

‘There is something you are missing; What about the children?’: Separating the rights of children from those of their caregivers

*Deon Erasmus**

Introduction

On the 25th of June 2009, Sachs J delivered a lecture at the National Gallery of Scotland in Edinburgh. Mainly, the lecture dealt with his majority judgment in *S v M (Centre for Child Law as amicus curiae)*.¹ In an interview² subsequent to the lecture, Sachs J revealed that he drafted at first a remissive response to the application for leave to appeal against the Supreme Court of Appeal’s refusal to hear her oral argument, as well as the sentence imposed by the High Court. He was of the opinion that that her application did not raise a constitutional question. He was further of the opinion that she had not made out a case, wanted to avoid going to jail and had no prospects of success. In the interview he revealed that it was a female colleague who insisted that the case be heard, and who argued that the human rights of the Applicant’s children were not being adequately considered as separate from those of their mother.

The following quote is taken from the interview with Sachs J:

She said: ‘There is something you are missing. What about the children? Mrs M has three teenage children. She lives in an area that we politely call fragile, an area of gangs, drug-peddling and a fair amount of violence. The indications are that she is a good mother, and the magistrate gave no attention to the children’s interests.

The minute my colleague spoke to me about the importance of the three teenage children of Mrs M, I started to see them not as three small citizens who had the right to grow up into big citizens but as three threatened, worrying,

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¹2008 3 SA 232 (CC).

²jackiekemp.com/children-rights/144-albie-sachs-interview (accessed 2009-11-26).

precarious, conflicted young boys who had a claim on the court, a claim on our society as individuals, as children, and a claim not to be treated solely as extensions of the rights of the mother, but in their own terms.

In this article, Sachs J's interpretation of children's rights in terms of section 28 of the Constitution of the Republic of South Africa, 1996³ in the judgment of *S v M* will be discussed. In addition, the interpretation of the socio-economic rights afforded to children in terms of section 28(1)(c) will be analysed in conjunction with the interpretation of children's welfare rights. It will be argued that the Constitutional Court is loath to give a substantive or concrete definition of these rights. Furthermore, this lack of a concrete definition contributes towards the weakening of children's rights as the case-by-case determination currently applied by our courts has the effect that the rights of a particular child are defined within the particular surrounding circumstances. It will be argued that a principled approach should be adopted when interpreting the socio-economic rights of children as such an approach would give concrete content to the rights of children, making the enforcement of these rights more accessible.

In the following paragraph, the judgment in *S v M*⁴ will be discussed with reference to the interpretation of section 28.

The judgment in *S v M*

Ms M, a 35-year-old mother was the primary caregiver of three boys aged 16, 12 and 8 respectively. She was convicted on 38 counts of fraud and four counts of theft. The presiding magistrate in the Regional Court took all the counts together for purposes of the sentence. The court requested a correctional supervision report, which indicated that M was an appropriate candidate for such a sentence. Her attorney strongly pleaded that she should not be imprisoned. The regional magistrate however sentenced her to four years direct imprisonment.⁵

On appeal her conviction on 38 counts of fraud and 3 of theft, amounting to a lesser total of R19 158.69, was confirmed. Her sentence was set aside and replaced with a sentence of four years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act.⁶ The effect of the change was that after she had served 8 months imprisonment, the Commissioner for Correctional Services could authorise her release under correctional supervision. The High Court denied her leave to appeal to the Supreme Court of Appeal against her sentence.⁷

Ms M subsequently unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal against the order of imprisonment. She then applied to the

³Hereafter referred to as 'the Constitution'.

⁴(N 1).

⁵*Id* para 2.

⁶Act 51 Of 1977.

⁷*S v M* (n 1) para 3.

Constitutional Court for leave to appeal against the refusal of the Supreme Court of Appeal to hear her oral argument, as well as against the sentence imposed by the High Court.⁸ The Constitutional Court refused the first part of her application, but did enroll her application for leave to appeal against the sentence.

Section 28(1) lists the rights afforded to children by the Constitution. These rights include the right to parental care, family or alternative care, to be protected against abuse and ill-treatment, socio-economic rights relating to shelter, health care, nutrition and the right to have legal practitioners assigned to them under specific circumstances.⁹ Section 28(2) of the Constitution determines that a child's best interest is of paramount importance in every matter concerning the child. In *S v M* the Constitutional Court considered *inter alia* the impact of this constitutional injunction on the sentencing process of primary caregivers of young children.¹⁰

The judgment commences with an extensive commentary on the scope of the best interest principle, which according to the court has been greatly enlarged by its constitutional inclusion.¹¹ The subsection has a 'very sweeping character' which may have an impact on its normative efficacy.¹² As an example of such impact the court referred to the case of *Jooste v Botha*.¹³ In this matter it was held that the best interest of the child principle is 'a general guideline and not a rule of law of horizontal application'. Sachs J held that while the principle serves as a general guideline to the courts, it does indeed establish a general set of children's rights that the courts are obliged to enforce.¹⁴

According to the court, the provisions of section 28 are undoubtedly wide and comprehensive. The emphatic language indicates that just as law enforcement must always be gender-sensitive, so it must also be child-sensitive. The section has the further consequence that statutes must be interpreted, and the common law be developed, in a manner which favours protecting and advancing the interests of children. Courts should therefore function in a manner which at all times exhibits due respect for the rights of children.¹⁵

The question next arose as to what is meant by 'paramount importance'. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*¹⁶ the High Court held that children's best interests can never be trumped by the rights

⁸*Id* para 4.

⁹Internationally the 'best interest' standard is also accepted, and it forms the foundation stone of the Convention on the Rights of the Child (1989). Compare in this regard Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' (2000) *Stellenbosch LR* 3.

¹⁰*S v M* (n 1) para 1.

¹¹*Id* para 12.

¹²*Id* para 13.

¹³2000 2 SA 199 (T) 210 C-E.

¹⁴*Id* para 14.

¹⁵*Id* para 15.

¹⁶2003 12 BCLR 1333 (CC) para 55.

of others. The Constitutional Court did not agree with this interpretation and held that constitutional rights are mutually interrelated and interdependent, forming a unified constitutional value system. It was held that section 28(2), like any other of the rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in accordance with section 36 of the Constitution.¹⁷

The question that may then rightly be asked is if a child's best interests are not always supreme, what is the purpose of section 28(2)? Friedman and Pantazis¹⁸ are of the view that section 28(2) is highly unusual, as it is the only section in the Constitution that applies to a group of people in relation to all aspects of their lives. They suggest that the section appears to be aimed at creating a right for children as *children*. The section thus aims to address the vulnerability of children and ensures that their rights do not give way to the rights of others.

According to Sachs J in *S v M*, section 28 should be viewed as an expansive response to South Africa's international obligations as a State party to the United Nations Convention on the Rights of the Child.¹⁹ In terms of article 3 of the Convention, in all actions concerning children the best interest of the child should be a primary concern. The right of a child to be a child and enjoy special care lies at the heart of the section.²⁰ The court explains what is meant by this interpretation in the following – oft quoted – passage:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.²¹

The court held that section 28(1) provides a list of enforceable substantive rights which goes well beyond anything catered for by common or statutory law. In dealing with the interpretation of section 28(2), the court commented that it

¹⁷*Id* para 55.

¹⁸Friedman and Pantazis 'Children's rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 47-34 - 47-35.

¹⁹*S v M* (n 1) para 16.

²⁰*Id* para 17.

²¹*Id* para 18.

creates a right that is independent of those specified in section 28(1). With reference to the case of *Sonderup v Tondelli*,²² the court held that section 28(2) is an expansive guarantee that a child's best interest will be paramount in every matter concerning the child.²³

However, the court warned that the expansiveness of the paramountcy principle creates the risk that it appears to promise everything in general while actually delivering little in particular. The court accepts that the concept of 'the best interests' is inherently indeterminate. The contextual nature and inherent flexibility of the section 28 is, however, also the source of its strength as the list of factors competing for the core of 'the best interests' principle is not exhaustive and will depend on each particular factual situation. Accordingly, a truly child-centered approach requires a 'close and individualised examination of the precise real-life situation of the particular child' in question. According to the court it would be contrary to the best interests of a child if a predetermined formula were applied for the sake of certainty.²⁴ It is this approach that will be challenged later in this contribution.

The court then discusses the appropriate operational thrust for the paramountcy principle by pointing out that there are very few laws or forms of public action that would not have a direct or indirect impact on children. This, according to the court, cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations.²⁵

As Skelton²⁶ correctly points out, the judgment in *S v M* goes further than any previous judgment in defining the paramountcy principle, albeit in the negative. Sachs J defines it as not being 'an overbearing and unrealistic trump'²⁷ and states that it cannot mean that the direct or indirect impact of a measure or action dealing with children should in all cases override all other considerations. The fact that the best interests of the child are paramount does not mean that they are absolute.²⁸ The court is thus of the view that it is important to acknowledge these realities, otherwise the best interests principle might be spread 'too thin' and lead to it becoming devoid of meaning, instead of promoting the rights of children.²⁹

The principle is however expressed in a positive manner later in the judgment when the court held that, read with the right to family care, it requires that the interests of children who stand to be affected receive due consideration. In this sense it does not mean the overriding of all other considerations. Rather, it calls

²²2001 2 BCLR 152 para 27-30.

²³*S v M* (n 1) para 22.

²⁴*Id* para 23-24.

²⁵*Id* para 25.

²⁶'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) 1 *Constitutional Court Review* 351 at 362.

²⁷*S v M* (n 1) para 25.

²⁸*Id* para 26.

²⁹*Id* para 25.

for appropriate weight to be afforded in each case to a consideration to which the law attached the highest value, namely the interests of children who may be concerned.³⁰ In the present matter this means that presiding officers should afford appropriate attention to the rights of children of primary caregivers and to take reasonable steps in order to minimise the effect the sentence will have on the children. The case deals specifically with the sentencing of primary caregivers of children, who are responsible for the day-to-day well-being of children, such as feeding and educating them.³¹ In this regard Ms M's children were entitled to the right to parental care as entrenched in section 28(1)(b) of the Constitution.

Skelton³² further correctly comments that this approach focuses on the best interest of the child and avoids entangling the rights of children with that of their caregivers. The inquiry therefore should not focus on the effect the rights of children would have on the sentence of the primary caregiver, but what effect the sentence would have on the rights of the children, including the protection of their right to parental care. This develops the best interests of the child test in such a way that children's rights are considered independently of their caregivers.

It is submitted that the reasoning in *S v M*³³ is sound, when compared to the judgment of the Constitutional Court in *Government of the Republic of South Africa v Grootboom*.³⁴ In this matter the court held that section 28(1)(c) does not provide children with a direct and immediately enforceable right to housing as provided for in section 26 of the Constitution. According to the court, the subsection did not create any primary State obligation to provide shelter on demand to parents and their children if the children were being cared for by their parents.³⁵ A child thus has the right to parental or family care in the first place, and the right to alternative appropriate care only where family care is lacking. This implies that the State only incurs the obligation to provide shelter to those children, for example, who are removed from their families.³⁶ This clearly indicates the concern of the court that parents would use children as stepping stones to acquire housing. It is submitted that this is a clear instance where the rights of children were entangled with the rights of their caregivers.

Bonthuys³⁷ correctly points out the rights of children should be balanced with the rights and interests of other family members and the needs of society. In the case of a family, there cannot be a complete separation between the rights of

³⁰*Id* para 42.

³¹*Id* para 28.

³²Skelton (n 26) 363.

³³(N 1).

³⁴2001 1 SA 46 (CC).

³⁵*Id* para 77.

³⁶*Ibid*.

³⁷Bonthuys 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 20:23 at 24.

children and those of their caregivers. This is clearly illustrated in the case of a right to shelter or housing. If a child qualifies for state supplied shelter or housing, would this mean that the child's parents cannot share the shelter or house with their child? This appears to be nonsensical.

In the following paragraph the issue of the rights of children, as opposed to the welfare of children, will be discussed. It will be pointed out that a rights' focused enquiry, as opposed to a welfare-focused enquiry, will lead to the strengthening of the rights of children.

The best interests principle: Rights v welfare

The best interest standard regarding children originates in – and has for a long period formed part of – South African common law.³⁸ It is articulated in a number of private law disputes, mainly in the field of family law.³⁹ This principle has now acquired human rights characteristics, as it has been incorporated into section 28 of the Constitution.

Children's rights are often placed in various categories. Freeman⁴⁰ lists four different categories of rights which children may possess. The first category is *welfare rights*, which embraces rights of recipience. These rights include claims to receive positive benefits such as adequate education, housing, health care and economic support.⁴¹ The second category is termed *rights of protection*. These rights emphasise the need for public intervention in order to prevent children from being exposed to various forms of harm, including abuse or neglect by their parents, economic exploitation and various hazardous activities.⁴² The third category is the *right to be treated like adults*. This demands that adult rights be extended to children on the basis that there is no rational reason for distinguishing between adults and children. The last category may be described as *rights of autonomy* and calls for greater recognition of the claims of young people to self-determination, their capacity for independent decision-making and freedom from parental control.

The best interest principle is also referred to as the 'welfare principle' by some authors. This leads to the question of whether the promotion of the 'welfare' of children is equal to the protection of their 'rights'.⁴³ Farson⁴⁴ correctly points out that we should draw a distinction between protecting *children* and protecting their *rights*. The welfare principle can be adverse to children's rights, for it supports not

³⁸*Id* 25.

³⁹Davel and Skelton *Commentary on the Children's Act* (2007) 2-6.

⁴⁰*The rights and the wrongs of children* (1983) 40-52.

⁴¹A prime example of these rights are the socio-economic rights contained in s 28(1)(c) of the Constitution.

⁴²These rights are afforded to children in sub-ss 28(1)(d), (e) and (f) of the Constitution.

⁴³Bainham *Children, parents and the state* (1988) 5.

⁴⁴*Birthrights* (1978) 165.

the right of children to make their own decisions, but the right of adults (such as judges, social workers or parents) to make decisions on their behalf. For instance, in the *Grootboom* case, the court made an assumption that the caregivers were able to provide for the welfare of the children concerned, without taking into account that the children themselves have an independent right to shelter.

Barford and Wattam⁴⁵ argue that children and young people are an excluded and marginalised group, who have to combat the effects of 'adulthood', which has a similar power dimension as sexism and racism. They describe it as a pervasive phenomenon which is almost unrecognisable and taken for granted. Adulthood extends into every area of children's and young people's lives, both at a personal level and in relation to the overall decision-making processes of society. Rausenbaum and Newell⁴⁶ point out that children and young people are not high political priorities and, as such, issues affecting them are rarely considered from their perspective.

In addition, Bonthuys⁴⁷ correctly points out that the inclusion in the Constitution of the best interest principle – and a detailed list of children's rights – leads to the creation of two tensions. Firstly there is the tension between the case-by-case application of the best interest principle versus the principled application of human rights and constitutional norms.⁴⁸ Secondly there is the tension between the need to balance the rights and interests of children with the rights and interests of other family members, as well as with the needs of society at large.⁴⁹

Bonthuys⁵⁰ argues that some of our courts ignore the best interest 'right' completely, while others simply assume that the common law as it currently stands accurately reflects the best interests of the child, and a third category use the principle to revise or drastically change the rules of our common law.

In the case of *S v M*⁵¹ the court made it clear that it only had to decide on the duties of a sentencing court when dealing with the sentencing of a breadwinner who is also the primary caregiver of children. The specific right of children protected here is the right to parental care, as set out in sub-section 28(1)(b) of the Constitution. It is submitted that this is a 'welfare right' as described by Friedman.⁵² Sachs J states that in all matters concerning children, everything will depend on the facts of the particular case.⁵³ This is indeed what Bonthuys⁵⁴ refers to as the 'first tension': the

⁴⁵Barford and Wattam 'Children's participation in decision making' (1991) 5/2 *Practice* 93-101 at 99.

⁴⁶Rausenbaum and Newell *Taking children seriously: A proposal for children's rights commissioner* (1991).

⁴⁷Bonthuys (n 37) 24.

⁴⁸*Ibid.*

⁴⁹*Id* 25.

⁵⁰*Ibid.*

⁵¹(N 1).

⁵²(N 38).

⁵³*S v M* (n 1) para 28.

⁵⁴(N 37) 24.

case-by-case application of the best standard principle versus the principled application of human rights and constitutional norms. Referring to the case of *Fitzpatrick*⁵⁵ the court reaffirmed that the best interest principle has never been given exhaustive content and should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. The list of factors competing for the core of the principle is almost endless and it will depend on each peculiar factual situation. The court sees 'a truly child-centered approach' as one which entails a close and individualised examination of the precise real-life situation of the particular child involved.⁵⁶

Bonthuys⁵⁷ is of the view that it is incorrect to use the best interest principle instead of a proper analysis of children's rights. It is submitted that the court in *S v M* did indeed focus on the rights of M's minor children. The court refers to 'the expressly protected right of a child to parental care under section 28(1)(b)' as opposed to the fact that it would be in the best interest of the minor children that M is not sentenced to direct imprisonment.⁵⁸ The primary focus was thus on the rights of the children and not on the right of the parent/caregiver not to be imprisoned. In the interview, Sachs J is quoted as follows:

We gave the rights of children a hearing. We were talking about three vulnerable young men in a precarious area who were totally dependent on their mother.⁵⁹

The 'second tension', namely the balancing of the rights and interests of children with the rights and interests of other family members, as well as with the needs of society at large, was also addressed in the judgment in *S v M*.⁶⁰ Regarding the rights of children and the needs of society at large, the court specifically weighed up the importance of maintaining the integrity of family care,⁶¹ with the duty on the State to punish criminal conduct.⁶² As Sachs J states:

The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.⁶³

In the next section, the paramountcy principle and the socio-economic rights of children will be discussed. It will be argued that a principled approach is called for, as opposed to a case-by-case approach.

⁵⁵*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

⁵⁶(N 1) para 24.

⁵⁷(N 37) 38.

⁵⁸(N 1) para 28.

⁵⁹(N 2).

⁶⁰(N 1).

⁶¹*Id* para 38.

⁶²*Id* para 39.

⁶³(N 1) para 35.

The paramountcy principle and socio-economic rights

The interpretation of the socio-economic rights of children is even more complicated, as the enforcement and provision of socio-economic rights normally has cost implications for governmental departments. As was pointed out above, in the *Grootboom* case,⁶⁴ the Constitutional Court held that section 28(1)(c) did not create any primary obligations on the State to provide shelter on demand to children and their parents. The primary obligation to care for children thus rests with their parents. The State has the obligation in the alternative to provide shelter, for instance, in the case where children are removed from their families. Section 28(1)(c) therefore does not provide children with a direct and immediate enforceable right to housing.

However, the case-by-case analysis applied in the majority judgment in *S v M*,⁶⁵ leads to practical problems when dealing with the enforcement of the socio-economic rights of children. If this reasoning is applied, for instance, to the claim of a child for housing from the State, an in-depth consideration of the needs and rights of the particular child or children in the precise real-life situation he or she finds him- or herself should be embarked upon. One real-life example of children who desperately need direct access to housing is children living in child-headed households, such as HIV/AIDS-orphans. According to the 2008/2009 Child Gauge Report⁶⁶ there are 614 000 maternal orphans, 2 364 000 paternal orphans and 701 000 orphans who have lost both parents. There are an estimated 148 000 (0,8%) children living in child-only households. In the Eastern Cape only 30% of children live with their parents. The South African Institute of Race Relations estimates that 5 700 000, or 32% of all children in South Africa will have lost one or both parents due to HIV/AIDS by 2015.⁶⁷

Brand⁶⁸ correctly indicates that the Constitutional Court in both the case of *Grootboom*⁶⁹ and *Minister of Health v Treatment Action Campaign*⁷⁰ cases displayed a reluctance to explain the substantive content of the basic socio-economic rights of children. He comments that the court managed in both cases to avoid applying the substantive duty to give a concrete description of socio-economic rights as the basis for its decision, thus avoiding having to define these rights.

⁶⁴(N 34) para 77.

⁶⁵(N 1).

⁶⁶Pendlebury, Lake and Smit *The South African Child Gauge 2008/2009* at 72-78.

⁶⁷*Eastern Province Herald* (2009-12-01) 1.

⁶⁸The proceduralisation of South African socio-economic rights jurisprudence or 'what are socio-economic rights for?' in Botha, Van der Walt and Van der Walt (eds) *Rights in a transformative constitution* (2003) 33 at 48.

⁶⁹(N 34).

⁷⁰2002 5 SA 721 (CC).

In addition, Steward⁷¹ is of the opinion that the Constitutional Court is reluctant to give substantive content to socio-economic rights. She argues that the Constitutional Court should adopt a principled approach when adjudicating the socio-economic rights of children. This is necessary to enable claimants to determine what they are entitled to under section 28(1)(c) of the Constitution, and to direct the State on its constitutional obligations in terms of children's basic socio-economic rights. Without a principled approach, the perception may arise that basic socio-economic rights of children will become rights on paper only and will lose their true meaning as actionable and justiciable rights.⁷²

It is submitted that members of child-headed households may not have the knowledge or the resources to enforce their right to shelter. An AIDS-orphan in the rural areas may not even know where to go to in an attempt to acquire shelter or housing. There are organisations and non-governmental organisations advancing the interests of these vulnerable groups, but it is submitted that the numbers of those in need are too vast to assess their needs on a case-by-case basis as suggested in *S v M*.

Steward⁷³ suggests the following approach in those instances where the Court is confronted with the simultaneous interpretation and limitation of the socio-economic rights of everyone, and children in particular: during the first stage of the constitutional analysis section 28(1)(c) should not be read in conjunction with the internal limitations set out in sections 25(5), 26 and 27. In the process of giving substantive content to section 28(1)(c) the Court should be guided by the Constitution, the constitutional values, the transformative aims of the Constitution and international law. Defining section 28(1)(c) means that the Court should identify the minimum entitlement of the right because this section refers to the basic attenuated level of services needed for a dignified existence. Identifying the minimum entitlement of section 28(1)(c) does not entail an absolute duty or rigid standard. In identifying the minimum entitlement, a high level of justification is set for situations where the minimum entitlement of this right is not respected, protected and fulfilled. It is submitted that AIDS-orphans or members of child-headed households could be such 'minimum entitlement' right bearers. This would mean that the entitlements of vulnerable groups, for instance, would have to be clearly spelled out in applicable government policies, and not left to the discretion of the courts.

During the second stage of the constitutional analysis of section 28(1)(c), the general limitation clause as opposed to the internal limitations in sections 26 and 27 should be employed. By employing section 36, the onus will shift to the state to justify the limitation. In order to justify an infringement the state must show that its policies and programmes are based on laws that have been publicly debated and adopted.

⁷¹'The basic socio-economic rights of children' (2008) 24 SAJHR 493.

⁷²*Ibid.*

⁷³*Ibid.*

Section 36 calls for a full-blown proportionality test, and it would therefore be more difficult for the state to justify the limitation. A proportionality analysis will further allow for a higher degree of scrutiny to be applied in the case of the realisation of the duties imposed by section 28(1)(c), because children are vulnerable beneficiaries.⁷⁴ It is submitted that it would be very difficult for a state department to justify why all AIDS-orphans and/or members of child-headed households should not automatically qualify for shelter or housing in terms of government policies. If such policies do not make provision for such automatic qualification, state departments should be ordered to amend their policies in order to make such provision.

Bonthuys⁷⁵ argues that the rights of children should always be fully argued, as should the rights of adults and other societal interests. This is necessary because matters involving children are almost invariably brought by adult parties. This may have the effect that the interests of children may be used for the benefit of the adult party. It is submitted that the rights of children in *S v M* were argued fully. That is indeed why there was no entanglement of their rights with that of their mother.

Conclusion

It is submitted that the judgment in *S v M*⁷⁶ clearly laid down the principle that the rights of children should not be entangled with that of their caregivers. It is further submitted that the facts of the case made it less difficult for the court to afford paramountcy to the rights of the children, as no cost implications such as providing the children with alternative care, were necessary.

In terms of section 28 of the Constitution, children are independent bearers of rights. Courts should thus be careful not to place too much emphasis on the welfare of children, as opposed to their rights. Although Sachs J addressed the independent rights of the children in *S v M*,⁷⁷ it is submitted that the reluctance of the court in this case – as in others – to give substantive content to the rights of children as set out in section 28 of the Constitution, could lead to a weakening of the rights of children, as the focus would be on their welfare, rather than their rights.

Courts should take of the realities of South African society into account, when laying down principles that should be employed to enforce the rights of children. It is respectfully submitted that the ‘case-by-case-determination’ principle endorsed in *S v M* does not take into account the realities surrounding *inter alia* AIDS-orphans and/or members of child-headed households. Most children who find themselves in such conditions do not have the privilege of M’s three minor children who were able to have an *amicus curiae* arguing the case on their behalf. If substantive content is given to the rights of children to shelter or housing,

⁷⁴*Id* 494.

⁷⁵(N 37) 38.

⁷⁶(N 1).

⁷⁷*Ibid*.

government departments will have to include these substantive rights or entitlements in their policies. This would eliminate the need for lengthy and often costly litigation.

As Archard states:⁷⁸

Children are young human beings. Some children are very young human beings. As human beings, children evidently have a certain moral status.

What Sachs J, with respect, may have missed is the duty of the Constitutional Court to give clear and substantive content to the rights of children, so that they receive the individual dignity they deserve.

⁷⁸*Children, family and the state* (2003) 1.