finally, M was ordered by the Court pay back "each of the persons or entities that she defrauded, as identified in the charges on which she was convicted, an amount equal to the value of goods she obtained".[245]

The Constitutional Court made valuable comments on the "best interests of the child". The Court acknowledged that the "South African courts have long had experience in applying the best interests principle in matters such as custody or maintenance" and

[243] *S v M*, para 33.
[244] *S v M*, para 48.
[245] *S v M*, para 77.

that the "scope of the best interests principle has been greatly enlarged in the new constitutional order".[246] The Court firmly accepted that the "child's best interests" as provided in section 28 of the Constitution, certainly, serves as a "general guideline" to the courts.[247] In other words, the Court regarded section 28 as a general guideline to the courts and not as a recognisable right in the Bill of Rights. The approach the Court took is problematic because if section 28 is regarded as merely a general guideline to the courts, other decision-makers will not be compelled to consider the "best interests of the child" when making decisions concerning children.

Although the Court accepted section 28(2) as a general guideline, it was stressed that "its normative force does not stop there".[248] According to the majority of the Constitutional Court, the "ambit of the section 28(2) is undoubtedly wide and its comprehensive and emphatic language indicates that just as law enforcement must always be gender-sensitive, so it must always be child-sensitive".[249] The Court further stressed that the interpretation of statutes and the development of common law must be "in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights".[250] Evidently, the "child best interests" is not regarded as a legitimate right by the Court, but as a general guideline that the courts must always consider, in order to give the rights of children due respect. Arguably, if the "child's best interests" is not categorised as children's rights, then it is not a right.

The Court reasoned that "section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk".[251] It was held by the Court that "the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular".[252] The Court accepted the fact that the paramountcy principle has many problems. First, the Court highlighted that the

[246] *S v M*, para 12.
[247] *S v M*, para 14.
[248] *S v M*, para 14.
[249] *S v M*, para 15.
[250] *S v M*, para 15.
[251] *S v M*, para 20.
[252] *S v M*, para 23.

"more difficult problem is to establish an appropriate operational thrust for the paramountcy principle".[253] Second, the Court regarded the word "paramount" as emphatic and reasoned that if the word "paramount" is used together with the phrase "in every matter concerning the child", which is far-reaching, the paramountcy principle would literally cover almost "all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them".[254]

The Court cautioned that "if the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application".[255] The Court reasoned that spreading the paramountcy principle too thin risks "defeating rather than promoting the objective of section 28(2)".[256] The Court stressed that the fact that the "best interests of the child" are paramount does not mean that they are absolute.[257] It was reasoned by the Court that "the best interests of the child like all rights in the Bill of Rights in their operation has to take account of their relationship to other rights, which might require that their ambit be limited".[258] It is indisputable that the Court took two approaches in this case. First, the Court adopted the guideline approach where the "best interests of the child" was regarded as a general guideline that assists courts. Second, the Court adopted the right approach where the "best interests of the child" was viewed as a right subject to limitation like other rights in the Constitution.

It was held by the Court that "the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests threatens to violate the interests of the children".[259] The Court stated that the purpose to emphasise the sentencing Court's duty to acknowledge children's interests is "to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm and not to permit errant parents unreasonably to avoid appropriate

[253] *S v M*, para 25.
[254] *S v M*, para 25.
[255] *S v M*, para 25.
[256] *S v M*, para 25.
[257] *S v M*, para 26.
[258] *S v M*, para 26.
[259] *S v M*, para 35.

punishment". The "best interests of the child" principle requires that the interests of children who stand to be affected by any decision to be given due consideration by the decision-makers. The Court emphasised that "the best interests of the child does not necessitate overriding all other considerations".[260] The Court reasoned that the "best interests of the child" calls for "appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned".[261]

From the two cases discussed above, it can be said conclusively that the approach which serves the child better is to regard the "child's best interests" as a legitimate right. It can be argued that if the "child's best interests" is considered a standard or a general guideline that assists the courts as per the interpretation of the Constitutional Court in *S v M*, its application will only be limited to the judiciary, and other sectors of society will not be obliged to promote and protect it. For example, if the "child's best interests" is treated merely as a general guideline that assists the courts, it will be useless to members of SGBs or school principals who make decisions that directly affect children in schools. This research draws a conclusion that it is incorrect for the Constitutional Court to categorise the "child's best interests" as a standard or general guideline that assists courts because section 28(2) of the Constitution does not demarcate "child's best interests" as such. It is no coincidence that the "best interests of the child" was included in the Constitution. The "child's best interests" has constitutional value, and it is safe to categorise it as a constitutional right entrenched in the Bill of Rights. It is incorrect to reduce the "best interests of the child" as a mere guideline or factor. Drafters of the 1996 Constitution, arguably never intended that "child's best interests" be treated as a standard or guideline that assists courts, but included it in the Bill of Rights as they expected that it will be protected like other constitutional rights, which are only subject to the limitation clause.

[260] *S v M*, para 42.
[261] *S v M*, para 42.

3.5. Conclusion

To conclude, one can argue that in post-apartheid South Africa, the prominence of the "best interests of the child" is reflected by its inclusion in the constitution[262] and legislation[263]. Despite its ambiguity, the "best interests of the child" has been used in South Africa to protect the children's interests, including their rights enshrined in the Constitution[264]. The principle has generated mixed interpretations from courts, as it is regarded as an independent right and in some instances as a guideline. The phraseology of section 28(2)[265] is arguably unclear whether it intended to make the "best interests of the child" a constitutional right or merely a considerable guideline. The Children's Act codified the "best interests of the child" as both a constitutional right and a standard. The Act further laid down factors that the courts must consider in custody cases. Regrettably, many factors enumerated in the Children's Act are irrelevant in the schooling system, where children are subjected to exclusion, discrimination, expulsion, humiliation and gross violations of their constitutional rights by school governors due to the SASA's silence on the "best interests of the child".

[262] Constitution of the Republic of South Africa, 1993 and Constitution of the Republic of South Africa Act, 1996.
[263] Children's Act 38 of 2005.
[264] Constitution of the Republic of South Africa, 1996.
[265] Section 28(2) of Constitution of the Republic of South Africa, 1996 states that:
"A child's best interests are of paramount importance in every matter concerning the child."

CHAPTER 4: AN ANALYSIS OF COURT DECISIONS ON THE "BEST INTERESTS OF THE CHILD" IN SCHOOLS

4.1. Introduction

Over the years, a considerable number of schooling-related cases have been adjudicated in the South African Constitutional Court. The Constitutional Court has been approached on a number of occasions to make determinations on the schools' sensitive issues of religious and cultural expression in the code of conduct, language policies, pregnancy policies and eviction of public school from private property. Regrettably, most court disputes that will be discussed in this chapter emanated from SGBs' policies, which were adopted in the best interests of their schools and conflicting with learners' best interests in schools.

This chapter will analyse selected Constitutional Court judgements in schools, mainly in relation to the "best interests of the child". The cases selected for discussion, mostly dealt with SGBs' policies in schools which were adopted in the schools' best interests while undermining the best interests of certain learners. The main aim of discussing the selected cases is to show how the SGBs are failing to promote and safeguard the "child's best interests" when formulating and adopting schools' policies, as most of their policies are promoting only the best interests of their schools. In this chapter, it will also be argued that the Courts are reluctant to make pronouncements regarding the constitutionality of the SGBs' policies which, *prima facie*, violate learners' rights to education and child's best interests.

4.2. The "best interests of the child" in the code of conduct

Religion and culture have been contentious issues in the South African schools since the dawn of the new constitutional order. There is no doubt that issues of religion and culture are sensitive in nature, and the sensitivity of religious and cultural matters require a high level of objectivity on individuals making decisions affecting one's identity and faith. In schools, policies are made by SGBs as empowered by SASA. Some SGBs draft and adopt schools' policies which are not in the "best interests of the child". As a result, their policies are taken to courts for adjudication. In some cases,

discriminatory policies are leaked to media and become headlines in both mainstream and social media.

SGBs often undermine the "best interests of the child" in order to promote the best interests of their schools. For example, the SGB may prohibit afro hairstyle or wearing of headscarf in school in order to ensure that all learners are uniform. When such policies are implemented, some learners' constitutional rights are infringed upon because policies are not in their best interests, but in the best interest of their schools. Parents are then left with no other effective remedies than to litigate in order to safeguard their children's best interests. The case below deals with issues of how a learner's best interests to express her identity and faith conflicted with the school's code of conduct.

***MEC for Education: Kwazulu-Natal and Others v Pillay*[266]**

During the September holidays of 2004, Ms Navaneethum Pillay allowed her daughter Sunali Pillay to pierce her nose and to insert a small gold stud for cultural reasons and as expression of her long-standing family tradition. Sunali was a pupil in Durban Girls' High School. On the 4th of October 2004 Sunali returned to school with a small nose stud. Unfortunately, Ms Pillay was told by the school principal that Sunali was not permitted to wear the nose stud because it was contravening with the code of conduct adopted by the SGB.

Aggrieved by the SGB's decision, Ms Pillay sent a letter to the Department of Education to seek clarity about its position on the matter. She thought that the decision of the SGB was violating her daughter's constitutional right to practice her religious and cultural traditions. The MEC concurred with the school's approach and Ms Pillay was informed about this in May 2005. The school then threatened to take Sunali to a disciplinary tribunal if she failed to remove the nose stud by the 23rd of May 2005. The disciplinary hearing was postponed and rescheduled for the 18th of July 2005.

[266] 2008 (2) BCLR 99 (CC). (Herein referred as 'Pillay case')

On the 14th of July 2005 Ms Pillay approached the Equality Court alleging that the Durban Girls' High School and the KwaZulu-Natal MEC for Education had unfairly discriminated against her daughter. She further alleged that her daughter' religious and cultural rights were violated by the school and the MEC. She obtained an interim order restraining against the school and the school was consequently "restrained from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali". The Equality Court concluded that the discrimination against Sunali was not unfair even though a prima facie case was made of discrimination. The Court held that the school had acted reasonably and fairly, and there was "no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred".[267]

Ms Pillay appealed against the Equality Court's decision in the Pietermaritzburg High Court. The High Court overturned the Equality Court's decision. The school's conduct was found to be discriminating against Sunali and was unfair in terms of the Equality Act. It was stated that "our society prohibits both direct and indirect discrimination and aims to eliminate entrenched inequalities".[268] The Court lambasted the Equality Court for failure to properly take into consideration the impact of the "Constitution and the Equality Act on the code of conduct and that both religion and culture are protected equally under the Equality Act and the Constitution".[269] The decision of the Equality Court was set aside by the High Court. The High Court declared "null and void" the school's "decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners".[270] Aggrieved by the decision of the High Court, the school then approached the Constitutional Court for a leave to appeal. Subsequently, a leave to appeal was granted by the Constitutional Court.

The Constitutional Court had to decide whether the SGB's decision to deny Sunali an exemption from its school's code of conduct for her to be allowed to wear a nose stud, discriminated unfairly against her on the basis of both religion and culture. The majority of the Court ruled that "the decision of the SGB of Durban Girls' High School to refuse Sunali Pillay an exemption from its code of conduct to allow her to wear a nose stud,

[267] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para14.
[268] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para15.
[269] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 15.
[270] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 18.

discriminated unfairly against her".[271] The Court further ordered the SGB of Durban Girls' High School to amend the code of conduct of the school to provide "for the reasonable accommodation of deviations from the code on religious or cultural grounds and a procedure according to which such exemptions from the code can be sought and granted".[272] The SGB was ordered to amend the code of conduct after consulting with the learners, parents and educators of the school and within a reasonable period of time.

The Constitutional Court dealt at length with the sensitive issue of learners' discrimination in school on the basis of religion and culture. Although the judgement was delivered at the time Sunali was no longer a learner in Durban Girls' High School, it has far-reaching implications on other learners in South African schools who are discriminated unfairly on the religious and cultural grounds by SGBs in their codes of conduct adopted in schools. SGBs will in future need to formulate policies that accommodate reasonable deviations on sensitive issues of religion and culture.

The Court observed two main problems emanating from the code of conduct that was adopted by the SGB of Durban Girls' High School. According to the Court, the school's code of conduct was problematic as "it did not set out a process or standard according to which exemptions should be granted for the guidance of learners, parents and the SGB".[273] Ironically, the tradition to grant exemptions in certain circumstances was developed by the school itself, while the code of conduct was silent on the guideline according to which such exemptions were to be granted.

The second problem of the code of conduct as observed by the majority of the Constitutional Court was the fact that "the jewellery provision in the code did not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place".[274] The Court reasoned that the dispute would never have started if the School granted Sunali an exemption to wear nose stud. However, the Court felt duty-bound to address the underlying problems arising from the code of conduct. The Court

[271] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 119.
[272] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 119.
[273] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 37.
[274] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 37.

stated that code of conduct that is properly drafted with realistic boundaries and which provides "a procedure to be followed in applying and granting exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes".[275] After identifying the underlying problems with the code, the Court confirmed that "the decision to refuse Sunali an exemption and the inadequacies of the code itself" were both problems in the *Pillay case.*[276]

It was argued by the Durban Girls' High School, the Governing Body Foundation and the Department that there was no group of learners who were comparable to Sunali and being treated better than her. Furthermore, it was argued that no discrimination could be established in the absence of a comparator. The Court rejected the argument and held that a comparator was available in the *Pillay case*[277] "between learners whose sincere religious or cultural beliefs or practices are not compromised by the code, and learners whose beliefs or practices are compromised".[278] The Court pointed out that religion or culture was a ground of discrimination as the school's code of conduct has "a disparate impact on certain religions and cultures".[279]

The Court criticised the code of conduct of the school for not being neutral and for imposing a norm that forces "the mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms".[280] According to the majority of the Court, the code was a "burden on learners who were unable to express themselves fully" as they "were to attend school in an environment that does not completely accept them".[281] The Court adopted a wider approach before establishing whether Sunali was discriminated against by the provisions of the code coupled with the school's refusal to allow exemptions. In rejecting the argument that there was no comparator, the Court reasoned that the code was compromising some learners' beliefs or practices by failing to allow exemption.

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[275] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 38.
[276] *2008 (2) BCLR 99 (CC)*.
[277] *2008 (2) BCLR 99 (CC)*.
[278] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 44.
[279] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 44.
[280] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 44.
[281] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 44.

Before deciding on the main issue of discrimination against Sunali by the school, the Court has to deal with a difficult question of the Equality Act and the Constitution and whether they were applicable to voluntary religious and cultural practices. It was argued by the school and the Governing Bodies Foundation (GBF) that voluntary practices should not be protected or be accorded less protection. It was argued by Ms Pillay that voluntary practices should be given protection and not less protection. The Court held that "the protection of voluntary and obligatory practices conforms to the Constitution's commitment to affirming diversity, which is in accord with South Africa's decisive break from its history of intolerance and exclusion".[282] The arguments of the school and the GBF on protection of voluntary practices were rejected by the Court, which concluded that "protection of voluntary practices applies equally to culture and religion".[283] Finally, the Court found that "Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act".[284]

The Court considered a wide range of factors in determining whether the discrimination Sunali experienced was fair or unfair. Ms Pillay argued that it was appropriate to decide Sunali's case on the principle of "reasonable accommodation". The Court supported Ms Pillay's argument and felt that it was "necessary to consider both the content of the idea of reasonable accommodation and its place in the Equality Act".[285] The Court stressed that the principle of reasonable accommodation ensures that "people who do not or cannot conform to certain social norms are not relegated to the margins of society".[286] The Court considered a number of factors before making a finding on whether the discrimination against Sunali was fair or unfair.

The Court rejected the School's argument that Sunali's right was infringed slightly, because she was allowed to wear the nose stud outside of the school. It was held that "preventing Sunali from wearing the nose stud for several hours of each school day would undermine the practice and constitute a significant infringement of her religious

[282] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 65.
[283] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 66.
[284] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 68.
[285] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 71.
[286] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 73.

and cultural identity".[287] It was reasoned by the majority of the Court that denying Sunali the right to wear the nose stud in the school "for even a short period sends a message that Sunali, her religion and her culture are not welcome".[288] The Court acknowledged the great deal of stress Sunali suffered and how her academic performance dropped because of the manner in which the school reacted to the nose stud and the related publicity. The Court was convinced that "the practice was a peculiar and particularly significant manifestation of Sunali's South Indian, Tamil and Hindu identity, as her way of expressing her roots and her faith".[289]

It was argued by the Durban Girls' High School and the GBF that allowing Sunali to wear the nose stud would have negative impact on the learners' discipline in schools and on the quality of the education the school provides, as a result. The Court acknowledged that "rules are important to education, as they promote an important sense of discipline in children and prepare them for the real world which contains even more rules than the schoolyard".[290] The Court observed that the *Pillay case*[291] was about granting a learner an exemption to express her religion and culture and was not about the school uniforms' constitutionality. The Court found no evidence that "a learner who is granted an exemption from the provisions of the code will be any less disciplined or that she will negatively affect the discipline of others".[292]

The argument by the Durban Girls' High School and the GBF that the nose stud was a popular fashion item and should be treated differently was strongly rejected by the majority of the Court. The Court pointed out that "asserting that the nose stud should not be allowed because it is also a fashion symbol fails to understand its religious and cultural significance".[293] The Court further stressed that the school and the GBF's argument on the nose stud as a fashion symbol was "disrespectful of those for whom it is an important expression of their religion and culture".[294] It was argued by the

[287] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 85.
[288] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 85.
[289] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 90.
[290] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 100.
[291] 2008 (2) BCLR 99 (CC).
[292] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 101.
[293] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 106.
[294] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 106.

school that allowing the nose stud to be worn by Sunali would necessitate that many undesirable adornments be allowed. The Court disagreed and stated that it was something to be celebrated and not feared if "other learners who were afraid to express their religions or cultures will be encouraged to do so".[295]

The Court concluded that allowing Sunali to wear a "nose stud would not have imposed an undue burden on the School".[296] The Court reasoned that "a reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud".[297] The finding of the High Court that Sunali was unfairly discriminated against was confirmed by the Constitutional Court. The Court stressed that its "judgment does not abolish school uniforms but only requires that schools make exemptions for sincerely held religious and cultural beliefs and practices, as a general rule". It was held that "the code coupled with the decision to refuse an exemption is discriminatory".[298] In rectifying the procedural defect in the code, the Court ordered the SGB of the Durban Girls' High School to amend its code in order to "provide for reasonable accommodation for deviations from the code on religious and cultural grounds and a procedure for the application and granting of those exemptions".[299]

The majority of the Court incorrectly compared Sunali, with learners whose religious beliefs and cultural practices were not compromised by the school's code of conduct. The central issue was the refusal by the school to grant Sunali an exemption on the basis of religion and culture. As Sunali was aggrieved by the school's failure to give an exemption in her circumstances, the Court could have identified those learners who are granted exemption in similar situations, as correct comparator. It must be borne in mind that the problem was not only emanating from the code on its face, but also from the administrative action exercised by the School, of denying Sunali an exemption. The Court acknowledged that the code of conduct of the school was not neutral. The code of conduct was seen as a form of burden on learners who were not in a position to express themselves fully because they were required to attend school in an

[295] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 107.
[296] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 112.
[297] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 112.
[298] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 115.
[299] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 117.

environment that did not accommodate them completely. However, the Court failed to declare the code as not consistent with the Constitution. It can be argued that the Constitutional Court failed to fulfil its constitutional obligation as imposed by section 172(1)(a) of the Constitution. It was a great opportunity for the highest court to declare the code to be invalid as it discriminated against some learners on cultural or religious grounds. Instead, the Court ordered the SGB to make amendment on the code of conduct of the school in order to allow for exemptions.

SGBs undeniably perform important functions in schools. SGBs are instrumental in the smooth functioning of their schools. The SASA expressly vested policy-making powers in the SGBs, including drafting the codes of conduct to regulate learners' behaviour in their respective schools. Mostly, the codes of conduct SGBs adopt, cover important issues such as school uniform and general appearance, school and class attendance, school rules, rules governing public places, accommodation of religious or cultural rights, misconduct and disciplinary procedures. The SASA unfortunately is unclear on how SGBs in drafting and adopting learners' codes of conduct must ensure that the "best interests of the child" are promoted and safeguarded. SGBs are required to act in their schools' and learners' best interests by the SASA. SGBs draft and adopt codes of conduct which are in their schools' best interests. However, some codes of conduct are not always in the best interests of learners. It is indisputable that codes of conduct that are not in learners' best interests consequently infringe on learners' constitutionally enshrined rights in one way or the other.

The Pillay case[300] is an example of a situation where the school's code of conduct adopted by the SGB in the spirit of school's best interest conflicted with the "best interests of the child". In this case, the SGB acted in its school's best interests, but its interests were in conflict with Sunali's best interests. It is unarguable that it was in the best interests for Sunali to wear a nose stud to express her religion and culture, and it was in the school's best interests to prohibit the wearing of jewellery through its code of conduct. The Constitutional Court correctly found that the practice of wearing a nose stud was a "significant manifestation of Sunali's South Indian, Tamil and Hindu identity,

[300] 2008 (2) BCLR 99 (CC).

as her way of expressing her roots and her faith".[301] This confirms that it was in Sunali's best interest to be granted an opportunity to wear a nose stud in expressing of her identity and culture. The SGB, unfortunately, denied Sunali such an opportunity and threatened her with disciplinary proceedings for contravening the code of conduct.

The SGB undoubtedly acted in good faith and wanted to safeguard the school's best interests, but its decisions were not in the Sunali's best interests. Arguably, the SGB in executing its policy-making function disregarded what was in the best interests of Sunali and other learners in the school who for religious and cultural reasons genuinely wanted to pierce their noses with studs. SGBs like other organs of state, perform public functions and are constitutionally obliged to consider the "child's best interests" as primary consideration in every matter concerning the child. At school level, SGBs usually undermine the "child's best interests" in order to promote their schools' best interests.

In the *Pillay case*,[302] the SGB adopted a policy which was discriminatory in its nature and was indisputably conflicting with the "best interests of the child", particularly Sunali who genuinely wanted to wear a nose stud for her religious and cultural reasons. The Constitutional Court was of the view that the main problem with the school's code of conduct was its failure to grant exemption to Sunali. The approach the Court took in identifying the problem with the code of conduct was respectfully too narrow, as it misdirected the central issue on lack of exemption in the code. The problem with the school's code of conduct was not lack of exemption, but it was the SGB's failure to promote the "best interests of the child" when inserting the jewellery provision. This research argues that making provision for an exception was not a pressing matter in the code as compared to taking into account the "best interests of the child", who genuinely wanted to pierce her nose with a stud as an expression of her identity and faith. The SGB's failure to consider and safeguard the "child's best interests" in the code of conduct was arguably the main cause of the problem.

The Pillay case[303] was a great opportunity for the Constitutional Court to remind SGBs about their important roles of promoting and safeguarding the best interests of learners

[301] *MEC for Education: Kwazulu-Natal and Others v Pillay,* para 90.
[302] 2008 (2) BCLR 99 (CC).
[303] 2008 (2) BCLR 99 (CC).

in their schools' codes of conduct. Unfortunately, the majority of the Court treated the case as an isolated incident which only needed to be addressed by reviewing of the code of conduct to grant exemption to learners who sincerely wanted to pierce their noses with studs as expression of their identity and faith. The Court should have stressed that SGBs have constitutional obligations promote the "best interests of the child" in adopting schools' policies, including code of conduct. Arguably, if the Court made emphasis on the importance of the "best interests of the child" and the role of SGBs in promoting these interests, the judgment would have carried more weight and could possibly prevent the future occurrence of similar incidents.

The judgement of the Constitutional Court in the Pillay case[304] was definitely a moral victory to Sunali and other learners who were directly affected by the school's code of conduct. Unfortunately, the judgement is insignificant to learners in other public and private schools where the codes of conduct of their respective schools subject them to unfair discrimination on religious and cultural grounds. The judgement would have been significant to other learners as well, if emphasis was made by the Court on the "child's best interests" and the role of SGBs in promoting the learners' best interests.

The mainstream media over the years reported many incidents of schools' policies which discriminated against learners on the basis of culture and religion. In 2013 two Muslim siblings dominated the news headlines after a Cape Town school kicked them out over traditional Muslim headgear. According to *OnIslam & Newspapers* , "in their first day at Eben Donges High school, Sakeenah Dramat, 16, and her brother Bilaal, 13, were kicked out for refusing to remove a headscarf and a traditional Islamic hat".[305] The two learners missed six schooling days and were only permitted back to the school after the Western Cape provincial department of education made interventions and instructed the school in writing to allow learners back to school and to permit them wear their headgear. In another incident, a grade 10 Rastafarian learner, Sikhokele Diniso was unlawfully suspended from school. It was reported that on 13th of March 2013, the principal of Siphamandla High School in Khayelitsha instructed Sikhokele Diniso "to leave school and not to

304 *2008 (2) BCLR 99 (CC).*

305 http://islam.ru/en/content/news/s-african-school-lifts-muslim-headgear-ban (accessed 13 September 2019).

return until he had cut his hair".[306] The learner was "suspended despite the fact that he was scheduled to write tests for History on 14 March, Mathematics on 15 March and Life Sciences on 18 March".[307]

In 2016 the Pretoria High School for Girls made headlines after learners protested against its hair policy and alleged racism. In a random survey conducted in 2016 by the *Mail & Guardian*, it was found that several state and private schools have outlawed "popcorn" hairstyles as well as "mohicans, Afros and Rastafarian" styles in their policies. Benoni High, Andrews Academy, Jeppe High School for Boys, Rondebosch Boys' High, Pinetown Girls' High and Greyville Primary were some of the schools which were inspected and their codes of conduct showed that the Afros, dreadlocks and braids were banned.[308] Earlier in 2019, parents were up in arms after a Grade 9 learner at Hyde Park High School was slapped with detention for having an afro hairstyle.[309]

The media reports cited above evidently show that SGBs promote their schools' best interests than the "best interests of the child" as most of their codes of conduct had provisions which were discriminatory in nature and not in the best interests of certain groups of learners, particularly those who genuinely wanted to express their culture and religion. Until such time members of SGBs are held accountable for their schools' policies and actions, they will continue to undermine the "best interests of the child" at the expense of learners. SGBs usually defend their policies and in doing so, fail to defend learners' best interests. Parents and learners are reluctant to challenge the schools' policies and decisions in courts because litigation is extremely expensive in South Africa and there is a fear of victimisation of learners. Most cases about the discriminatory policies of SGBs are leaked to media than adjudicated in the courts of law. Arguably, there are many unreported cases where learners' best interests to express their identity and religion are undermined by codes of conduct of the schools. It is important to stress that the Courts, when adjudicating educational cases like Pillay

306 https://www.sowetanlive.co.za/news/2013-03-27-rastafarian-learner-unlawfully-suspended-school/ (accessed 15 September 2019).
307 https://www.sowetanlive.co.za/news/2013-03-27-rastafarian-learner-unlawfully-suspended-school/ (accessed 15 September 2019).
308 Prega Govender 'Several state and private schools have bans on dreadlocks, Afros and braids' Mail & Guardian 02 Sep 2016.
309 Tebogo Monama 'School finds pupil's Afro too much to handle' The Star 12 March 2019.

case,[310] need to emphasise the significance of the "best interests of the child" and the roles of the SGBs in promoting learners' best interests. Their judgements will then carry more weight and subsequently minimise the occurrence of similar incidents.

4.5. The "best interests of the child" in language policies

SGBS are vested with statutory powers to formulate language policies of their schools. SGBs formulate policies that are in the best interests of their schools and their learners. In performing their statutory functions, some SGBs formulate language policies which are not in the "best interests of the child". In some instances, SGBs in well-resourced schools (which have capacity to offer dual-medium of instruction) adopt language policies which permit single-medium of instruction, and their policies are not in the best interests of learners who prefer to be taught in another language.

The problem then arises when learners who want to be taught in another language are denied admission on the basis of SGBs' language policies which allow only a single-medium of instruction. As a result, learners' constitutional rights are threatened by these policies as they are not in such learners' best interests. The Ermelo case exemplifies how the SGBs promote their schools' best interests and how their language policies undermine the best interests of learners who preferably want to be taught in another language in schools.

Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another[311]

In the beginning of the 2007 academic year, Hoërskool Ermelo an exclusively Afrikaans language public school was approached by Mpumalanga Department of Education. The Department requested that Hoërskool Ermelo must admit 113 learners in grade 8 who wanted to be taught in English language. A request by the Department was made at a time those 113 learners could not be accommodated at any of the English schools in Ermelo because they were already filled to capacity. Unfortunately,

[310] 2008 (2) BCLR 99 (CC).
[311] 2010 (3) BCLR 177 (CC). (Herein referred as 'Ermelo case')

Hoërskool Ermelo refused to admit them, despite the fact that its enrolment was at 685 learners while it has 32 classrooms with 44 educators and could accommodate 1 200 learners.

On the 9th of January 2007 a meeting was scheduled by the SGB to discuss the admission of learners with the HOD. However, the HOD failed to arrive and instead the principal received a letter from the acting Regional Director in Ermelo, which instructed him to admit the affected learners in Hoërskool Ermelo to avoid disciplinary proceeding taken against him without further notice. On the same day the SGB instructed the principal to admit those learners in accordance with the school's admission policy. It was also made clear that all grade 8 learners are welcome in the school only if they are willing to submit themselves to the Afrikaans language policy of the school. Subsequently, the principal took the SGB's instruction to the acting Regional Director.

On the 10th of January 2007, about 71 learners went to Hoërskool Ermelo for admission and were accompanied by their parents and department officials. The principal explained that learners were eligible for admission to the school if they submitted to tuition in Afrikaans. Sadly, none of them were admitted that day. Two weeks later, the SGB received a letter informing them about the decision of the HOD to withdraw the SGB's function of determining the language policy of Hoërskool Ermelo. The letter stated that the withdrawal of the SGB's function was applicable "with immediate effect in view of the current crisis and the urgent matter that there are about 113 learners who were stranded at home".[312] The HOD also selected the interim committee which was tasked to adopt a language policy and English language was to be included as a medium of instruction in a new policy. The committee was also to assist on the admission of 113 English learners who were stranded. It was expected to work for three months. The interim committee amended the language policy and adopted it as a parallel medium of instruction of Afrikaans and English. Consequently, the school admitted the English learners.

[312] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 21.

Aggrieved by the HOD's decision, the SGB approached the High Court to challenge the HOD's decision of withdrawing the function of determining the language policy from the SGB. The High Court found that the SGB was unreasonable in refusing to review its language policy, and in preventing admission of 113 English grade 8 learners in the school. It was concluded by the court that "the HOD was entitled to revoke the power to determine the language policy under section 22, and to confer the power on an interim committee in terms of section 25".[313] The High Court subsequently dismissed their application. The SGB was later granted leave to appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal ruled in favour of the SGB. Consequently, the HOD's decision of withdrawing the SGB's function to determine the language policy of the school, was set aside. The Court went further in setting aside the decision of the HOD for appointing the interim committee which was tasked to perform the SGB's function to determine the language policy of the Hoërskool Ermelo. Finally, the interim committee's decision to amend the Hoërskool Ermelo's language policy to parallel medium, was set aside by the Court. Importantly, the Court ruled that learners that registered in the school from 25th of January 2007 "in terms of parallel medium language policy shall be entitled to continue to be taught and write examinations in English until the completion of their school careers".[314]

In this case, the Constitutional Court had to determine number of material issues. The Court had to decide whether the HOD was empowered under section 22 of the SASA to revoke the school's language policy that was adopted by the SGB in terms of section 6(2) of the SASA. If so, the Court had to decide if there were reasonable grounds for the HOD to withdraw the SGB's function. The Court had to decide if the HOD was empowered to appoint the interim committee to determine a school's language policy under section 25 of the SASA. If so, the Court had to determine if the interim committee was established in a way that was procedurally fair and lawful. The Court had to decide

[313] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 31.
[314] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 33.

if the interim committee fulfilled its mandate in a manner that is lawful and procedurally. Finally, the Court had to decide the just and equitable order.

The majority of the Court confirmed that the HOD was permitted to withdraw the language policy of a school on reasonable grounds. However, the Court found that the HOD exceeded his powers in withdrawing the SGB's functions. The Court ruled that the HOD "acted unlawfully and in breach of the constitutional principle of legality in setting up an interim committee tasked to decide a school's language policy under section 25 of the SASA".[315] It was confirmed by the Court that the interim committee appointed by the HOD was not lawfully constituted. The SGB of Hoërskool Ermelo was ordered by the Court to review its language policy and to determine a language policy of the school in accordance with section 6(2) of the SASA and the Constitution. The SGB had to give the Court a report on the process it followed when its language policy was reviewed and a copy of the reviewed language policy was to be submitted to the Court. The HOD was ordered by the Court to report on "the likely demand for grade 8 English places at the start of the school year in 2010".[316] The report expected to set out "the steps that the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo".[317]

The Constitutional Court mainly dealt with two issues. First, the Court assessed the lawfulness of the Head of Department's withdrawal of the language policy function of the SGB. Second, the Court determined the lawfulness of the HOD's decision to set up an interim committee tasked to change the school's language policy and the legality of such policy. The question of whether the HOD was authorised by the SASA to withdraw the language policy function of the school's SGB was addressed conclusively by the Court.

[315] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 89.
[316] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 104.
[317] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 104.

The Court confirmed that the HOD was empowered to withdraw SGB's function only "on reasonable grounds"[318], including the function to determine language policy vested on the SGB by section 6 of the SASA. The Court took a different line of reasoning from the Supreme Court of Appeal which was of the view that the power to formulate a language policy conferred to the SGB in section 6(2) is beyond the reach of the HOD and the HOD may not withdraw it through section 22(1), except by a court on review.[319] According to the majority of the Constitutional Court, the HOD's power to revoke a "function conferred by section 22(1) is broad in the sense that it relates to any function of a governing body conferred by the SASA or by any other provincial law".[320] The Court concluded that the power to intervene and revoke a function of the school governing body is authorised by the statute (the SASA) "itself provided it is done on reasonable grounds and in order to pursue a legitimate purpose".[321]

The Court found that the approach of the Supreme Court of Appeal was that of interpreting the word 'function(s)' as bearing different meanings in the provisions of the SASA. This approach was described by the Court as being "narrow and particularistic"[322] in nature. The Court reasoned that "the power to withdraw a function of a governing body extends to all functions of a governing body envisaged in sections 20 and 21".[323] It was concluded that the approach to the meaning of the word 'function' "in *Mikro School* was correct, as the Court indicated, an HOD may on reasonable grounds withdraw a language policy of the school".[324] However, the Court cautioned that in revoking the function, an HOD must "observe meticulously the standard of

[318] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 64.
[319] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 67.
[320] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 68.
[321] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 68.
[322] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 70.
[323] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 71.
[324] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 71.

procedural fairness required by section 22(2) and, in cases of urgency, by section 22(3)".[325]

In addressing the question of what constitute reasonable grounds, the Constitutional Court stressed that the determination of reasonable grounds is based on case by case. The Court added that the following factors must also be considered in determining the reasonable grounds by the reviewing court:

i. "the nature of the function,
ii. the purpose for which it is revoked in the light of the best interests of actual and potential learners,
iii. the views of the governing body
iv. the nature of the power sought to be withdrawn
v. the likely impact of the withdrawal on the wellbeing of the school, its learners, parents and educators".[326]
vi. "the procedural safeguards, and due time for their implementation"[327] (in the case of language policy functions)

The majority of the Court highlighted that "the SGB of a public school must recognise that it is entrusted with a public resource which must be managed not only in the interest of those who happen to be learners and parents at the time." [328] The Court added a public resource entrusted on the SGB must be managed "also in the interests of the broader community in which the school is located and in the light of the values of our Constitution".[329] This implies that the SGB, in exercising its statutory obligations must also consider the best interests of other learners who belong to the broader community. However, the Court reasoned that the extensive powers and duties of the

[325] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 73.
[326] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 74.
[327] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 75.
[328] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 80.
[329] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 80.

SGB does not imply that "the HOD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school pays adequate heed to section 29(2) of the Constitution".[330]

The Court provided much needed clarity on how the HOD can withdraw a language policy function of the SGB. Importantly, the Court enumerated various factors that must be considered by the HOD before withdrawing the SGB's language policy function. The purpose for which the language policy function of the SGB is revoked must take into account the best interests of actual learners enrolled and also the prospective learners. The best interests of actual and prospective learners, is one of the important factors that must be considered by the HOD when revoking the language policy function of the SGB. The best interests of the actual learners enrolled in a school need to be considered before a decision to revoke language policy function is revoked.

It is worth mentioning that the HOD must not only consider the best interests of learners who are enrolled, but also those who are not yet enrolled in the school. In simple words, the "best interests of the child" must be given primary consideration before the SGB's language policy function is revoked by the HOD. SGBs likewise must promote and safeguard the "best interests of the child". It is indisputable that SGBs in drafting and adopting their schools' language policies must also consider the "best interests of the child". In considering the "best interests of the child", SGBs must pay attentions to the worthy benefits of their language policies to learners who were enrolled and even learners who are not yet enrolled. If language policies of SGBs are exclusionary to certain learners, such policies are not in their best interests, and the HOD is entitled to withdraw the language policy functions of SGBs concerned in order to safeguard and promote learners' best interests. The "best interests of the child" must be considered by both the HOD and the SGB when performing their statutory functions. It is noteworthy that the "best interests of the child" is not limited to learners enrolled but include the prospective learners who are not yet enrolled in schools. The decisions that are in the "best interests of the child" are more likely to benefit the prospective learners.

[330] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 81.

The Constitutional Court addressed the question of whether the HOD acted lawfully in appointing the interim committee to amend the school's language policy. The Court reasoned that the HOD wrongly invoked the provisions of section 25. As provisions of section 25 were wrongly invoked by HOD, the Court reasoned that the HOD's recourse to section 22 was also contaminated. According to the majority of the Court "the HOD acted unlawfully and in breach of the constitutional principle of legality".[331] It was held that the interim committee appointed by the HOD unlawfully constituted as "all conduct premised on the provisions of section 25 are of no legal force or effect".[332]

The Court ruled that "the HOD incorrectly acted under section 25(1) in appointing the interim committee in circumstances where he had no such power".[333] The Court concurred with the conclusion of the Supreme Court of Appeal that reasoned that once the SGB's function is properly withdrawn in terms of section 22(1), therefore, it vests in the HOD. It was reaffirmed by the Court that the HOD is permitted and obliged to exercise it (function withdrawn in terms of section 22(1)) in order to achieve specified goals permitted by the SASA. The Court finally concluded that "the HOD conflated the powers given to him under sections 22(1) and 25(1) of the SASA and it is impermissible".[334]

In dismissing the appeal, the Constitutional Court concluded that "where reasonable grounds exist the HOD has the power under section 22(1) to withdraw the SGB's function of determining the language policy under section 6(2)".[335] The Court held that by withdrawing the SGB's function and establishing an interim committee at the same time, the HOD acted unlawfully and fused together the requirements of sections 22(1) and 25 of the SASA. In simple words, the Court found that the HOD is not empowered

[331] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 87.
[332] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 89.
[333] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 85.
[334] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 87.
[335] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 93.

to by the SASA to establish the interim committee. It was held that language policy formulated by the interim committee "is void and has no legal consequences"[336] due to the fact that the "HOD was not entitled to constitute the interim committee and the same committee did not have the requisite power to fashion the new language policy for the school".[337] The Court affirmed the order of the Supreme Court of Appeal which allowed the registered English learners to continue being taught in English language at Hoërskool Ermelo until they complete of their studies.

The majority of the Court unfortunately failed to recognise and highlight the importance of the "best interests of the child" as enshrined in the Constitution of the Republic of South Africa. It was an ample opportunity for the Constitutional Court to remind SGBs in schools about their constitutional obligations to promote and safeguard the best interests of learners. In the South African schooling system, many school governors are under a false impression that they are only obliged to protect only their school's interests and learners' interests whenever decisions are to be taken. This misconception is one of the reasons leading to court battles between the stakeholders in education. Until such time the Constitutional Court highlights the importance of "best interests of the child" as provided by the Constitution, SGBs will continue to adopt rigid school policies which will directly or indirectly infringe the best interests of learners who happen to be the minority or those who seek admission into schools.

From the facts of the *Ermelo case*[338], one can easily draw a conclusion that the SGB of Hoërskool Ermelo was prepared to do whatever it could cost in safeguarding its language policy and in ensuring that the policy is implemented without compromise. The SGB wanted to safeguard the school's best interests and even interests of its Afrikaans learners. Sadly, the English learners' interests who wanted to be admitted urgently in the school were disregarded despite the fact that 15 classrooms were in excess in a school, which could accommodate 1200 but the enrolment was at 685 learners. In situations like this, the Constitutional Court ought to highlight the

[336] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 94.
[337] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,* para 93.
[338] 2010 (3) BCLR 177 (CC).

importance of relevant constitutional rights particularly the “best interests of the child” even before determining the material issues brought before it for determination by the concerned litigants.

Failure on the Constitutional Court to emphasise the importance of the “best interests of the child” when confronted with a case involving the exclusion of certain groups of learners is disastrous in the South African constitutional dispensation. Judgments like this are more likely to give school administrators room to continue adopting and implementing their school policies which are exclusive in nature and infringing the rights of certain learners whom such school administrators feel they are not duty-bound to safeguard. Learners whose best interests are not safeguarded by the school’s language policy have a big price to pay, as they are likely to lose the academic time stranded at home waiting for the HOD to come to their aid and to follow statutory procedure required by the SASA to address policy deficiencies or alternatively take a route of judicial review process.

The Court’s judgement in the *Ermelo case*[339] is not perfect as great focus was shifted to the conduct of the HOD in revoking the SGB’s language policy function than the factual problem emanating from the SGB’s policy and conduct. The Court should have commented on the SGB’s and school’s conduct of denying stranded English learners accommodation where human resources and infrastructure were available to cater for their needs.

The Constitutional Court is obliged by section 172(1)(a) of the Constitution, “when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency”. However in the *Ermelo case*[340], the Court failed to declare the language policy of Hoërskool Ermelo to be invalid for its inconsistency with the “best interests of the child” enshrined in the Constitution and for infringing learners’ right to education by denying them admission before the HOD intervened. Ironically, the majority of the Court made an

[339] 2010 (3) BCLR 177 (CC).
[340] 2010 (3) BCLR 177 (CC).

order that the Hoërskool Ermelo's SGB had to amend its language policy and to make report available to the Court.

The Court cited two reasons on why there was a need for the language policy of the Hoërskool Ermelo to be reviewed. Firstly, the school was required to exercise its power to choose a language policy in a manner take into account the provisions of section 29(2) of the Constitution, section 6(2) of the SASA and also the norms and standards. Secondly, the school was to take into consideration the fact that a demand for the admission of English learners was so great in grade 8 and they wanted to learn in English language. The two reasons the Court cited above are no doubt, inadequate to convince the SGB of Hoërskool Ermelo to amend its language policy to be a parallel medium of Afrikaans and English. The Court should have cited the "best interests of the child" as a key reason why the language policy must be reviewed. The Court should have criticised the conduct of the SGB and the school principal as they acted only in the school's best interests and the Afrikaans learners' interests while disregarding the "best interests" of other English learners whose right to basic education is in the same way protected in the Bill of Rights.

The judgment of the majority in the *Ermelo case*[341] does not necessarily give a guarantee that the school's language policy will be reviewed by the SGB to such an extent that the interests of other learners are given proper meaning and protection in the context of the Constitution. In other words, it will be difficult for the SGB to review its language policy in such a way that the interests of other learners who prefer to be taught in English language are safeguarded, due to two reasons. Firstly, the structure of the SGB is dominated by parents of learners enrolled in the school and parents as majority usually hold more votes than other components of teachers and non-teaching staff. Secondly, parents serving in the SGB always put at heart the best interests of their learners and are reluctant to adopt policies which serve interests of the minority of learners in a school or potential learners. Generally, a school's policy whether on admission, pregnancy, religion or any other matter is a reflection of the common views shared by the parents of learners. It is hard to imagine how the interests of the broader community can be safeguarded by the SGB which is exclusively controlled by only the

[341] 2010 (3) BCLR 177 (CC).

parents of the learners who are enrolled. Members of the broader community are not legally permitted to participate in the affairs of the SGB of the school where they have no children.

The Constitutional Court should have been clear that the language policy and conduct of the SGB in Hoërskool Ermelo was inconsistent with the Constitution as it denied the English learners who were in a desperate situation of lack of access to education. If the Court had pronounced that the policy and the conduct of the SGB were not consistent with the Constitution, the judgment would have carried more weight and would be valuable in protecting other learners who find themselves in a similar situation like the 113 learners in this case. By ordering the reviewing of the school's language policy, the Court was acknowledging the fact that the language policy was inconsistent with the Constitution. This research argues that the order made by the Constitutional Court on the review of the school's language policy, is a clear indication that the policy was inconsistent with the Constitution. If the policy was consistent with the Constitution, it would have been unnecessary for the highest court to make a review order of the language policy.

The Court's remarks on the "interests of the broader community" are problematic and unrealistic within the current framework of SASA. Firstly, the SGBs are mandated to promote the interests of their schools and learners. Secondly, the SGBs are comprised of two components (i.e. teachers and parents), and parents always have interests of their children enrolled in their schools and promote their schools' best interests. Thirdly, SASA which mandated SGBs to promote the schools' and learners' interests, is silent on the "best interests of the child". This is problematic in the South African schooling system where the school's interests and learners' interests compete with the interests of the broader community or where the "best interests of the child" conflict with the school's best interests. The Court should have acknowledged that the "best interests of the child" is important and should be given primary consideration by the SGBs, who are entrusted with public resources. Instead, the Court expressed the view that "interests of the broader community where the school is located" must also be served by the SGBs. It will be difficult for the SGBs to ensure that there is a proper balance between the interests of their schools and those of the communities because what are in the schools' best interests are not always in the communities' best interests

where schools are located. The SGBs have roles to play in promoting the "best interests of the child" in schools. The problem is SASA which is silent on the "best interests of the child" and its failure to mandate the SGBs to promote the "best interests of the child" in schools. It is undisputed that if the "best interests of the child" are promoted by the SGBs in schools, the interests of the communities will be served.

4.4. The "best interests of the child" in private property

The "child's best interests" and right to a basic education are some of the most important constitutional rights learners are to enjoy in schools. The MECs and SGBs are required by the Constitution and the SASA to promote learners' best interests and their right to education. The MECs ensure that public schools are made available to learners, while SGBs ensure that their schools are properly governed with policies that promote the best interests of their learners and that their right to a basic education is fully realised. The MECs are empowered by the SASA to enter into agreements with the owners of private properties to have public schools in their properties. In instances where public schools are permitted to operate in private properties, the MECs and SGBs are obligated to play their roles to ensure that the learners' best interests are safeguarded and the right to a basic education is realised. Failure by the MECs and SGBs to effectively play their roles unfortunately jeopardise learners' best interests and right to education. It is of note to highlight that it is not the responsibilities of the private properties' owners to provide education and promote the learners' best interests. The promotion of learners' best interests and provision of education are the responsibilities of the MECs and SGBs. The case below dealt with how a public school was evicted from the private property and how such eviction conflicted with learners' best interests and right to education.

Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others[342]

In 1957 the Juma Musjid Primary School was founded officially as a state-aided school for children in Grades 1 to 9, and as Madressa, "an Islamic school to offer education

[342] 2011 (8) BCLR 761 (CC).

with a distinctive religious character".[343] The school was situated in a private property and was owned by the Trust. But it was only in 1997, when the Trust allowed the Department of Education to list the Juma Musjid Primary School as a public school in terms of section 14(1) of the SASA. The permission was subject to the conclusion of a written agreement under section 14(1) of SASA between the MEC and the Trustees. Although no formal agreement was concluded, the Trust's property was used as a public school. Some expenses that were related to the operation of the school were paid by the Trust, and "these payments were made allegedly on the understanding that the Department would reimburse the Trust".[344]

The Trust and the SGB took two years to conclude a written agreement and the agreement was referred to as the Moral Deed of Agreement (Moral Deed). The problem started when the Trust sent a letter to the Department, which indicated that it wanted to establish a self-governing school on its property. The letter further stated that the Trust will serve the Department with a notice to close the existing school. The SGB also received a copy of the letter. Consequently, the SGB wrote a letter to the Department and raised its concerns about the Trust's letter. The Department in its response stated that "if the school were to be evicted from the premises, the Department would either relocate the school to other premises or close it".[345]

It was on the 17th of July 2003 when the Trust directed the notice to the Department terminating its occupation right, effective from the 31st of December 2004. Subsequently, the Department made an undertaking to vacate the premises. However, the Department failed to do so. From the 5th of December 2005 the Trust sent all invoices for expenses directly to the Department. Unfortunately, no payments were received by the Trust from the Department. On the 11th of January 2007, the Department made an undertaking "to pay rentals backdated to 1998, but this too did not happen".[346]

[343] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 11].
[344] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 11.
[345] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 12.
[346] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 13.

The Department again made an undertaking to settle rentals and the expenses the Trust incurred in the school. The Department, consequently, failed to fulfil an undertaking made. The Department was then asked by the Trustees to show the date it would vacate the property. The Department then requested a meeting with the Trustees. The Trustees then approached the High Court for the eviction of the school from its property[347] and it was based on the common law remedy of *rei vindicatio*. The Trustees submitted to the Court that the "MEC had failed to fulfil the various undertakings she had made and to comply with her tenancy obligations".[348] Consequently, an order of eviction was granted by the High Court.

The High Court held that "the obligation to provide basic education is the responsibility of the Department and not that of the Trust".[349] It was concluded by the Court that the learners would "be entitled to enforce their constitutional rights to education by claiming appropriate relief, but they must do so against the [MEC] and/or [the Minister] and any other necessary parties".[350] The Court reasoned that "the eviction of the school from the property does not constitute a closure of the school in terms of section 33 of the Schools Act".[351] The MEC was ordered to pay costs because of her failure to provide the Court with relevant information and to comply with her constitutional obligations. The High Court further "mulcted the SGB with costs on a party and party scale because its opposition, albeit in good faith, was misplaced".[352]

Aggrieved by the High Court's decision, the applicants submitted an application for leave to appeal to the High Court. The High Court dismissed an application for leave to appeal with costs on the ground that they wanted to advance new grounds on appeal. They then petitioned to the Supreme Court of Appeal for leave to appeal the High Court's decision. Unfortunately, their application for leave to appeal was also dismissed with costs. Dissatisfied with the decision of the Supreme Court of Appeal, they then approached the Constitutional Court for a leave to appeal. Subsequently, the Constitutional Court granted the applicants leave to appeal.

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[347] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 14.
[348] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 15.
[349] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 17.
[350] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 22.
[351] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 22.
[352] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 23.

The Constitutional Court had to deal with three material issues. The Court had to decide whether the MEC fulfilled his constitutional obligations to promote learners' right to a basic education. The Court had to determine whether the Trustees had any constitutional obligations to promote the learners' right to a basic education when they claim their property rights. And if so, the Court had to decide whether there was a need for *rei vindicatio* to be improved in circumstances where the learners' right to a basic education was likely to be affected the order of eviction.

The Court held that "the MEC failed to fulfil the constitutional obligations in relation to the learners' right to a basic education".[353] The Court found that the Trustees had a secondary obligation to "learners' right to a basic education".[354] The Court held that the Trust also have a constitutional obligations not to impair the right to a basic education of learners, once it allowed the public school in its private property. The Court found that "the High Court failed to give efficacy to guaranteed rights in sections 29(1) and 28(2) of the Constitution".[355]

The Court dealt with the important issues that have wide-ranging implications on the MEC's constitutional obligations to provide education and the private property owner's "negative constitutional obligation not to impair the learners' right to a basic education".[356] The judgment set a precedent of how the right to private property and the right to education must be weighed in situations where the two are in conflict. The judgement also made emphasis on the importance of the learners' best interests in situations where their right to a basic education are to be impaired.

The majority of the Court held that "the right to education is immediately realisable unlike some of the other socio-economic rights".[357] The Court reasoned that "there is no internal limitation requiring that the right be progressively realised within available resources subject to reasonable legislative measures".[358] It was acknowledged by the

[353] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 51.
[354] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 62.
[355] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 66.
[356] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 60.
[357] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 37
[358] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 37.

Court that the right to a basic education is recognised in the international human rights instruments.[359] The Court made references to the international instruments recognising the right to a basic education such as the United Nations Convention on the Rights of the Child and International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Court held that "access to school is a necessary condition for the achievement of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution".[360] According to the Court, the significance of the right to a basic education is also indicated by the fact that "any failure by a parent to cause a child to attend school renders that parent guilty of an offence and liable, on conviction, to a fine or imprisonment" for a six months period or less.[361] The Court added that the fact that people who prevent learners to attend schools, without just cause, are "also guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months"[362], signifies the importance of the right to a basic education.

The Constitutional Court addressed the question of whether the MEC failed to fulfil her constitutional obligation. The Court ruled that the MEC failed to fulfil her constitutional obligations. It was held that "the MEC has a duty in terms of section 12 of the Act to provide public schools for the education of the learners".[363] The Court found that the MEC "ought to have taken adequate steps to make alternative arrangements for the learners", but unfortunately she did not do so.[364] The Court reasoned that should the MEC have taken "adequate steps to make alternative arrangements for the learners, the need for the eviction application might not have arisen".[365]

The MEC was criticised by the Court for neglecting "to take reasonable measures to conclude a section 14(1) agreement".[366] The MEC was furthermore criticised by the

[359] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 40.
[360] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 43.
[361] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 44.
[362] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 44.
[363] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 45.
[364] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 47.
[365] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 47.
[366] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 48.

Court for failing to teach by example.[367] The Court should have extended criticisms to the School Governing Body (SGB) as it played a passive role until the Trust made eviction application in the High Court. It was irresponsible of the SGB to ignore the issue of non-payment by the Department to the Trust. The SGB was aware that the Trust was not receiving payments from the Department and consequences of the school being evicted from the private property were foreseeable, but it did not bother to intervene on the matter. The SGB's failure to engage with the MEC and the Trust to find amicable solutions on the matter evidently shows that it failed to promote and safeguard the best interests of the school and its learners. The SGB is considered the highest decision making body at a school level, and it is expected to make decisions that promote the learners' best interests.

According to the majority of the court, "the MEC failed to discharge her constitutional obligation, to respect, protect, promote and fulfil the learners' right to a basic education".[368] The MEC failed to fulfil her obligations to provide a public school and to ensure that enough school places were available in the areas affected. The Court noted that the MEC failed in her obligation when she simply informed the "High Court that there are no other schools in which to absorb all the learners".[369] The conduct of the MEC was regarded as "being below the standard required by the Constitution and the relevant statutory provisions".[370] It can be argued that the SGB equally failed to discharge its statutory obligation of promoting and protecting the school's best interests and its learners' best interests. As government of the school, the SGB was reasonably expected to engage on the matter. The SGB should have applied to the Department for the relocation of its school. It was in the learners' best interests for relocation to be applied by the SGB, as the Trust was not receiving payments from the Department for their private property where the school was located.

The Court found that "there is no primary positive obligation on the Trust to provide basic education to the learners, but that primary positive obligation rests on the

[367] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 50.
[368] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 51.
[369] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 51.
[370] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 52.

MEC".[371] The Court confirmed that "there was also no obligation on the Trust to make its property available to the MEC for use as a public school".[372] However, the Court observed that the Department was permitted by the Trust "to enlist the school as a public school on its property with a distinctive religious character in accordance with sections 56 and 57 of the Schools Act".[373] It was further observed that the Trust was also performing the public function by managing all affairs of the Madressas "in the most advantageous manner, including the payment of the costs of various items which the SGB and the Department ought to have provided".[374] The Court concluded that "the Trust does have a negative constitutional obligation not to impair the learners' right to a basic education".[375]

The Court conclusively addressed the question of whether the Trustees acted in a reasonable way in applying for an eviction order. The Court was aware of the fact that it was state's primary obligations to promote the learners' right to a basic education and Trust's secondary obligations to promote the learners' right to a basic education. The Court reasoned that by allowing its private property to be utilised as a public school, the Trust did not waive its ownership rights of the property. However, the Court stressed that the "Trust's constitutional obligation was to minimise the potential impairment of the learners' right to a basic education , once it had allowed the school to be conducted on its property".[376]

It was observed by the Court that the Trust had showed its willingness to conclude a section 14 agreement with the Department of Education which unfortunately dragged its feet for many years. It was further observed that the Trust had negotiated extensively with the Department of Education before pursuing an order of eviction in the High Court.[377] The Court reasoned that the purpose of these negotiations was to minimise the impairment to the learners' rights. After considering all the circumstances and the Trust's obligation of not impairing the right to a basic education of learners,

[371] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 57.
[372] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 57.
[373] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 59.
[374] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 59.
[375] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 60.
[376] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 62.
[377] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 63.

the Constitutional Court reached a conclusion that "the Trustees acted reasonably in seeking the order for eviction".[378]

The Constitutional Court also addressed the question of whether the "best interests of the child" and right to a basic education of learners were properly taken into consideration by the High Court. It was concluded that the High Court failed to give efficacy to constitutional guaranteed right to a basic education (sect 29(1)) and the "child's best interests" (sect 28(2))". The Court was mindful of the fact that the applicants in opposing the eviction application, were acting in the learners' interests and to children's benefit. The Court criticised the High Court for granting the eviction order without properly considering the learners' best interests and its effect on the learners' interests. The majority of the Court reasoned that if the High Court "considered the character and nature of the occupants and the mechanism in terms of which the school obtained occupation of the private property, it would not have ordered the eviction".[379] The Court further found that the High Court neglected to request the MEC to give "information on how the constitutional mandate of providing a basic education was to be fulfilled".[380] The High Court was lambasted for its failure to give sufficient weight to the learners' rights and their best interests.

Even though the majority of the Court made valuable comments on the "best interests of the child", they cannot be praised for lambasting the High Court in granting the order of the eviction. The Constitutional Court strongly criticised the High Court, reasoning that it failed to recognise the "best interests" of learners and their right to a basic education as entrenched in the Constitution. The undue delay in processing payments and unreasonable period in which the private property was used by the Department warranted the eviction order. Learners' best interests and right to education are constitutional rights, but are also subject to section 36 of the Constitution, which makes provisions for a limitation clause. Arguably, the private property owner has the right to property and is entitled to apply for eviction order where necessary, even in a situation where property right conflict with "child's best interests" and right to education. The High Court was reasonable in granting the eviction order against the Department. The

[378] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 65.
[379] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 68.
[380] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 69.

Constitutional Court should have criticised the Department and the SGB for failing to engage one another in finding amicable solutions during the time the Trust was threatening with legal actions.

The Constitutional Court should have criticised the Department and the SGB for their failure to fulfil their constitutional and statutory obligations of promoting the best interests of the learners. The Court should have been mindful of the fact that the Department and the SGB waited too long without making efforts in addressing the problem the Trust was raising. There were many options the SGB had at the time. For example, the SGB could have engaged the Department or even gone to court for appropriate relief in order to safeguard the learners' interests. Unfortunately, the SGB was silent until the Trust approached the High Court for eviction order. On the other hand, the Department should have made payment to avoid the eviction order being sought by the Trust. This study supports the decision of the High Court as it correctly granted the eviction order and did not deserve such criticisms from the Constitutional Court. The criticism of the High Court was misdirected. It is unarguable that the High Court correctly applied its mind and weighed various factors and evidence before granting the eviction order. The Department and the SGB failed to fulfil their obligations of promoting the "best interests of the child" and right to education.

According to the majority of the Court, the High Court failed to properly consider "the learners' best interests and the impact that the eviction order would have had on the learners and their interests".[381] The learners' best interests were considered to be an important factor by the Constitutional Court, which the High Court should have taken into account before granting the eviction order. As pointed out above, the High Court did not deserve such criticisms. The Constitutional Court should have directed criticism at the Department and the SGB as the two are the main role players in the schooling system, and are obliged by the Constitution and the SASA to promote the learners' best interests. It can be argued that the Department was not acting in the best interests of the learners when entering and concluding an agreement with the Trust, to have a public school in a private property for which it knew that payments will not be made.

[381] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, para 68.

The actions of the Department were in bad faith and consequently undermined learners' best interests and their right to education.

4.5. The "best interests of the child" in pregnancy policies

The SASA gave the SGBs powers to formulate and adopt codes of conduct for their own schools, and not excluding the pregnancy policies. The SASA also mandated the SGBs to promote their schools' and learners' best interests. The SGBs must, in formulating and adopting pregnancy policies are obliged to promote the school's best interests and also the best interests of their learners. Like all other organs of the state, SGBs also have the constitutional obligations to promote the "child's best interests" in all decisions affecting the child. It is indisputable that the decisions of the SGBs should not only be in their schools and learners' best interests, but also give the "child's best interests" primary consideration. However, it is not a simple task for SGBs to promote their schools' and learners' best interests whereas they are obliged to ensure that the "child's best interests" are given the primary consideration.

In practice, SGBs promote the interests of their schools, and as a result neglect their constitutional obligations of promoting the "best interests of the child". The SGBs formulate and adopt schools' pregnancy policies which are in their schools' best interests and these policies. Their pregnancy policies are not at all times faultless, and sometimes they clash with the learners' best interests and the "best interests of the child". SGBs' pregnancy policies adopted without paying due regards to the child's best interests, are in most cases, challenged in court for their inconsistence with the Constitution. The *Welkom and Harmony case* is a typical example of cases where SGBs adopted pregnancy policies in their schools' best interests but conflicting with the "best interests of the child". The case will be discussed in detail below.

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another[382]

[382] 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC). (Herein referred as *Welkom and Harmony case)*

In 2008 and 2009, Welkom High School and Harmony High School through their SGBs respectively "adopted pregnancy policies for their respective schools that provide for the automatic exclusion of any learner from school in the event of her falling pregnant".[383] At Harmony High School, a learner who gave birth in October 2010 was instructed by the principal to leave the school and was to be admitted in the following year. Then her mother went to the Department of Education in the Free State Province for assistance on the matter. The school principal of Harmony High was given an instruction to permit the learner to resume her studies at school by the Free State HOD. The HOD further instructed that measures be put in place by the principal in order to assist her catch up with the work she might have missed while at home. The SGB was not impressed by the HOD's decision and subsequently applied for interdictory relief in the High Court. It argued that the HOD does not have the power to give the school principal instruction in the way in which it was given.

At Welkom High School, a mother of a pregnant Grade 9 learner was instructed by the principal that her daughter has to leave the school on the 16th of September 2010 and was to stay at home until the first term of 2011 came to an end. The principal's instruction was in line with the pregnancy policy of the school adopted by the SGB. The learner's family requested the Minister of Basic Education and also the South African Human Rights Commission (SAHRC)[384] to intervene in the matter. The Minister failed to intervene, but the SAHRC wrote to the school that it was violating the learner's constitutional right to education by excluding her on a ground of her pregnancy. The school subsequently ignored the letter from the SAHRC. The Free State HOD gave the principal of Welkom High instruction to immediately permit the learner to resume her studies at school. The SGB of Welkom High was of the view that the HOD did not have authority to give the school principal instruction to readmit the learner, in the manner in which the principal was instructed. The SGB then brought an application on urgent basis for interdictory relief in the Free State High Court.

In the Free State High Court, the Welkom High School and the Harmony High School through their SGBs sought a declaratory order that the HOD does not have power to

[383] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 6.
[384] An independent national human right institution established pursuant to Section181 of the Constitution of the Republic of South Africa to support constitutional democracy.

give instruction to the principals of schools or to compel them to act in a manner contrary to the SGBs' pregnancy policies. The court ruled in their favour, and held that the HOD does not have power to give instructions to the school principals or compel them to act in a manner contrary to the SGBs' pregnancy policies.

The HOD then approached the Supreme Court of Appeal which, subsequently, concurred with the High Court's decision that the HOD does not have authority to give the school principals instructions to act contrary to the SGBs' policies. The Supreme Court of Appeal interdicted and restrained the HOD from instructing the school principals of Welkom High and Harmony High to act in a manner contrary to the SGBs' policies. However, the HOD was granted leave to appeal against the SCA judgment to the Constitutional Court. Subsequently, the HOD appealed to the Constitutional Court.

The Constitutional Court had to deal with two material issues in the case. Firstly, the Court had to determine whether the HOD have the power to instruct public schools' principals to ignore SGBs' policies of their schools, in the light of his authority as employer (under the SASA) or his constitutional responsibilities. Secondly, the Court had to decide on the manner and extent that the issues raised regarding the unconstitutionality of the schools' pregnancy policies could be addressed.

The majority of the Court concluded that the HOD did not act lawfully in instructing the public schools' principals to ignore the SGBs' policies of their schools. In ruling that the HOD's decision was unlawful, the Court confirmed that the High Court and Supreme Court of Appeal were correct in their decisions in granting and upholding the interdictory relief sought by the schools. The Court found that "the Free State HOD was obliged to address his concerns with the pregnancy policies pursuant to his powers under the Schools Act", but not through unlawful means.[385] Finally, the SGBs of Welkom High School and Harmony High School were ordered by the Court "to review their pregnancy policies".[386]

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[385] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 76.

[386] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 128.

The Court dealt with the fundamental issues that have important implications on the learners' rights to education in the South African schooling system, largely in relation to access to education by pregnant learners. The judgment also highlighted the remedies afforded to the Provincial Education Heads of Departments[387] in the SASA, which can be effectively utilised in situations where the SGBs formulate and implement policies that unfairly exclude certain group(s) of learners from accessing education. The judgement also gave direction on how the provisions of the SASA should be interpreted in situations where the HODs want to intervene on matters concerning the school policies adopted by the governing bodies. Consequently, misunderstanding and misinterpretation of the Schools Act on the powers of the HOD and governing bodies will be put to rest. The Court's findings will be examined in the subparagraphs below.

The Constitutional Court dealt at length with the main issue of whether the HOD was empowered by the SASA to give the principals of public schools' instructions to ignore SGBs' policies in schools, and in the light of his responsibilities under section 7(2) of the Constitution. According to the majority judgment, section 7(2) "did not mean that the Free State HOD was "entitled to do anything he wished in order to achieve the purported objective of addressing the unconstitutionality of the policies".[388]

The Court held that the HOD should have made use of the clear remedies available in the Schools Act to address the exact problem he was facing. The Court stated that the HOD in an event he formed the view that remedies available in the Schools Act will be "inappropriate, could have moved a court to have the allegedly unlawful policies set aside".[389] It was concluded by the Court that HOD was not allowed to ignore the means

[387] Section 14 of the SASA provides that "the Head of Department May, on reasonable grounds, withdraw a function of a governing body. It is worth mentioning that the SASA does not have other effective remedies that can be effectively used by the HOD in instances the SGBs infringe learners' rights". The SASA is silent on the question of remedies afforded to the HOD and this is one of the weaknesses of the Act. It does not even make provisions regarding the circumstances where legal actions can be taken by the HOD against the SGB. After all, it is the discretion of the HOD to institute a legal action in a situation where the provisions of the Schools Act cannot be used to protect learners' rights which may be threatened by the SGBs' policies of decisions.

[388] *Welkom and Harmony case*, para 90.

[389] *Welkom and Harmony case*, para 90.

of addressing the unconstitutionality of the SGBs' policies. The Court concluded that the HOD's status as the employer of the schools' principals does not allow him to instruct them to ignore, contravene or override the pregnancy policies duly adopted by their respective SGBs. Before reaching this conclusion, the Court took into account the following considerations:

i. "First, that instruction amounted to an imposition of a different policy on the Welkom High School and Harmony High School in circumstances where the Free State HOD was not entitled to make this imposition".[390]
ii. "Second, it was not the Free State HOD's place to engage in a constitutionality review of the policies adopted in both Welkom and Harmony, and then to instruct his employees to ignore these policies simply because he believed that they do not pass muster".[391]

It is noteworthy that the constitutionality of the SGBs' pregnancy policies was not properly pleaded for before the Constitutional Court. However, the Court decisively dealt with the matter after invoking section 172(1) (b) of the Constitution. The Court concluded that "the policies prima facie violate the learners' constitutional rights to equality, basic education, human dignity, privacy and bodily and psychological integrity, and the best interests of the child".[392] In deciding the unconstitutionality of the pregnancy policies adopted by the SGBs of both Welkom High School and Harmony High School, the Court gave the following reasons:

i. "First, the policies differentiate between learners on the basis of pregnancy. Because the differentiation is made on the basis of a ground listed in section 9(3) of the Constitution, it is both discrimination and presumptively unfair".[393]
ii. "Second, the policies limit pregnant learners' fundamental right to basic education in terms of section 29 of the Constitution by requiring them to repeat up to an entire

[390] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 95.
[391] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 95.
[392] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 112.
[393] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 113.

year of schooling. The policies thus have drastic effects on learners' ability to complete their schooling".[394]

iii. "Third, the policies prima facie violate learners' rights to human dignity, privacy and bodily and psychological integrity by obliging them to report to the school authorities when they believe they are pregnant".[395]

iv. "Fourth, by operating inflexibly, the policies may violate section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. The policies are designed in such a way as to give the school governing bodies and principals no opportunity to consider the best interests of pregnant learners".[396]

SGBs were ordered by the Constitutional Court to review their pregnancy policies and "to report back to the Court on reasonable steps they have taken to review the pregnancy policies".[397] The Court found "it appropriate to order meaningful engagement between the parties in order to give effect to the remedy granted in this case".[398] However, the Court refrained from declaring the invalidity of the pregnancy policies due to the fact that the SGBs of both Welkom High School and Harmony High School have not made submissions before Court to justify the constitutionality of their policies. The Court strongly encouraged the HOD and SGBs to "engage in consultation and employ the tools provided by the Schools Act for resolving disputes before resorting to further litigation".[399]

The approach the Court adopted in this case is similar to approaches of the Pillay and Ermelo cases, where the SGBs where ordered to review their policies. However, in both *Pillay and Ermelo cases*, the Constitutional Court failed to deal with the constitutionality of the schools' policies adopted by the SGBs, particularly in relation

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[394] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 114.
[395] *Welkom and Harmony case*, para 115.
[396] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 116.
[397] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 125.
[398] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 125.
[399] *Head of Department, Department of Education, Free State Province v Welkom High School*, para 126.

to the "best interests of the child". Although, SGBs' policies in both cases were evidently not in the "best interests of the child", the Constitutional Court focused only on the main issues which were pleaded for by the parties. The Court was reluctant to deal with the constitutionality of the school policies, but later ordered the SGBs to review their policies. It was only in Welkom and Harmony case, where the Constitutional Court was prepared to deal with the constitutionality of SGBs' policies and it was found that the pregnancy policies were not designed in such a way that "child's best interests" could be promoted.

The pregnancy policies adopted by SGBs of both the Welkom High School and the Harmony High School, were unquestionably in the best interests of their schools. Both SGBs, evidently disregarded the "child's best interests" in adopting pregnancy policies which excluded pregnant learners automatically. The pregnancy policies compromised learners' constitutional rights while promoting schools' best interests. The principals in both schools excluded pregnant learners in terms of the provisions of the pregnancy policies. The actions of the principals were in the schools' best interests and also in accordance with the pregnancy policies adopted by the SGBs respectively.

Arguably, it was in the best interests of Welkom High School and Harmony High School to automatically exclude pregnant learners. Unfortunately, what was in the best interests of both high schools was not in the pregnant learners' best interests. The SGBs are obliged by the Constitution to give "the child' best interests paramount importance in all actions concerning the child".[400] Evidently, both SGBs failed to promote the "best interests of the child". Ironically, both SGBs excluded pregnant leaners from their schools which were in contradiction with their constitutional obligations to promote the "child's best interests".

As governors of schools, SGBs play important role in promoting the "best interests of the child". Unfortunately, SGBs adopt pregnancy policies without clear guidelines from the SASA on how the "child' best interests" must be weighed against the schools' best interests. In the absence of a clear legislative framework, it is problematic for SGBs

[400] Section 28(2) of the Constitution, 1996.

to balance their schools' best interests with learners' best interests. One of the reasons SGBs adopt school policies that are not in the "best interests of the child", is the silence of the SASA on the role of SGBs in promoting the "child's best interests". The SASA is crafted as if the "child's best interests" do not exist in the schooling system or at best that the school's best interests will also be in the child's best interests. The SASA expressly mandated the SGBs to promote their schools' best interests. In the *Welkom and Harmony case*, the SGBs clearly wanted to safeguard their schools' best interests, and did not bother about the promotion of the "best interests of the child". Shockingly, the school principals in both Welkom and Harmony strictly applied the pregnancy policies, which were not in the "best interests of the child".

The Constitutional Court found that the pregnancy policies were designed in such a way that they could not give SGBs and principals a chance to consider the pregnant learners' best interests. From the Court's findings, it can be argued that the pregnancy policies in schools need to be made in a way that the pregnant learners' best interests are given due consideration. In other words, pregnancy policies must allow the decision-makers such as principals, SGB members and teachers to consider the best interests of learners affected by such policies. In the *Welkom and Harmony case*, the pregnancy policies were undoubtedly in the schools' best interests and did not have provisions which gave decision-makers opportunities to promote pregnant learners' best interests. The Court reasoned that the pregnancy policies if not flexibly applied could violate learners' right to have their "best interests" as entrenched in section 28(2) of the Constitution. Importantly, it was concluded by the Court that "other constitutional rights such as the right to equality, basic education, human dignity, privacy and bodily and psychological integrity"[401] were infringed by the pregnancy policies in both Welkom and Harmony High Schools.

The SGBs' failure to take into account the "best interests of the child" when formulating and adopting pregnancy policies in schools is a serious problem in the South African schooling system. Welkom and Harmony case illustrate how SGBs undermine learners' best interests while promoting their schools' best interests. This case should not be mistakenly treated as a unique incident because there are many cases in South

[401] *Welkom and Harmony case*, para 32.

Africa where pregnant learners' best interests are compromised by SGBs' policies. It is noteworthy that most of the cases where SGBs' pregnancy policies subject pregnant learners to exclusion are not publicised. Few of these cases are adjudicated in courts while others are reported in the media. For instance, on the 15th of May 2019, the SABC reported that many schools in Limpopo Province expelled pregnant learners.[402] From the media report cited above, it can be argued that some SGBs are failing to promote the best interests of pregnant learners when they adopt and implement their policies.

4.5. Conclusion

From the cases discussed above, the research conclusively opines that SGBs promote their schools' best interests than the "child's best interests". In other words, SGBs are failing to fulfil their constitutional obligations of promoting the "child's best interests" when formulating and adopting school policies. As reflected in *Pillay, Ermelo and Welkom and Harmony cases*, SGBs prioritise their schools' best interests and subsequently compromise what is in the best interests of certain groups of learners. In the *Pillay case*, the SGB's policy compromised the best interests of a learner who wanted to express her culture and faith. In the *Ermelo case*, the SGB in its single-medium language policy subjected English learners to exclusion and its policy was evidently not in the English learners' best interests. In *Welkom and Harmony case*, SGBs' pregnancy policies subjected pregnant learners to exclusion from the schools and were not in the pregnant learners' best interests. From the three cases discussed, this research draws a conclusion that SGBs are not promoting the "best interests of the child" in some schools in South Africa. SGBs promote their schools' best interests even at the expense of learners' best interests. This research suggests that South African courts need to start placing emphasis on SGBs' constitutional obligations of promoting the "child's best interests" in schools. This will enlighten SGBs to start giving the "child's best interests" a paramount consideration as protected in section 28(2) of the Constitution.

[402] P Baloyi, 'Limpopo schools expel pregnant pupils'. http://www.sabcnews.com/sabcnews/limpopo-schools-expel-pregnant-pupils (accessed 12 September 2019).

CHAPTER 05: CONCLUSION AND RECOMMENDATIONS

1.1. Introduction

This chapter focuses on the research findings, conclusion and recommendations. The first part of this chapter will deal with the research findings. The second part will then highlight the recommendations relating to the study and recommendations for further studies. The conclusion drawn from the study will be given attention to in the last part of this chapter.

1.2. Research Findings

The aim of this study was to investigate the role of SGBs in promoting the “best interests of the child” in schools. There were five main questions to be addressed in the study. Firstly, what is the role of School Governing Bodies in promoting the best interests of the child in schools? Secondly, what is the nature and scope of the “best interests of the child” principle under international law? Thirdly, what is the nature and scope of the “best interests of the child” principle under South Africa’s national laws, particularly in the education context? Fourthly, what are some of the court decisions that dealt with the application of the “best interests of the child” principle in the South African education context? Lastly, is there a need for a review of the Schools Act to safeguard the “best interests of the child” in schools?

The above research questions will be addressed in the subsequent paragraphs:

In relation to the first question of the role of School Governing Bodies in promoting the best interests of the child in schools, the study found that the SASA is silent on SGBs’ role of promoting the “best interests of the child” in schools. The study found that SGBs have statutory functions of promoting their schools’ best interests. The study further found that SASA’ silence on the “best interests of the child” makes it difficult for SGBs to struck a proper balance between their schools’ best interests and the interests of the child.

In relation to the second question of the nature and scope of the “best interests of the child” principle under international law, the study found that the development of the “best interests of the child” was influenced by many international instruments. The study further found that South Africa has ratified the United Nations Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (ACRWC) both of which are leading instruments on the rights of children and both make provision for the “best interests of the child”. Furthermore, the study found that South Africa is obliged to consider the “best interests of the child” in all matters about children, as per both the CRC and ACRWC.

In relation to the third question of the nature and scope of the “best interests of the child” principle under South Africa’s national laws, particularly in the education context, the study found that the “best interests of the child” is constitutionally protected as it is provided for in the Constitution. The study also found that the constitutional framework on the “best interests of the child” generated mixed interpretations by the Courts. Courts were not consistent in their interpretation of the “best interests of the child” with some judges describing it as a legitimate right and others treating the “best interests of the child” as a standard and general guideline. The study found that the mixed interpretations by the Courts are causing confusion on the concept. The study further found that the Children’s Act makes provisions for the “best interests of the child”. However, most provisions from the Children’s Act are not applicable in the education context, and do not assist the SGBs in understanding their role of promoting the “best interests of the child”.

It was found that the SGBs are mandated to promote their schools’ and learners’ best interests by the SASA, which is a national legislation regulating the schooling system in South Africa. It was also found in the study that the SASA is silent on the “best interests of the child” in schools and it becomes difficult for SGBs to promote the principle that is not provided for in the legislation that gave them statutory powers to promote and protect their learners’ and schools’ best interests. The SASA’s silence is creating systematic problems in schools as the SGBs are not in a position to strike a proper balance between their learners’ or schools’ best interests and the child’s best interests. Furthermore, the study found that the SGBs protect their schools and learners’ best interests as required by the SASA’s provisions, and in the process, they disregard the “best interests of the child”.

On the question of the court decisions that dealt with the application of the “best interests of the child” principle in the South African education context, the study found that SGBs in most cases disregard the “child’s best interests” when they formulate and adopt school policies regulating sensitive issues of learners’ pregnancy, code of conduct, religion, language and admission. The study also found that most court cases were triggered by the SGBs’ reluctance to protect and promote the “best interests of the child” when formulating and adopting school policies. It was further found that SGBs do not strike a proper balance when the best interests of their schools and learners are conflicting with the “best interests of child” or group of children, and this is evidently caused by the SASA’s silence on the principle. Also, in adjudicating over these cases, courts have been reluctant to map out the contours of the obligations of SGBs to advance the children’s best interests.

On the question of whether there is a need for a review of the Schools Act to safeguard the “best interests of the child” in schools, it was found that there is a need for a review of the current legislative framework. The study found that SASA’s silence on the “best interests of the child” is problematic in the South African schooling system. Firstly, SGBs play a passive role in promoting the “best interests of the child” in schools whereas they enthusiastically promote and safeguard the best interests of their schools and learners enrolled. Secondly, when SGBs are confronted with problems arising from their school policies (i.e. where their schools’ best interests or learners’ best interests conflict with the “child’s best interests”), they find themselves disregarding the “child’s best interests” and protecting their schools’ best interests. Thirdly, the SASA mandated SGBs to promote their schools’ and learners’ best interests, and this makes it difficult to balance the schools’ best interests and the child’s best interests. Fourthly, SGBs are reluctant to disregard their schools’ best interests in order to safeguard the “child’s best interests”. Fifthly, the schools’ best interests are not always in the “child’s best interests” and last but far from being least, SGBs’ policies that do not give attention to the “best interests of the child” are challenged in courts and sometimes exposed in media platforms.

1.3. Recommendations

5.3.1. Recommendations of the study

In spite of all the limitations, the study makes recommendations that could assist SGBs to promote the “best interests of the child” in the South African schooling context. These recommendations need to reflect in the national policies, particularly the SASA in order to have the “best interests of the child” to be accorded primary consideration in every matter affecting children in schools. These would ensure that decision-makers like SGBs do not disregard the “best interests of the child” in instances where it is conflicting with their schools’ best interests.

- **Amendment of SASA to safeguard the “best interests of the child” in schools**

The study recommends the amendment of the SASA to ensure that the “best interests of the child” is given primary consideration by all decision-makers in schools, including SGBs. This would assist the decision-makers in schools (such as SGBs, SMTs, principals and educators) to understand their obligation to protect and promote the “best interests of the child”. As observed in the study, one of the reasons the “best interests of the child” is not promoted in schools is SASA’s silence on the principle.

The amendment of the SASA would possibly minimise the undesirable situations where SGBs ruthlessly deny learners access to education in order to safeguard their schools’ best interests. The amendment would consequently protect learners from unfair discrimination and exclusion they are subjected to by the SGBs. As observed in the study, the current legislative framework empowers SGBs to develop policies and make decisions that promote the best interests of their schools. As a result, SGBs promote the interests of their schools at the expense of learners’ best interests and the “child’s best interests”. As the SGBs are empowered by the Act to do what is best for their schools, learners’ constitutional rights may sometimes be undermined. For instance, pregnant learners are sent home due to the fact that pregnancy is not in their schools’ best interests and violates policies adopted by the SGBs in the spirit of promoting their schools’ best interests.

- **Establishment of an independent statutory body to regulate conduct of SGBs' members in schools**

The study recommends that an independent statutory body be established to regulate and monitor the members of SGBs in South African schools. The proposed statutory body should be established not only to regulate the school governors, but also to be a watchdog of children's rights in schools. One of the most important functions of the body can be to ensure that all school policies and decisions are adopted and implemented in line with the "best interests of the child" and other constitutional rights envisaged in the South African Constitution and also in the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child. The body could hold the members of the SGBs accountable for their policies and decisions. The statutory body needs to be given authority to monitor the trainings of SGBs' members in order to ensure that they are trained and sensitised about the important function of protecting children's best interests in the exercise of their statutory functions.

Furthermore, this body needs to be given statutory authority to suspend SGBs' policies or decisions that infringe the constitutional rights of learners. As it was revealed in the study that most parents are reluctant and fearful to take legal actions against the SGBs for violating the constitutional rights of their children, it is highly recommended that parents and learners be entitled to lodge complaints directly to an established statutory body. The establishment of the statutory body would empower parents to hold members of SGBs accountable for their reckless actions or unjust school policies which violate the guaranteed constitutional rights of learners.

5.3.2. Recommendations for further studies

Further studies observably need to be much more focused on prospective learners and on the role of SGBs in promoting their best interests in schools. The "best interests of the child" as observed in this study are not limited to children who have been admitted in schools as learners but also extend to children who are not yet admitted. This study further recommends that the role of SGBs in promoting the best interests

of the children in their communities, be one of the areas that should be explored. The "best interests of the child" in the communities where schools are located also raises controversial issues particularly with regard to the question of whether SGBs are obliged to promote the "best interests of the child" in the communities where schools are located and whether their roles of promoting a "child's best interests" are limited to schools.

1.4. Conclusion

The "best interests of the child" is broadly recognised in many international human rights instruments, and it is codified in the Constitution of the Republic of South Africa. SGBs need to promote and protect the "best interests of the child" as their obligation in schools, and not as an option. The amendment of SASA to give effect that the "best interests of the child" is given primary consideration would dramatically shift SGBs from a position of promoting their schools' best interests, to a position of protecting and promoting both the child's and schools' best interests. It is high time that a statutory body be established in the schooling system of South Africa to act as a watchdog of members of SGBs and as a chief protector of learners in schools. The establishment of the statutory body would minimise reckless behaviour by members of SGBs when adopting school policies and decisions affecting learners and their constitutional rights. In other words, members of SGBs will be held accountable for their actions and policies.

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