

## SOME IDEAS ON THE “BESTS INTERESTS OF A CHILD” PRINCIPLE IN THE CONTEXT OF PUBLIC SCHOOLING

### 1 General and introductory remarks

The purpose of this note is to consider aspects of the “best interests of the child” norm contained in section 28(2) of the Constitution in the context of public schooling. However, for this to be done, certain basic principles concerning section 28(2) have to be restated.

Before the advent of the new constitutional dispensation in South Africa, the universally accepted principle of the “best interests of a child” was obviously already recognised – it was usually applied in cases of custody and access (see generally, eg, *Fletcher v Fletcher* 1948 1 SA 130 (A); *Townsend-Turner v Morrow* 2004 2 SA 32 (C) (*re* access by grandparents); *R v H* 2005 6 SA 535 (C)). This principle directed the supreme court as upper guardian of all minors to promote the interests of children rather than focus on the rights and entitlements of parents (see eg Currie and De Waal *The Bill of Rights handbook* (2005) 618).

Section 28(2) of the Constitution now declares that “a child’s best interests (a person under the age of 18 years) are of paramount importance in every matter concerning the child”. This is a simple sounding but complex provision. The provision is an indication that the mere existence of fundamental and other rights of children are not deemed sufficient to ensure their full protection and the promotion of their best interests. It may be assumed that section 28(2) has replaced the common law “best interests of the child” criterion. However, the principles developed at common law are still relevant, but not decisive, in giving content to section 28(2).

### 2 Brief analysis of section 28(2) of the Constitution

#### 2.1 Nature and status of the provision

While the rights of children are listed and expressly referred to in section 28(1), the term “right” does not occur in section 28(2). What is then the nature and status of section 28(2)? There are at least the following possibilities:

- (a) The provision does not confer a “right” since the Constitution does not say so. It should thus rather be seen as a kind of constitutional principle. The purpose of the principle is to promote the best interests of children by acting as a directive (i) concerning the manner in which the rights of children should be interpreted and weighed up against other rights, and (ii) regarding the interpretation, limitation and application of the rights, competencies, functions and duties of others dealing with children. Reference may generally be made to, for example, *Jooste v Botha* 2002 2 SA 199 (T) 210C–E

where it was held that rigorous application of the best interest standard could mean that the rights of parents and siblings are always subject to those of their children and that the standard should therefore be seen as a general guideline in cases involving children, rather than a substantive legal rule.

- (b) Section 28(2) does by implication create a right for a child to have his or her best interests given the fullest possible effect (see eg *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T)). However, this is not a “super right” when balancing or weighing competing rights and the interests of children as this would be alien to the Constitutional Court’s approach that all rights are mutually interrelated and form a single constitutional value system (see *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC)). Some decisions on the best interests principle do equate this standard with the rights of children. For example, in *Bannatyne v Bannatyne* 2003 2 SA 363 CC) par 24 it was remarked that that the best interests criterion contains a duty on parents to properly care for their children and requires the state to have a proper administrative structure to ensure that children receive all the protection they are entitled to in terms of section 28 of the Constitution.

## 2.2 Scope of application

The reach of section 28(2) cannot be restricted to the ambit of fundamental rights included in section 28(1) of the Constitution (see *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) 17). In addition, section 28(2) probably applies to a specific child as well as to children collectively, whether as a defined group or merely as children in general (see eg s 6(1)(b) of the Children’s Act, 2005). This interpretation may be of importance in the sphere of general official decision-making on education affecting groups or categories of children. Is section 28(2) applicable where the competing rights or interests of two or more children have to be considered in a given situation? If so, the correct solution would probably be the finding of a balance providing for the best interests of every child in the circumstances to be accepted to the fullest extent possible.

What is meant by “every matter concerning the child”? In view of the generality of the language used, it is obvious that a wide interpretation should be accepted. It would thus be quite natural for the interests of a child in an educational context to be covered as well (in addition to all the well-documented and classical instances where it has been applied already). The following general statement concerning the best interests of the child has received some judicial approval in *Grootboom v Oostenberg Municipality* 2000 3 BCLR (C) 288I:

“[T]he inclusion of a general standard for the protection of children’s rights can become a benchmark in the review of all proceedings in which decisions are taken regarding children.”

However, there must be limits even to a wide interpretation of “every matter concerning the child”. For example, a reasonable link between a “matter” (which can include almost any kind of situation) and a “child” must be construed in terms of a sensible meaning of the term “concerning”, which links the two. If the link is too indirect or tenuous, section 28(2) may not find application. To use an extreme example: A child would not be able to legally challenge the level of taxation her father has to pay because it prevents him from spending more money

on her and so to better serve her best interests. And a child could not claim to receive preferential treatment in conflict with existing law when validly entering into a contract because it would “serve his best interests” to do so.

In what respect could the application of section 28(2) be limited? It does appear that the “best interests” standard is obviously not without limitation (see *Sonderup v Tondelli* 2001 1 SA 1171 (CC) on the alleged unconstitutionality of the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996; see also Cheadle, Davis and Haysom *South African Constitutional law: The Bill of Rights* (2002) 531–532). Perhaps section 36 of the Constitution which contains the requirements for the limitation of fundamental rights is also applicable here – even if section 28(2) does not technically embody a substantive fundamental right.

It has also been stated that the “best interests” principle may not ultimately be the paramount consideration where issues relating to the allocation of fiscal resources are relevant, and the Constitutional Court has warned that there is a danger that children may become stepping-stones to a claim, instead of being independently valued (see *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 71).

### 2.3 “Best interests”

Generally an “interest” means an advantage, benefit or concern. The reference to “best interests” in section 28(2) should mean that whenever necessary, all the relevant interests in a given situation must be ascertained on the basis of evidence, including naturally the interests of the child, and a judgment made on what the child’s “best” interests in a given situation are – in other words, the child’s most advantageous position practically possible and desirable in view of the relevant law. The best interests of a child clearly depend on a proper evaluation of the facts of every case. However, only interests falling under express or implied rights of a child should be considered as they alone are accepted by the legal order as worthy of protection. Besides the common law principles and examples that have evolved in this regard, section 7 of the Children’s Act, 2005 now provides a long list of *factors* to be taken into account when applying the best interests of the child standard. The list contains a diverse mixture of relevant considerations, but cannot really be seen as providing a proper definition of what the “best interests” of a child are. If an attempt is made to define “best interests”, this can only be done in general terms and thus devalue its usefulness in direct proportion to its generality. It thus makes good sense to have regard to factors that are relevant to determine a child’s best interests rather than attempt to arrive at an abstract description of “best interests”.

Far-reaching and generally useful as the factors listed in section 7 of the Child Act are, they can also *not* be regarded as an exhaustive list. In any event, section 7 must be measured against section 28(2) of the Constitution to determine its constitutional validity and section 28(2) can for obvious reasons never be restricted to a fixed list of factors.

### 2.4 “Paramount importance”

Something is literally of paramount importance when it is “more important than anything else” or of “supreme importance”. Theoretically formulated, the application of section 28(2) would mean that other competing interests (provided for by rights, competencies, powers and functions) will have to be disregarded to the

extent that they are incompatible with due recognition being given to the “best interests” of the child. A sensible and proper balancing and weighing of competing rights and interests should be made and section 28(2) is obviously limited to what is possible and realistic in a given situation. The paramount position of a child’s best interests must be assured by application of existing legal principles. It is probably correct to interpret existing law to allow for the paramount importance of a child’s interests to be given effect.

The “best interests” yardstick has allegedly become controversial in a sense because it does not (always) provide a reliable or determinate standard and creates the danger of social engineering where public officials are entitled to decide what are in the best interests of children (eg Currie and De Waal 618). Furthermore, a perceived difficulty with this standard is the impossibility of predicting whether certain decisions will (in the long run) benefit a particular child because of the subjective and culture-specific nature of decisions regarding child-raising (*ibid*). Further criticism is that in practice the *constitutional* status afforded to the “best interests” principle has apparently not made a significant difference in legal practice and that judges simply equate the standard with the existing content of family law rules and that the standard itself is often used to justify the interests of *parents* instead of those of children (*idem* 619). On the other hand, it should be remembered that the best interests principle implies that what is in the best interests of a child may not accord with his or her wishes. This principle is of special relevance in the case of older children who may have their own considered opinions and who should be consulted about matters affecting them.

One should also consider the decision in *Christian Lawyers Association v Minister of Health* 2005 1 SA 512 (T) where the court held, regarding certain provisions of the Choice on Termination of Pregnancy Act 92 of 1996, that the submission that the non-involvement of parents was unconstitutional because the applicable provisions did not cater for the interests of the child, was unsustainable as the legislative choice opted for in the legislation served the best interest of the pregnant girl since it was flexible in recognising and accommodating her individual position based on her intellectual, psychological and emotional make-up. It would not have been in the interests of a pregnant girl, according to the court, to adopt a rigid age-based approach that took no account of her individual peculiarities – the “best interests” of a child represents an objective norm and the opinions of caring and informed parents may be important to establish these interests but can obviously not be decisive. It goes without saying that a parent’s view of the best interests of his or her child may not be correct since children are persons with “independent” rights and are not merely extensions or possessions of their parents, or automatically subject to decisions of state officials.

In the final analysis it appears that a court has a wide discretion on what the best interests of a child are and how effect should be given to these interests. This may be good for children but difficult for those who have to make decisions involving children or lawyers required to give realistic advice.

### **3 Best interests of the child in an educational context (public schooling)**

#### *3.1 General*

The principle of “best interests” as enshrined in section 28(2) of the Constitution should be of particular relevance in the context of the public education of children – although there are apparently not many cases in which this has been

expressly recognised. In view of the fact that children are only persons who have not yet completed their eighteenth year, the best interests principle could obviously not apply to school learners who have already reached the age of 18 years.

It is well known how the best interests standard can limit the decision-making capacity and interests of parents. This should obviously be similar in the case of public education officials taking decisions concerning children, controlling them or providing education to them. It speaks for itself that, theoretically at least, only education and an educational environment which are in the “best interests” of a child should be provided and maintained and that all decisions by parents and education officials in this regard impacting on a child should be measured in terms of section 28(2). However, education is a complex sphere and there are problems with matters that cannot so easily be controlled by education officials and educators, as well as uncertainty about what the best interests of children would actually be in a given situation. There could be widely different views on a child’s best interests in the school system. Theoretically, the “best interest” standard should nevertheless be applicable in regard to all decision-makers (including decision-making bodies) in education concerning children. This would include parents with their mainly common-law derived rights and powers (although they also have direct and indirect functions in terms of legislation such as the South African Schools Act 84 of 1996 – “Schools Act”), as well as the whole spectrum of state officials and state bodies (eg the Council of Education Ministers in terms of s 9 of the National Education Policy Act 27 of 1996; the Heads of Education Departments Committee provided for in s 10 of the National Education Policy Act; the governing body of a public school as envisaged in s 16(1) of the Schools Act), as well as the national Minister of Education, members of the provincial executives responsible for education, and finally educators and other staff who interact with children (see, by way of analogy, *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) where the court directed *departments and other participants* to remedy their conduct in dealing with unaccompanied foreign children).

In making education laws the national legislature and provincial legislatures are probably also bound by section 28(2) (see eg a 3.1 of the Children’s Convention; Currie and De Waal 618). The potential for the application of section 28(2) is thus vast – at least in theory.

The Schools Act, which is the primary national legislation on school education, does contain a few express references to the “interests” and “best interests” of learners (see eg ss 5(4)(d)(i) (admission), 8(5) (disciplinary code for learners), 51(2)(a) (registration of child for home education) – however, there are also provisions concerning the “best interests of the school” in s 20(1)(a)). The mere inclusion of the phrase “best interests” in a legislative instrument is, of course not the only way to ensure that the best interests of children (“learners” in this context) receive proper recognition. It may be concluded that many provisions of the Schools Act creating a proper educational framework are aimed at promoting the best interests of children who are learners. Nevertheless, with the redrafting of the Schools Act that is on the cards, every provision should be specifically measured against section 28(2).

Two recent examples from reported case law may now be considered to evaluate the influence of section 28(2) (see also for a reference to the best interests principle in solving disputes concerning parental involvement, Visser “Some principles regarding the rights, duties and functions of parents in terms of the

provisions of the South African Schools Act 84 of 1996 applicable to public schools” 1997 *TSAR* 627–628). The cases below deal with language in school education and it can hardly be denied that a child’s best interests are usually served by allowing him or her to be educated in the language with which the child is most familiar – provided that education of a sufficient quality can take place in such a language.

### 3 2 Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys

In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) the facts were as follows: In November 2001 the first applicant, at that stage the only public school in a certain area of Middelburg in Mpumalanga with Afrikaans as the exclusive teaching medium in terms of its valid language policy, was instructed by a representative of the second respondent, the education MEC for the province, to enrol 20 learners who wished to attend the school from 2002 and to be taught in English. The applicant refused to comply as the school’s instruction medium was Afrikaans. In January 2002 the school’s power to admit learners was withdrawn by the first respondent. The next day a number of learners, who were to be taught in English, were enrolled at the school. This led to an application for the setting aside of the decision of the first respondent.

The court was concerned about the interests of the learners, specifically about the effect that the change of the school’s status would have on the learners with special learning requirements and on the Afrikaans learners, and about the fact that it appeared that the respondents had not paid any attention to the interests of the learners who were to receive their instruction in English. For these reasons the court decided to appoint a *curatrix ad litem* for the learners. From the *curatrix*’s report it appeared that the new learners could easily have been accommodated in other schools, that the learners had adapted reasonably well at the applicant school, that the applicant school was probably the best primary school in the area, that it was the nearest school to their homes, that the learners’ parents wanted them to attend the applicant school, that a forced turning away of the learners would have a negative influence on them, that the learners might feel rejected, and that it would thus be in the learners “best interest” to stay at the first applicant school, despite the administrative defects of the process.

The single judge court (Bertelsmann J – who was, as a senior advocate at that stage, involved in the drafting of the Schools Act) held that the respondents’ interpretation of the regulations was incorrect. The regulations clearly stated that the schools which offered the tuition in the desired language had to be at full capacity before the status of a single-medium school could be changed. The provisions of the regulations had thus been disregarded and the respondents’ administrative conduct was *prima facie* unfair. Neither the Schools Act nor the applicable language regulations authorised the respondents to instruct a school to change its single-medium status.

Bertelsmann J further held that it was difficult to determine the content of the right to a single-medium school as opposed to the right to be educated in the official language of one’s choice (see s 29(2) of the Constitution). It was clear that the latter right entailed the core right to mother tongue education, or education in the language of choice. The claim to an institution where the language of choice was used exclusively, necessarily had to be seen against the background

of the protection of the right to use a language of own choice and to live a cultural life of own choice. A claim to a single-medium institution, according to the judge, was probably best defined as a claim to emotional, cultural, religious and social-psychological security. As long as a dual-medium school was properly run, it could hardly be argued that the conversion of a single-medium public institution to a dual-medium school *per se* detracted from the claim of each cultural society to education in its own official language or language of its choice. The right to a single-medium public educational institution was clearly subordinate to the right which every South African had to education in a similar institution and had to make way where there was a clearly proven need to share education facilities with other cultural societies (see generally Malherbe "Reflections on the education clause in the South African Bill of Rights" 1997 TSAR 85). All this did not mean, according to the judge, that an existing single-medium institution could be challenged without compliance with the existing legal requirements.

Bertelsmann J then came to the "best interests of the child" principle and declared that the courts had repeatedly emphasised that practical content was to be given to what he described as the "fundamental right" entrenched in section 28(2) of the Constitution, namely that a child's best interests were of paramount importance in every matter concerning the child. It was self-evident, stated the court, that section 28(2) was directly applicable to education and every situation in which a learner might find himself or herself. All things considered, the court held that the interests of the relevant learners would best be served by allowing an English course to be created at the applicant school. The court noted that the respondents had undertaken not to close the class for the learners with special educational requirements. The learners in the Afrikaans course at the school would lose the exclusivity of an Afrikaans school if the respondents' decision were not set aside, and their classes would probably become somewhat fuller. There was no indication, however, that their exercise of the Afrikaans language and culture, or their academic or sport achievements would be prejudiced by the step, as long as the relationship of 40 to one was not exceeded (as prescribed in the official norms and standards regarding language in public schools).

In the light of the foregoing, the court sought to balance the interests of the school, and specifically its right to fair administrative action which had undeniably been violated by the respondents, against the interests of the learners who were dragged into the rather unpleasant dispute by the conduct of the respondents. Although the applicants argued that section 28(2) ("best interests of the child") created no fundamental right, but only afforded priority/precedence to a child in the weighing-up of conflicting interests, the court held that section 28(2) indeed establishes that the fundamental right of every child has to take first place in the balancing of the conflicting rights of fighting parties (and thus also the fighting parties' claim to fundamental rights and the maintaining of such rights). The applicants' interests thus had to yield to those of the minors *in casu*.

The court further remarked that the applicants had waited very long (almost nine months) before the present matter was placed before the court. It could not be denied that the learners in the meantime developed an indisputable interest to remain at the applicant in the future. If the application had been brought before the court on the day that the respondents' decision was taken, the court would not have hesitated to set the decision aside. That route could not be followed now, however, without prejudice to the learners. A further consideration in favour

of not allowing the application, was the concession by the respondents that they would most probably resume their attempt if the present application succeeded. It was in no one's interest to expose the school and the learners to a repetition of the process.

Bertelsmann J concluded that no matter how unsatisfactory the result might be from the viewpoint of the applicant, administrative law and single-medium schools in general, the application had to be dismissed.

The above judgment is thought-provoking and attempts to provide a practical and fair solution to a highly politicised dispute. The court gave extraordinary effect to what it perceived to be the best interests of learners enrolled for education through the medium of English. However, it appears to be incorrect to literally balance the "interests of the school" against the "rights of the minors" to receive education in English: the school as a juristic person does not have fundamental rights (although it may have many statutory rights), does not exist for its own benefit and does not necessarily represent the rights of (all) the learners associated with it. What must be balanced, *inter alia*, are the rights of the Afrikaans learners "of the school" and those learners requiring tuition in English. This raises the intriguing question of how the best interests principle is to be applied in a situation where there are different groups of children and the best interests of all of them are of "paramount importance". In practice, the rights and interests of the different groups will probably have to be fairly and reasonably balanced and the best accommodation of the (best) interests of all be achieved. Viewed in this light, Bertelsmann J's judgment does appear to be generally acceptable.

The emphasis placed in the judgment on the relative importance of section 28(2) is apparently to the effect that the best interests of a child can override aspects of section 28(2) of the Constitution regarding language. This demonstrates that section 28(2) may lead to considerable uncertainty regarding rights and duties in public education.

### 3.3 Western Cape Minister of Education v Governing Body of Mikro Primary School

The decision of the Supreme Court of Appeal in *Western Cape Minister of Education v Governing Body of Mikro Primary School* (Case No 140/2005 (SCA)) has attracted wide attention (see for a discussion Visser 2006 *THRHR* 333). The Mikro Primary School is an Afrikaans medium public school in Kuilsriver close to another primary public school (De Kuilen) which provides education in Afrikaans and English on a parallel basis. The governing body of Mikro had been resisting requests by the Western Cape Education Department to change the language policy of the school so as to convert it into a parallel medium school. The school's admission policy, which incorporates its language policy, provides as follows: "All education in this school (except in the areas of English and Xhosa) occurs through medium of Afrikaans" (in translation).

Eventually a directive by the head of the Education Department to the principal of the school to admit certain learners, and to have them taught in English, gave rise to an urgent application by the school to the Cape High Court for an order setting aside the directive. The application succeeded and that court interdicted the head of education from compelling the school or its principal to admit learners other than in compliance with the school's language policy. The court further interdicted the education department from instructing or permitting officials



of the department to unlawfully interfere with the government or the professional management of the school and ordered that the 21 learners who had been admitted to the school be placed at another suitable school or schools. The Cape Education Department then appealed against this judgment (reported as *Governing Body of Mikro Primary School v Western Cape Minister of Education* [2005] 2 All SA 37 (C)) to the Supreme Court of Appeal.

It is not necessary to traverse this judgment by a unanimous court of five appeal judges as far as its interpretation of the language provisions in section 29(2) of the Constitution is concerned (see Visser 2006 *THRHR* 333 on this) and only the relevance of the best interests of the children *in casu* has to be considered as articulated by Streicher JA (par 47 *et seq*):

“Counsel for the third appellants submitted that it would not be in the best interests of the 21 English learners to be transferred to another school during their primary schooling. Relying on the provisions of section 28(2) of the Constitution, which provides that a child’s best interests are of paramount importance in every matter concerning the child, she submitted that the court *a quo*’s order should be replaced by an order that the learners be placed at the second respondent on a permanent basis. In the alternative she submitted that we should admit further evidence so as to enable this court to determine whether the learners could be accommodated at De Kuilen and that, in the event of our finding that they could, we should order that they be placed at De Kuilen. The submission that it is in the best interests of the 21 learners concerned that they stay at the second respondent is based on the say so of some of the parents of the learners, which in turn is based on the fact that the learners have settled in well at the second respondent and that they are happy there. However, in my view, no case has been made out that it would be in the best interests of the learners to stay at the second respondent and for the following reasons there is no reason to believe that their interests would be better served by an order that they should remain at the second respondent:

- (a) The fact that they are at present happy does not guarantee that they will in future years be happy as a very small minority in a school that is otherwise an Afrikaans medium school.
- (b) There is no reason to believe that they would be less happy at another school. In this regard it should be borne in mind that the second respondent was not their parents’ first choice.
- (c) It is unknown whether or not it would be possible to cater adequately for their educational needs at the second respondent if they remain such a small group.
- (d) The legislature clearly considered it in the best interests of learners that they be educated in schools which are governed and professionally managed in a manner that accords with the provisions of the Act. Given the background to the dispute, to impose the learners in question on the first respondent would be anomalous and would run counter to this goal.
- (e) The judge *a quo* carefully considered their interests in formulating his order and its terms were designed to ensure that their placement at another school would cause minimal disruption in their lives.
- (f) The respondents indicated during argument that they have no objection to the addition at the end of paragraph 7 of the order by the court *a quo* of the following sentence: ‘The placement of the children at another suitable school is to be done taking into account the best interests of the children.’

In the light of the foregoing the question as to what the position would have been had it been held to be in the best interests of the 21 learners to stay at the second respondent need not be considered. In the event, should it transpire that it is not in the best interests of the learners in question to be moved, the appellants are free to approach a court for appropriate relief. At that stage it would be necessary to

consider to what relief, if any, having regard to competing rights and interests, the appellants are entitled.”

It is submitted that the above judgment generally follows a legally acceptable and sensible approach to the role of section 28(2) by giving appropriate weight to a mixture of objective and subjective considerations. The court also appears to have correctly placed an (evidential?) *onus* on the appellants to demonstrate why the orders of the court *a quo* would not serve the best interests of the learners. In addition the court took a wider view and considered the background of the dispute. In contrast with the *Laerskool Middelburg* case (par 2 2 *supra*), Streicher JA confirmed that the fact that the children moved to another school did not necessarily mean that their best interests were prejudiced. However, the court added that the high court could be approached should there be grounds indicating that it is not in the best interests of the children to be moved when the time for this actually arrives. This careful flexibility is consistent with an approach to properly take the best interests of children as learners into account.

The judgment implies that the actions of the education officials were not in the best interests of the learners. It could probably be argued that these officials had been pursuing a political agenda in terms of which the children were merely used as pawns in a power game to achieve the result of a parallel medium school and without taking the actual interests of the children into account. The best interests principle thus provides an important check on the misuse or abuse of statutory power by officials – just as it has traditionally prevented parents from acting selfishly to the detriment of their children.

#### 4 Conclusions

One cannot say that the best interests of the child standard has so far received sufficient recognition and application in our public school system. Much more can and must be done in this regard in terms of a conscious strategy to align every facet of public schooling with a sensible interpretation and application of section 28(2) of the Constitution. This norm could in principle be a very powerful instrument, if used appropriately, to force education policy-makers and officials to promote the best interests of children in public education through, for example, properly managing the schooling system and individual schools with due regard to administrative justice; adopting and implementing sound education policies; ensuring proper training of and control over educators; generally ensuring that high quality education can be and is being provided; respecting the religious, language and cultural orientation of learners; securing a favourable and safe environment for teaching and learning; desisting from attempts to indoctrinate children by means of state approved ideologies and worldviews (see by way of analogy concerning religion, *Duncombe v Willies* 1982 3 SA 311 (E)).

Practical aspects where the best interest could receive more recognition, is in maintaining discipline at a school, the framing of a realistic code of conduct and in giving properly defined (and more limited) powers to parents and governing bodies to decide on school fees and providing for the better auditing of their activities regarding the raising and spending of school fees.

The inherent vagueness of the concept of the best interests of children in public education, could, of course, present practical difficulties. It will not serve any purpose to attempt to use section 28(2) to cause more chaos or instability in public education. Thus, much more objective research will probably have to be undertaken to establish what a school system should look like which is primarily

aimed at serving the best interests of children and not the ideology of the government or the prejudices of parents. Education officials and bodies would probably have to be educated to understand how to measure their actions and policies against a reasonable interpretation of the best interests of all children at every public school.

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