

# Article 13 of the United Nations Convention on the Rights of People with Disabilities: Does the Children's Act 38 of 2005 support access to justice for children with disabilities?

Eileen I Carter

LLB LLM

Doctoral Candidate, Department of Private Law, University of Pretoria

Trynie Boezaart

BA LLB LLD

Professor of Private Law, University of Pretoria

## OPSOMMING

### Artikel 13 van die Verenigde Nasies se Konvensie oor die Regte van Persone met Gestremdhede: Ondersteun die Kinderwet 38 van 2005 kinders met gestremdhede se reg op toegang tot die reg?

Statisties word kinders met gestremdhede meer gereeld mishandel as kinders sonder gestremdhede. Hierdie tendens dui daarop dat sodanige kinders kwesbaar is en meer dikwels as kinders sonder gestremdhede die hulp van 'n toeganklike regstelsel kan benodig. Artikel 13 van die Verenigde Nasies se Konvensie oor die Regte van Persone met Gestremdhede bepaal dat die reg ook vir persone met gestremdhede toeganklik moet wees. Met die inwerkingtrede van die Kinderwet 38 van 2005 is erkenning gegee aan hierdie spesifieke reg van kinders met gestremdhede. Ten spyte van die riglyne wat artikel 13 verskaf, blyk dit dat die Kinderwet, asook die Suid Afrikaanse regering, sukkel met die implementering van hierdie bepaling. Meer word dus van al die betrokke partye geverg om te verseker dat wanneer kinders met gestremdhede die hulp van die reg benodig dit sowel toeganklik as ontvanklik vir hulle behoeftes is.

## 1 INTRODUCTION

General human rights advocacy for people with disabilities was formally set in motion with the adoption of the United Nation's Declaration on the Rights of Mentally Retarded Persons in 1971,<sup>1</sup> and the Declaration on the Rights of Disabled Persons in 1975.<sup>2</sup> South Africa is bound by international law to give effect to children's rights, including the rights of children with disabilities.<sup>3</sup> Through

1 Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

2 Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

3 S 39 of the Constitution of the Republic of South Africa, 1996 provides that the courts and other legal bodies, when interpreting the Bill of Rights, *must* consider international law and *may* consider foreign law. In *S v Makwanyane* 1995 3 SA 391 (CC) para 35, Chaskalson CJ stated that public international law would include binding as well as non-binding law and

*continued on next page*

the ratification of the United Nations Convention on the Rights of the Child,<sup>4</sup> as well as the United Nations Convention on the Rights of Persons with Disabilities,<sup>5</sup> the South African government has pledged its commitment towards the fulfilment of the rights of this particularly vulnerable group of society.<sup>6</sup>

In 2006, some 650 million people were estimated to be living with a disability worldwide.<sup>7</sup> Of this number, 150 million are perceived to be children.<sup>8</sup> Research indicates that violence against children with disabilities occurs at annual rates at least 1.7 times greater than against their non-disabled peers.<sup>9</sup> This means that children with disabilities are at greater risk of harm than children who do not have any sort of disability. Moreover, children with disabilities are extremely vulnerable to neglect,<sup>10</sup> often because parents and caregivers do not know how to address their children's special needs.<sup>11</sup> According to the United Nations International Children's Emergency Fund<sup>12</sup> 2013 Report on the state of the world's children, children with disabilities are also abandoned more frequently than their non-disabled peers. This apparent increased level of neglect may occur as a result of many reasons, one being that caring for children with disabilities may result in numerous expenses.<sup>13</sup>

In light of the increased risk of children with disabilities to be subjected to abuse, maltreatment and neglect, such children may require and seek legal redress more frequently than their non-disabled peers. For example, in South Africa, if children are abandoned and neglected, alternative care arrangements may possibly have to be made for them, through the application of the Children's Act 38 of 2005,<sup>14</sup> and the involvement of the Children's Court.<sup>15</sup> In accordance with the

---

that both may be used as tools of interpretation. He added that international agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood. In addition, s 233 of the South African Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

4 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577 3 (hereafter UNCRC).

5 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106 (hereafter UNCRPD).

6 In addition, the International Covenant on Economic, Social and Cultural Rights makes specific reference to non-discrimination. South Africa has signed this document but has yet to ratify the covenant; GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS (hereafter ICESCR).

7 See <http://bit.ly/1HHPLtk> (accessed on 30 March 2011).

8 See <http://bit.ly/1OIivBN> (accessed on 30 March 2011).

9 See <http://bit.ly/1xLLKhg> (accessed on 26 March 2011).

10 The Children's Bureau, Washington, USA, indicates in an article published in March 2012 that children with disabilities often experience multiple types of maltreatment, with neglect being the most common. It was also found that children with disabilities were more likely to experience neglect than children without disabilities. See <http://1.usa.gov/1XJGanB> (accessed on 25 June 2012).

11 See Jamieson and Proudlock "From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act" (2009) available at <http://bit.ly/1HHQ2wo> 7 (accessed on 8 July 2015).

12 Hereafter UNICEF.

13 UNICEF "State of the world's children" 2013 available at <http://uni.cf/1laXXbz> (accessed on 15 January 2014).

14 Hereafter referred to as the Children's Act.

15 See ch 4 of the Children's Act.

above-mentioned statistics, children with disabilities are more likely to require the assistance of the Children's Court and in essence, access to justice, than their non-disabled peers.

Conversely, in assessing South Africa's response to the right of children with disabilities to have access to justice, the Children's Act serves as the principal point of departure. The Act came into full operation on 1 April 2010<sup>16</sup> and specifically includes the rights of children with disabilities.<sup>17</sup> The Act is also the product of an extensive review of its predecessor, the Child Care Act,<sup>18</sup> during which the South African Law Commission (SALC)<sup>19</sup> endeavoured to address the needs of children in especially difficult circumstances, such as children with disabilities.<sup>20</sup> Generally, the objectives of the Children's Act are to give effect to children's specific constitutional rights.<sup>21</sup> These include the best interests of the child principle,<sup>22</sup> protection of children against discrimination,<sup>23</sup> enabling the survival and development of the child,<sup>24</sup> child participation<sup>25</sup> and the promotion of the rights of children with disabilities specifically.<sup>26</sup> Measures supporting access to justice in particular for children with disabilities are discussed and addressed below, as guided by article 13 of the UNCRPD.

## 2 ARTICLE 13 OF THE UNCRPD

Before the UNCRPD the phrase "access to justice" had not been stipulated in an international treaty as a standalone, substantive right.<sup>27</sup> In addressing the right of people with disabilities to have access to justice, article 13 explains how state parties can ensure that people with disabilities have equal access to justice.<sup>28</sup>

16 The Children's Act was assented to on 6 June 2006. The first part of the Act was passed by Parliament in 2005. This part deals primarily with national government functions. The Children's Amendment Act 41 of 2007 was passed in 2007 and included additional provisions relating mostly to provincial government functions. On 1 April 2010 the whole of the Act as well as the Amendment Act came into full operation.

17 The specific rights of children with disabilities were included in the Children's Act after much lobbying by concerned stakeholders. See Bekink and Bekink "Children with disabilities and the right to education: A call for action" 2005 *Stell LR* 126. See also Jamieson and Proudlock (2009) 1.

18 The Child Care Act 74 of 1983.

19 Now the South African Law Reform Commission.

20 See the SALC "Issue paper 13 Project 110: Review of the Child Care Act" (1998) 10 and Boezaart "The Children's Act: A valuable tool in realising the rights of children with disabilities" 2011 *THRHR* 271.

21 S 28 of the South African Constitution; see Gray and Jack "Health policy and legislation" 2011 *South African Health R* 9.

22 S 28(2) of the South African Constitution and s 2(b)(iv) and s 7 read with s 9 of the Children's Act.

23 S 9 of the South African Constitution and ss 2(f), 6(2)(d) and 32(b) of the Children's Act.

24 Ss 10 and 29 of the South African Constitution and ss 2(d), 2(i) and 6(2)(e) of the Children's Act.

25 Ss 28(1)(h), 34 and 35 of the South African Constitution and s 10 of the Children's Act.

26 S 9 of the South African Constitution and s 11 of the Children's Act.

27 Kanter *The development of disability rights under international law: From charity to human rights* (2015) 222.

28 A 13 provides: "1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative

*continued on next page*

Kanter<sup>29</sup> describes article 13 of the UNCRPD as affirming access to justice for people with disabilities. Read with articles 2 and 5(3) of the UNCRPD,<sup>30</sup> article 13 requires states parties to provide such accommodation as the person with a disability may need so as to access justice in the same way as a person without a disability.<sup>31</sup> The UNCRPD thus provides three very useful elements against which equal access to justice can be measured, namely, reasonable accommodation, participation and the training of relevant stakeholders. These three essential elements offer guidance in assessing the responsiveness of a judicial system towards the needs of people with disabilities. Clark<sup>32</sup> states that article 13 of the UNCRPD recognises that both “legs” of legislation and practice are necessary to attain the inclusion necessary for victims of crime who may have some form of disability. He also argues that such an approach would include policies and procedures as well as sound training programmes to guarantee that the purpose and outcome of the training are translated into practice.

In view of the guidance provided by article 13 of the UNCRPD, and in view of the increased need for children with disabilities to gain access to justice, the responsiveness of the Children's Act to these determinations should be ascertained. It should also be established to what extent this Act supports article 13. In the paragraphs to follow, this Act is examined with reference to the promotion of access to justice for children with disabilities as determined by article 13.

### 3 THE RESPONSE OF THE CHILDREN'S ACT

#### 3.1 Accessible court procedures

The Children's Court, as provided for by the Children's Act, may be seen as an accommodative mechanism to facilitate access to justice for children with disabilities, as the Act provides that a child him- or herself may bring a matter to court.<sup>33</sup> This is because the processes applied in the Children's Court deviate from the formalistic approach used by, for instance, a criminal or civil court. Section 52 of the Children's Act further provides that any rule made with specific reference to the Children's Court must be made to avoid adversarial procedures.<sup>34</sup>

---

and other preliminary stages. 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

29 Kanter (2015) 221–222.

30 A 2 of the UNCRPD defines reasonable accommodations as “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to people with disabilities the enjoyment, or exercise on an equal basis with others of all fundamental human rights and fundamental freedoms”. A 5(3) of the UNCRPD requires that States Parties must take all appropriate steps to ensure that such reasonable accommodation is provided.

31 Kanter (2015) 222.

32 Clark “The human right of the disabled to access justice: An imperative for policing” 2012 *Police J* 225.

33 S 53(2)(a) of the Children's Act.

34 Ss 52(2) and 6(4)(a) of the Children's Act. The adversarial process has been proven to be to the detriment of children and may also constitute secondary victimisation. Case law indicates that children are “by their very nature ill-equipped to deal with a confrontational and adversarial setting”: *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) para 12 (hereafter *Phaswane*).

The Children's Act supports informal court proceedings and requires such proceedings as far as possible to be conducted in a relaxed and non-adversarial atmosphere.<sup>35</sup> The general environment of the Children's Court is thus to encourage the involvement and participation of the child who forms part of these processes. The Children's Act further provides that every child has the right to bring,<sup>36</sup> and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court.<sup>37</sup> This section therefore supports the right of access to court of everyone as set out in section 34 of the South African Constitution and does not limit this form of access only to the Children's Court.<sup>38</sup> Boezaart and De Bruin<sup>39</sup> point out that the fact that a child more often than not has limited capacity to litigate on his or her own, does not dispossess that child of the right of access to a court in terms of section 14 of the Children's Act. This holds true in respect of children with disabilities as well. The only qualification to section 14 is that the matter must fall within the jurisdiction of the specific court. No other qualification is expressly laid down by section 14, such as only children who are able to participate may bring a matter to a court or that only children who have reached a specific level of development may bring a matter to court. The general application of section 14 refers to *every* child, and therefore mechanisms must be in place in order to support all children whatever their special needs may be. Training must also be provided to clerks, such as the Children's Court clerk, who is designated to receive matters directly from children, on how to assist and address children with disabilities.

### 3.2 Physically accessible courts

Article 13 of the UNCRPD does not specifically refer to physical access to a courtroom. It only refers to procedural and age-appropriate accommodations being made, which one may argue can be achieved without a matter having to be heard in a formal court setting. This inference correlates with the general understanding that courtrooms intimidate people and children in particular. Müller<sup>40</sup> argues that traditional courtroom procedures work against the eliciting of complete and reliable evidence from children. In 1987, Hill and Hill<sup>41</sup> published a study on the effect of a formal courtroom environment on the ability of children to recall certain facts and occurrences. Half of the children interviewed were interviewed in a private room while the other children were interviewed at court.

35 See s 60(3) in this regard. S 6(4)(a) further provides that an approach which is "conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided". The non-adversarial approach is thus supported throughout the Children's Act.

36 S 14 of the Children's Act.

37 A child who is affected by or involved in the matter to be adjudicated may also bring a matter which falls within the jurisdiction of a Children's Court, to a clerk of the Children's Court for referral to a Children's Court.

38 Boezaart and De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" 2011 *De Jure* 419.

39 *Idem* 420.

40 "An inquisitorial approach to the evidence of children" (2001) available at <http://bit.ly/1OzF2CG> (accessed on 14 July 2015).

41 "Videotaping children's testimony: An empirical view" 1987 *Michigan LR* 809–833.

The study found that the children interviewed in the private room recalled facts more accurately and did not experience the questioning as being as traumatic as the children who were interviewed in the courtroom.<sup>42</sup> A similar finding was also made by Saywitz and Nathanson<sup>43</sup> who found that the mere character of the courtroom may interfere with the capacity of a child to give proper evidence and places great stress on children.<sup>44</sup> This begs the question whether a formal court environment should at all be considered in matters where children are parties or witnesses, or whether matters involving children who seek access to justice should not automatically be diverted away from a courtroom, to a more relaxed and conducive environment. This may have to include children giving testimony through other means, such as CCTV cameras, as the default position, as this would remove them from the intimidating nature of the courtroom and serve the best interests of the child principle, which remains a paramount consideration in all matters affecting a child.<sup>45</sup>

As is the case in South Africa, however, the judicial authority is vested in the courts,<sup>46</sup> and the *status quo* is that matters referred for judicial adjudication, such as a matter relating to a child in need of care and protection<sup>47</sup> must be adjudicated by, and heard in a court. This may mean that the relevant courtroom in itself must be as suitable as possible for a child having no option other than to be heard in this setting. The physical accessibility of the Children's Court is addressed by section 42(8) of the Children's Act, which provides that hearings of the Children's Court must, as far as is achievable, be held in a room which is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings whilst respecting the prestige of the court, and be accessible to persons with disabilities and special needs. Reference is also made to the specific "room" in which proceedings are held. This room should be accessible to persons with various types of disabilities and special needs and should not focus only on certain disabilities such as disabilities where people make use of wheelchairs.

Sections 14, 42 and 52 of the Children's Act all support article 13 of the UNCRPD by requiring some sort of age-appropriate and procedural accommodation for children with disabilities approaching the courts. Although this may be viewed as domesticating, this very important "pillar" into local legislation, these sections will only be successful if properly committed to and implemented. As these accommodations may also have a budgetary impact on relevant role-players and departments, an assessment must be made in terms of the expenditure and roll-out of relevant programmes in order to ascertain whether the obligations under article 13 are fully recognised and respected.

In this regard, it is important to refer to the *Esthé Muller* matter.<sup>48</sup> Ms Muller, a legal practitioner in South Africa and a wheelchair user, took the respondents

42 Hill and Hill 815.

43 Saywitz and Nathanson "Children's testimony and their perceptions of stress in and out of the courtroom" 1993 *Child Abuse and Neglect* 613.

44 *Idem* 615.

45 S 9 of the Children's Act.

46 S 165 of the South African Constitution.

47 S 150 of the Children's Act.

48 *Esthé Muller v DoJCD and Department of Public Works (Equality Court, Germiston Magistrates' Court 01/03)* unreported case 2003.

to the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>49</sup> Ms Muller, who was supported by the South African Human Rights Commission (SAHRC), alleged that courthouses were inaccessible to people with disabilities, with specific reference to those who were wheelchair-bound. In 2004, a final settlement was reached in this matter and the respondents committed themselves to a plan to ensure that court buildings throughout the country would be made accessible within three years. In this regard, the settlement determined that at least one courtroom and one toilet in each building would be made accessible to people with disabilities. As the agreement required resource-intensive responses, it was settled that inaccessible courthouses, in the interim, would need to find alternative avenues of ensuring that persons with disabilities have access to the court facilities.<sup>50</sup> Consequently, according to the Department of Justice and Correctional Services (DOJ&CS)<sup>51</sup> all new courts built as from the 2009/2010 financial year are equipped with one courtroom which is fully accessible to people with disabilities.<sup>52</sup>

The Children's Act, however, calls for proceedings to be held in a room "not ordinarily used for the adjudication of criminal trials".<sup>53</sup> Thus, should there only be one room equipped in a court that suits the needs of persons with disabilities, it will most likely host criminal, civil as well as Children's Court matters as the need arises. Criminal matters will therefore be heard in the same room, contrary to the requirements of section 42(8)(c).<sup>54</sup>

In courts that were built before 2009/2010, wheelchair ramps are being added to make courts wheelchair-accessible. This addition is referred to as the "first phase of making courts accessible". The "second phase" is the installation of lifts in courts built prior to 2009/2010. According to the Department's submission to Parliament, these were the only measures in place or planned in terms of the infrastructure relating to access to courts for people with disabilities.<sup>55</sup> Therefore

49 4 of 2000.

50 SAHRC "Equality court victory for people with disabilities" 24 February 2004, available at <http://bit.ly/21xR84t> and <http://bit.ly/1OJdis> (accessed on 25 June 2015).

51 See the DOJ&CS's presentation to Parliament: "Presentation to the Portfolio and Select Committees on Women, Children and People with Disabilities: Implementation of the United Nations Convention on the Rights of Persons with Disabilities" August 2012 available at <http://bit.ly/1Q2to4y> (accessed on 14 July 2015).

52 *Ibid.*

53 S 42(8)(c) of the Children's Act.

54 It is contended that the introduction of s 48(2) creates some latitude here. It states that Children's Court hearings must, as far as is practicable, be held in a room not ordinarily used for criminal proceedings. Should this section be met with strict adherence, the DOJ&CS must provide two rooms that are fully accessible to persons with disabilities: one for Children's Court and civil matters, another for criminal matters. However, a room that is only used for criminal proceedings when access needs to be provided for a person with a disability would not "ordinarily" be used for criminal proceedings. Should this room indeed mainly be used for criminal proceedings, this may create a challenge in terms of s 48(2)(c) *vis-à-vis* s 48(2)(d).

55 It is argued that emphasis is placed on wheelchair accessibility against the backdrop of the Esthé Muller out-of-court settlement of 2004, which created a precedent by directing that all court buildings be made accessible, and the Willem Hendrik Bosch case in 2005 which determined that all police stations be made accessible. See South African Government Information "Equality court victory for people with disabilities" <http://bit.ly/1NJhEUq> (accessed on 22 January 2013).

in phase one of enabling access to courts for people with disabilities, only the needs of people with movement impairments are reported to be addressed through the upgrading and amendment of infrastructure.<sup>56</sup>

Available data in relation to the needs and prevalence of certain disabilities should have been highlighted in order to determine what type of infrastructure should be prioritised. In terms of Census 2001 and 2011, the most prevalent disability amongst South Africans is visual impairment.<sup>57</sup> In respect of the current implementation of physical accessibility for children and people with disabilities, only some disabilities are catered for. In its 2011/2012 annual report, the Department indicated that an amount of R85 million was allocated to the Rehabilitation and Maintenance Programme which was aimed at the upgrading and maintenance of buildings.<sup>58</sup> However, the Rehabilitation and Maintenance Project budget for 2011/2012 was diverted to capital projects where funds were urgently needed and was therefore cut. One of the key deliverables of the Department in this regard was to improve four priority courts through the Rehabilitation and Maintenance Programme in 2011/2012.

This target was not achieved due to financial constraints and all of the later programmes were “put on hold”.<sup>59</sup> This indicates that upgrading courts in order to become “disabled friendly” is not a priority performance indicator, and although the Department indicated to Parliament that measures were in place to address accessibility to courts for people with disabilities, the implementation thereof is once again challenging.<sup>60</sup>

### 3.3 Differential questioning techniques

Fouche and Joubert<sup>61</sup> state that children can be trustworthy witnesses and that they can make meaningful comments about their experiences when questioned correctly. Songca<sup>62</sup> argues that even though children may communicate in a different way from adults, this does not prevent them from providing information

56 Wheelchair ramps and lifts are specifically aimed at creating ease of access to people who have difficulty in moving unaided.

57 Access to courts for persons who are wheelchair-bound may have been seen as taking precedence in relation to other disabilities. Should a person not be able to access a court, his or her right is not only limited, but denied as he or she will have no means to approach services that should be available to them. Although a person with a visual impairment may physically access the court, his or her access will be limited as services will not be fully enjoyed as they need to be specifically accommodated.

58 The DOJ&CS Annual Report 2011/2012 25.

59 *Idem* 52.

60 In the 2013 Budget Vote Speech, the Deputy Minister of Justice and Constitutional Development indicated that over the next three years, the department would spend R3,2 billion on the construction of courts and other infrastructure projects to enhance access to justice. A further R92 million would be spent on day-to-day maintenance and R279 million on rehabilitation of court facilities. See <http://bit.ly/1Qh1xMw> (accessed on 12 October 2014). The department, however, had a budget cut of more than R600 million and it is argued that, should a shortfall arise in one or the other areas of service delivery, funds would be cut in the budget for infrastructure, and therefore in the budget for making courts more accessible to people with disabilities.

61 “Facilitating disclosure of child sexual abuse victims in the middle childhood: A seven-phase forensic interview protocol” 2009 *Acta Criminologica* 43.

62 “The evidence of young children: Establishing the truth in South African criminal courts” 2004 *SAQJCR* 313.



accurately in a manner that can be understood. Generally, children should be questioned in a specific manner as they simply do not have the same abilities as adults to retain memories and information.<sup>63</sup> This impacts dramatically on their reliability as information bearers and witnesses unless specific techniques are utilised in order to source the required information. Dunn<sup>64</sup> illustrates that young children by the mere nature of their age still need to learn to retain information. She also indicates that this may result in the child not having any memory of a particular event, or conversely, only recalling fragments of the event.<sup>65</sup> When questioned on issues where he or she has no or very little recollection of the event, a child attempts to fill in the gaps of the story.<sup>66</sup> Should a child be coerced into a direction by means of an incorrect questioning technique, the child may attempt to fill in the gaps of his memory with incorrect or suggested information.<sup>67</sup> She also states that children are much less likely to be able to filter out actual retained memory from modifications in the original memory that resulted from post-event occurrences and input. Walker<sup>68</sup> further illustrates that linguistic complexities may contribute to the testimonies of children being brought into question. Vocabulary, word order, syntactic methods and ambiguity in language may be difficult for children to grasp, and much more so for children with learning and speech impairments. The mere use of prepositions may also have the effect of a dire outcome in a matter should they be incorrectly used by a child.<sup>69</sup> Walker provides the example of the use of the prepositions “in” and “on”. A child gave testimony that her father put his hand “in” her bottom. The father was charged with sexually abusing the child. Upon re-interviewing the child, a child-psychologist, who noted an inconsistency in her use of prepositions, ascertained that the child meant to say that her father put his hand “on” her bottom. Although he was guilty of physically assaulting his child, the father was not guilty of sexual abuse. It is therefore important for any person questioning a child to be alert to the importance of language command. In the light of the status of sign language, the nuances of prepositions, synonyms and ambiguity require alertness from the person questioning the child. As much as it may be challenging to determine the true meaning behind the testimony provided by a child as a result of linguistic intricacies, it becomes ever more complex if the language used by the child can only be understood by a limited number of role-players, for example a trained sign-language interpreter or the child’s immediate family who are able to understand him or her.<sup>70</sup>

63 Dunn “Questioning the reliability of children’s testimony: An examination of problematic elements” 1995 *Law and Psychology R* 1.

64 *Ibid.* See also Dale “Ensuring reliable testimony from child witnesses in sexual abuse cases: Applying social science evidence to a new fact-finding method” 1993 *Albany LR* 187; Lyon “Child witnesses and the oath: Empirical evidence” 2000 *Southern California LR* 1021–1027; Cunningham “Helping a child be a witness in court: 101 things to know, say and do” (2011) available at <http://bit.ly/1IFPbHw> (accessed on 14 July 2015) 1–55.

65 Dunn 1995 *Law and Psychology R* 1.

66 *Ibid.*

67 *Ibid.*

68 “Children in the courts: When language gets in the way” 1999 *Association of Trial Lawyers of America* 2. Walker is a forensic linguist and consultant.

69 *Ibid.*

70 Other judicial role-players will be unable to determine whether a child who uses sign language used prepositions incorrectly, etc.

Appropriate questioning techniques are therefore even more important in matters where the child with a disability is asked to testify or relay an experience. Should the wrong questioning technique be used, the credibility of the child may be brought into question. For example, a child with Down's syndrome may be particularly sensitive to negative emotion and would respond to what he or she perceives as aggression by trying to appease the questioner.<sup>71</sup> Consequently, the reliability of the information he or she provides may be undermined, unless questioning is kept non-threatening, non-adversarial and simple.<sup>72</sup>

Against this background, section 52 of the Children's Act calls for rules to be made on the appropriate questioning techniques for children with intellectual or "psychiatric difficulties" or with hearing or other physical disabilities that cause difficulties in communication.<sup>73</sup> Gallinetti<sup>74</sup> states that this provision is innovative as it provides for the legal framework for the *obligatory* drafting of rules to protect vulnerable children from certain procedures at court. The Children's Act therefore obliges relevant role-players<sup>75</sup> to make rules designed to address these various types of questioning techniques. However, no such rules have been made in terms of the Children's Act. The Rules Board for Courts of Law Act<sup>76</sup> provides that the Board may, with a view to the efficient, expeditious and uniform administration of justice in courts, subject to the approval of the Minister, make rules for the lower courts, which would include the Children's Court.<sup>77</sup> The Rules Board Act also states that the Rules Board may generally make any rule which may be useful to be prescribed for the proper despatch and conduct of the functions of the courts.<sup>78</sup> Although both the Children's Act and the Rules Board Act mandate the Rules Board to make rules for procedures such as questioning techniques, the Rules Board has failed to do so. Although crucial in terms of the rights of children with disabilities to have access to justice and participate during court proceedings, there is no prescribed manner in which presiding officers and other judicial stakeholders should undertake the questioning of children with communication difficulties.

### 3.4 Training in order to address stigmatisation

Article 13 of the UNCRPD expressly addresses the training of relevant stakeholders. Against the framework discussed above, stakeholders must be appropriately trained to assist and address children with disabilities in accessing justice. In order for South Africa to meet its international obligations, persons at present attending to the rights of children with disabilities to access justice must receive some form of specific training. A "one-size-fits-all" approach cannot suffice, as reference must be made to the permutation approach which implies

71 McEwan *The verdict of the court: Passing judgment in law and psychology* (2003) 98.

72 Sanders *et al* "Witnesses with learning disabilities" 1996 *Office of Research and Statistics* 2.

73 S 52(2)(a)(ii) of the Children's Act.

74 Gallinetti "The Children's Court" in Davel and Skelton (eds) *Commentary on the Children's Act* (Revision Service 2013) 4–22.

75 In this regard, the DOJ&CD and the Department of Social Development.

76 The Rules Board for Courts of Law Act 107 of 1985 (hereafter the Rules Board Act).

77 S 6 of the Rules Board Act.

78 S 6(1)(t) of the Rules Board Act.

that children with disabilities are vulnerable and unique as a result of their age and disability.

It is thus crucial for presiding officers to be trained to assist children with disabilities in their pursuit to access justice. With the initial implementation of the Children's Act, the training body of the DOJ&CS, the Justice College, provided training to presiding officers on the implementation of the Children's Act.<sup>79</sup> However, no reference was made to children with disabilities in the 2009 edition of the *Guide for presiding officers in the Children's Court on the new Children's Act*, as developed by Justice College. Reference was only made to the accessibility of a courtroom to "persons who are disabled".<sup>80</sup> This is an oversight as a differential approach in procedure, accommodation as well as questioning techniques must be embarked on to provide children with disabilities with equal access to justice. For instance, should the court find that the child is in need of care and protection, there are few children's homes or places of safety with physical environments that are accessible or with staff who are properly trained to accommodate the needs of a child with disabilities.<sup>81</sup> A presiding officer must thus be knowledgeable on the needs of such child, so as to ensure the appropriate response in that matter. By merely addressing all children in the same way, children with disabilities will be subjected to further victimisation. Proper training also becomes imperative in relation to role-players who provide for procedural accommodation in respect of access to justice for children with disabilities. For instance, it is crucial that intermediaries are continuously trained on how to assist not only children in general, but also children with disabilities. Without specific guidance, intermediaries will generally not be able to address and understand the needs of, for instance, a child with a mental disability. There are also general concerns about the expertise of intermediaries as no government training or oversight is officially required. Jonker and Swanzen<sup>82</sup> maintain that intermediary work is *ad hoc* in its nature, and therefore there exists very little room for accountability and support in specific pursuits for expertise. The training of intermediaries was also highlighted in the *Phaswane* matter where the court pointed out that language barriers, as well as an intermediary's unfamiliarity with court procedures, contribute to the inefficiency of the intermediary service.<sup>83</sup> In these instances, intermediaries may simply serve as interpreters as they would be unsuccessful in performing their appointed function of ensuring that the child is made comfortable by specific use of language and tone of questioning.<sup>84</sup>

79 Justice College was the DOJ&CD's official training body. Justice College no longer trains presiding officers, as this duty is currently the responsibility of the Office of the Chief Justice and the judiciary in general.

80 See Justice College (ed) *Guide for presiding officers in the Children's Court on the new Children's Act* (2009) 3.

81 Jamieson and Proudlock 8.

82 "Intermediary services for child witnesses testifying in South African criminal courts" 2007 *Int J on Human Rights* 110. See also Goodman-Brown *et al* "Why children tell: A model of children's disclosure of sexual abuse" 2003 *J of Child Abuse and Neglect* 525–540. On the need for training to understand the child witness, see *S v S* 1995 1 SACR 50 (ZS); *S v Ontong* A 719/01 (unreported) 2002 (C).

83 *Phaswane* para 196.

84 This situation is not unique to South Africa. In March 2012, a case was heard at the Court of Appeal in the United Kingdom relating to a man who had been accused of a sexual

*continued on next page*

Apart from equipping relevant stakeholders to respond adequately to the needs of children with disabilities, training is also imperative in order to prevent stigmatisation and continued unequal treatment. Basic elements such as how to refer to the child's disability or how to address a child with a specific disability can assist in providing the child with equal access to justice in a dignified manner. Although not a specific science or enshrined in any international agreement, disability etiquette is key in the promotion and protection of the rights of children with disabilities to access justice. According to the United Nations Office of the High Commissioner for Human Rights,<sup>85</sup> it is imperative, when engaging with a person with a disability, to focus on the person and not his or her disability.<sup>86</sup> Accepted terminology according to the UNCRPD is "persons with disabilities", not "disabled person"; "rights of persons with disabilities", not "disability rights". The UNCRPD also uses the terms "mental disability" and "intellectual disability" although some prefer the term "psychosocial disability". If a person with disabilities prefers the use of certain terminology, respect for that person's wishes is pivotal, unless it can be considered derogatory or as undermining dignity. Relevant stakeholders such as legal representatives and court personnel must be conscious of the language used to address and communicate with children with disabilities, as well as referring to them. This may be attained through very basic training in respect of disability etiquette, which in turn may serve to promote the obligations under pillar six of the above-mentioned framework.

#### 4 CONCLUSION

Article 13 of the UNCRPD focuses on the practicalities of providing access to justice for people with disabilities.<sup>87</sup> It makes reference to "age-appropriate accommodations", which suggests that accommodations required for children with disabilities may differ from those required by adults with disabilities. The UNCRPD thus provides three very useful elements against which equal access to justice can be measured: reasonable accommodation, participation and the training of relevant stakeholders.<sup>88</sup> These three essential elements offer guidance in assessing the responsiveness of a judicial system towards meeting the needs of people with disabilities.

The Children's Act, as the main legislation applicable in matters where children with disabilities may have been abused and neglected, domesticates article 13 of the UNCRPD to some extent. Accessible court procedures have

---

offence. The accused presented a clear learning disability as well as a speech impairment. The presiding judge directed that the accused be provided with an intermediary under his common-law powers to ensure a fair trial. However, no "appropriate" intermediary was available. In fact, three different intermediaries were approached but each felt unable to provide the necessary assistance. The matter continued at the discretion of the presiding judge, and the accused was convicted. The accused later argued that the trial had been unfair. This matter is another illustration of firstly, the issues relating to the availability of intermediaries in court proceedings and secondly, the suitability, skill and training of intermediaries to assist persons with special needs. See *Regina v Anthony Russell Cox* No 2011/04593/C1.

85 OHCHR (2010) 1-68.

86 OHCHR (2010) 48.

87 *Ibid.* See also Kanter 221-222.

88 A 13 of the UNCRPD.

been put in place in respect of the Children's Act. In this regard, a child may bring a matter to the attention of the Children's Court by him- or herself.<sup>89</sup> Section 14 of the Children's Act has general application and may not be limited to matters relating to the Children's Act.<sup>90</sup> In this regard, children do not need the permission of their parents to approach a court.<sup>91</sup> Children with disabilities who are able to approach a court and who find themselves being abused and neglected, may therefore bring this matter to the attention of the relevant Children's Court in order to obtain relief and assistance. The processes of the Children's Court are also designed to be informal and non-adversarial, which correspond with the age-appropriate accommodations required under article 13 of the UNCRPD.<sup>92</sup>

Courtrooms and court buildings generally intimidate children and using alternative settings when children with disabilities need their matters to be heard, may be an approach requiring consideration.<sup>93</sup> Nevertheless, where children with disabilities have no option but to have their matters addressed in a formal courtroom setting, these courts must be structured and equipped to accommodate children with disabilities. This is supported by the Esthé Muller agreement as well as section 42(8) of the Children's Act, which provides that hearings of the Children's Court must, as far as is achievable, be held in a room which is conducive to the informality of the proceedings and be accessible to persons with disabilities and special needs.

Despite the Esthé Muller settlement and the requirements set out in the Children's Act, it appears that the administrative will and commitment to abide by these standards are being neglected by the DOJ&CS. Budgets for renovation are not prioritised and sometimes re-allocated to other areas of need. Also, the main implementation phases appear to address disabilities where people make use of wheelchairs. As was also illustrated, the most prevalent disabilities are in fact related to seeing, cognitive and hearing difficulties, with only 2% of the population having difficulty with movement.

Further to this, section 52 of the Children's Act calls for rules to be made on appropriate questioning techniques for children with intellectual or "psychiatric difficulties" or with hearing or other physical disabilities that cause difficulties in communication.<sup>94</sup> It was also pointed out that no such rules had been made by the Rules Board as yet.

Although certain measures are in place to support the implementation of article 13 of the UNCRPD, and although in general the Children's Act supports the application of this section in respect of matters falling within its jurisdiction, more needs to be done by relevant stakeholders to ensure that children with disabilities are provided with equal access to justice, as their vulnerability profile increases their chances of having to approach the Children's Court.

---

89 S 14 of the Children's Act.

90 See para 3 1 above.

91 In the case of the Children's Court, s 53 of the Children's Act provides that the presiding officer will then decide whether the child requires legal representation.

92 S 52(2) and s 6(4)(a) of the Children's Act.

93 See para 3 1 above.

94 S 52(2)(a)(ii) of the Children's Act.