

*FAILING CHILDREN: THE COURTS'  
DISREGARD OF THE BEST INTERESTS OF  
THE CHILD IN LE ROUX v DEY\**

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*The concept of the best interests of the child is firmly entrenched in international law, the South African Constitution and South African legislation and jurisprudence. The Committee on the Rights of the Child has recently declared that it is a threefold concept existing as a substantive right, a fundamental interpretative legal principle, and as a rule of procedure. The best interests of the child should be considered, at least, in all matters concerning children. Yet, in the matter of Le Roux v Dey, where three boys were defending a delictual claim of defaming their school vice-principal, the judges of the High Court and the Supreme Court of Appeal, and eight of the ten presiding judges of the Constitutional Court did not even mention the best interests of the child. The article explores some of the possible reasons for this failure and offers some recommendations as to what a more preferable approach would have been in the circumstances.*

## I INTRODUCTION

The 'best interests of the child' is not a new concept. A search of the law reports reveals that South African courts considered the interests of the child as early as 1893,<sup>1</sup> and have consistently regarded it as a concept of paramount importance in many custody disputes.<sup>2</sup> In *Fletcher v Fletcher* the Appellate Division confirmed that where custody of children was awarded to a 'guilty party' in divorce matters decided in terms of the divorce law which applied at the time, the interests of the children had to override the fact that the other party was the innocent party.<sup>3</sup> The concept was unequivocally established in

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<sup>1</sup> *Alexander v Alexander* 1893 Hertzog 183 (Supreme Court of the Transvaal). See also *Susannah MW Smith v JP Waller and R Bowlby, Executors Testamentary in Estate of Late John Smith* (1879–1880) 1 NLR 81 referring to the 'interests of any minors'.

<sup>2</sup> See for example *Cronje v Cronje* 1907 TS 871 at 872; *Tabb v Tabb* 1909 TS 1033, where the court stated that 'the guiding principle to be borne in mind is not what are the feelings of the parents, but what is best for the children'; and *Ramsay v Ramsay* 1935 SR 84 where the court stated that it 'would always assume the parents would have the best interests of the child at heart, and are not likely to make any arrangements as to custody which would not be in the interests of the child'. See furthermore *Matthews v Haswari* 1937 WLD 110 at 111; *Christian v Christian* 1945 TPD 434 at 438. In England the Guardianship of Infants Act, 1925 provided that the welfare of the infant was to be the first and paramount consideration for the court in deciding a question of the custody or upbringing of the infant. Many South African judges regarded this to be statutory confirmation of the 'previous practice' in England and of the common law position in South Africa. See for example Schreiner JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 144–5.

<sup>3</sup> *Fletcher v Fletcher* supra note 2 at 134.

international law when the General Assembly of the United Nations adopted the Declaration of the Rights of the Child in 1959 and agreed that the best interests of the child was to be ‘the paramount consideration’ whenever laws were enacted to provide special protection to children.<sup>4</sup> The 1989 Convention on the Rights of the Child (‘CRC’) introduced it as a new principle of interpretation in international law<sup>5</sup> along with recognition of the evolving capacities of the child.<sup>6</sup> Article 3 of the CRC stipulates that the best interests of the child should be a primary consideration in all actions concerning children, whether these are undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. By employing these measures of interpretation, the CRC departed from the traditional welfare approach to children and confirmed the rights-based approach, in terms of which a child is regarded as an individual being<sup>7</sup> entitled to a full range of human rights.<sup>8</sup> The Convention remoulded the best interests principle<sup>9</sup> from a principle of compassion to one of interpretation which has to be considered in *all actions* concerning children.<sup>10</sup> In May 2013 the Committee on the Rights of the Child finally provided some much anticipated direction on the best interests of the child by publishing their fourteenth general comment.<sup>11</sup> In their comment the Committee explicitly states that the best interests principle is a threefold concept existing as a substantive right, a fundamental interpretative legal principle, and as a rule of procedure.<sup>12</sup> Apart from the CRC, the principle can also be found in The African Charter on the Rights and Welfare of the Child (‘ACRWC’),<sup>13</sup> which provides even stronger protection in that art 4 requires that ‘[i]n all

<sup>4</sup> Principle 2 of the Declaration.

<sup>5</sup> Geraldine van Bueren ‘The United Nations Convention on the Rights of the Child: An evolutionary revolution’ in Trynie Davel (ed) *Introduction to Child Law in South Africa* (2000) 204.

<sup>6</sup> Article 5 of the CRC provides: ‘States Parties shall respect the responsibilities, rights and duties of parents . . . or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.’

<sup>7</sup> As opposed to a ‘becoming’: see in general in this regard Michael Freeman ‘Introduction’ in Michael Freeman (ed) *Law and Childhood Studies* (2012) 3.

<sup>8</sup> Jean Zermatten ‘The best interests of the child principle: Literal analysis and function’ (2010) 18 *International Journal of Children’s Rights* 483.

<sup>9</sup> Van Bueren op cit note 5 at 205.

<sup>10</sup> Zermatten op cit note 8 at 493; Committee on the Rights of the Child ‘General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ CRC/C/GC/14 at 4. (Also available at [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf), accessed on 3 October 2013).

<sup>11</sup> General Comment No 14 *ibid*.

<sup>12</sup> *Ibid* at 4.

<sup>13</sup> 1990, and which entered into force in November 1999. South Africa ratified this Convention on 7 January 2000.

actions concerning the child undertaken by any person or authority the best interests of the child shall be *the*<sup>14</sup> primary consideration’.

Since South Africa is a signatory to both the CRC<sup>15</sup> and the ACRWC, it must adhere to these binding standards. In fact, the principle has been firmly embedded in South African legislation: the Constitution stipulates that a child’s best interests are of paramount importance in every matter concerning the child.<sup>16</sup> The Children’s Act 38 of 2005 in turn makes 57 references to the best interests of the child. Section 9 of the Act confirms that the child’s best interests are of paramount importance, while s 7 of the Act lists a number of factors to be taken into consideration ‘[w]henever a provision of this Act requires the best interests of the child standard to be applied’. Section 6 contains a number of general principles which must guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. One of these guidelines consists of a peremptory provision that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights of the Constitution, the best interests of the child standard set out in section 7 of the Act, and the other rights and principles contained in the Act.<sup>17</sup>

It is evident that the provisions set out in South African legislation provide a strong and powerful basis for a child-centred approach in all court proceedings concerning a child. Nevertheless, in the matter of *Le Roux v Dey*<sup>18</sup> the majority of the Constitutional Court failed to mention the best interests of the children involved in this matter, let alone considering it to be of paramount importance in the formulation of its judgment. In this case the deputy-principal of a school instituted a delictual claim for compensation from three children who had allegedly defamed him. Eight of the ten presiding judges of the Constitutional Court, as well as the judge of the North Gauteng Division of the High Court<sup>19</sup> and the five judges of the Supreme Court of Appeal,<sup>20</sup> did not even contemplate what it would mean to have regard to the best interests of the children involved in the case. This article seeks to discuss the decisions of the various courts in this matter, placing particular emphasis on the different Constitutional Court judgments. The aim of the article is to discuss the failure of the courts to approach the matter from the perspective of the best interests of the child. As such, it does not analyse the courts’ findings in terms of the law of delict, particularly on

<sup>14</sup> Emphasis supplied.

<sup>15</sup> South Africa ratified the CRC on 16 June 1995.

<sup>16</sup> Section 28(2) of the Constitution of the Republic of South Africa, 1996, hereinafter ‘the Constitution’.

<sup>17</sup> Section 6(2)(a) of the Children’s Act.

<sup>18</sup> *Le Roux & others v Dey* (*Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae*) 2011 (3) SA 274 (CC) (hereafter *Le Roux v Dey* (CC)).

<sup>19</sup> *Dey v Le Roux en andere* (GNP) unreported case no 21377/06 (28 October 2008).

<sup>20</sup> *Le Roux & others v Dey* 2010 (4) SA 210 (SCA) (hereafter *Le Roux v Dey* (SCA)).

the questions of defamation, wrongfulness or damages. The article focuses instead on the methods employed by the courts on previous occasions where the principle of the best interests of the child was indeed applied. These methods are now also to be assessed in light of the direction being provided by the General Comment of the Committee on the Rights of the Child. While some criticism has been directed against the minority decisions of Yacoob J and Skweyiya J, which do deal with the best interests principle,<sup>21</sup> I shall argue that their approach was the correct one to adopt in the matter. Although I do not necessarily agree with the minority's finding that the picture was not defamatory, I argue that the majority judgment of the Constitutional Court was disappointing because of its failure to develop and enhance the law, while simultaneously failing to promote the rights of the child.

## II *LE ROUX v DEY*

### (a) *The facts*<sup>22</sup>

The facts of the decision are fairly well-known<sup>23</sup> but can be briefly summarised as follows. The plaintiff in the court a quo, Dr Louis Dey, was the deputy-principal of a well-known school in Pretoria at the time of the incident. At some point during February or March 2006 he became aware of the fact that an electronically modified picture of him and the principal of the school had been circulated digitally to some of the learners. The image was also placed on one of the notice boards of the school. The picture was the creation of a fifteen-year-old boy who, on a Sunday afternoon, having been inspired by an episode of a television show he had recently watched, decided to place pictures of the faces of Dr Dey and the principal onto the bodies of two gay bodybuilders. The boy went to a website apparently dedicated to gay bodybuilders, found a picture of two naked men sitting next to each other in sexually suggestive and intimate circumstances, and then attached the head and face of Dr Dey to one of these bodies and the head and face of the principal to the other. The school crest was placed on each of the bodies in the image, so as to obscure the hands and genitals of each of the men. Hereafter the boy sent the image to two of his friends' cell phones.

<sup>21</sup> One such opinion is offered by Michael Celumusa Buthelezi 'In dissent: A critical review of the minority judgment of Yacoob J *Le Roux v Dey* 2011 (3) SA (CC)' (2013) 34 *Obiter* 719–731. There has been much commentary on the decision. See John Campbell SC 'Pleading meaning in defamation cases: *Le Roux v Dey*' (2011) 128 *SALJ* 419; Anton Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey*' (2011) 128 *SALJ* 395; J Neethling & J M Potgieter 'Defamation of school teachers by learners — *Le Roux v Dey* 2011 3 SA 274 (CC)' (2011) 32 *Obiter* 721; and Jaco Barnard-Naudé & Pierre de Vos 'The heteronormative observer: The Constitutional Court's decision in *Le Roux v Dey*' (2011) 128 *SALJ* 407.

<sup>22</sup> The facts appear from the judgment of Yacoob J in the Constitutional Court supra note 18 paras 12–20.

<sup>23</sup> See too Buthelezi op cit note 21 at 719.

Unsurprisingly, the now infamous picture went ‘viral’ almost immediately, and was distributed between both learners and teachers of the school.

Upon the discovery of the picture, the school authorities punished the three learners by prohibiting them from assuming any leadership positions at the school, from wearing honorary colours for the remainder of 2006, and by sending them to detention at school for three hours for each of five consecutive Fridays. Dr Dey also laid criminal charges against the three boys. These charges were resolved through a diversion process in terms of the Criminal Procedure Act 51 of 1977, which required that the boys clean cages at a local zoo as community service. Despite this, Dr Dey, apparently acting on legal advice, did not accept the apology of two of the learners in the same way that the principal had, and still felt deprived of his rights. He consequently instituted a civil claim for delictual damages in the amount of R600 000 for the injury to his good name and reputation and for the injury to his dignity.

*(b) The decisions in the High Court and Supreme Court of Appeal*

Du Plessis J of the North Gauteng High Court found for Dr Dey and awarded him an amount of R45 000 in damages for his claim based on defamation and the claim based on the injury to his feelings.<sup>24</sup> In considering the appeal from the three boys, the majority of the Supreme Court of Appeal (‘SCA’) confirmed the North Gauteng High Court’s decision, holding that ‘even adolescents know where to draw the line between jest and ridicule’.<sup>25</sup> The majority also found that the image dealt with Dr Dey’s ‘sexual orientation in a derogatory manner’,<sup>26</sup> ridiculed him and his moral values, and therefore disrespected his person. The image was found to be defamatory and the publication thereof wrongful.<sup>27</sup> As to the question of damages, the SCA found that an apology could have impacted on the quantum. However, the court viewed the attempts at an apology by the children to be suspect, and took into account the fact that it happened on the advice of a third party, long after the publication of the image took place. Furthermore, the court found that the boys, throughout their testimony in the trial court, remained disrespectful towards Dr Dey and showed no remorse. The majority held that the children’s view that ‘the plaintiff should not have taken offence at what they did, and that he should have been content with the disciplinary steps that had been taken by the school and the community service to which they had been subjected’ to be an aggravating factor.<sup>28</sup> In two final short paragraphs<sup>29</sup> the majority of the SCA considered the fact that the appellants were school children and found that, although ‘the source cannot affect the

<sup>24</sup> *Dey v Le Roux* supra note 19.

<sup>25</sup> *Le Roux v Dey* supra note 20 para 18.

<sup>26</sup> *Ibid* para 19.

<sup>27</sup> *Ibid* para 19.

<sup>28</sup> *Ibid* para 45.

<sup>29</sup> *Ibid* paras 47–8.

defamatory nature of the statement it might affect the award'.<sup>30</sup> It nevertheless came to the conclusion that the high court was fair in its award.<sup>31</sup>

(c) *The Constitutional Court decision*<sup>32</sup>

(i) *The majority decision*<sup>33</sup>

The majority, for whom Brand AJ penned the judgment, agreed with the high court and the Supreme Court of Appeal in finding that Dr Dey had been defamed.<sup>34</sup> However, the court reduced the amount of compensation to be paid to the plaintiff to R25 000 and ordered that the three boys tender an unconditional apology to Dr Dey for the injury that they caused him.<sup>35</sup>

In ascertaining whether the image was defamatory, the court agreed with the two-stage objective approach applied by the majority of the SCA.<sup>36</sup> As to the question of the ordinary meaning of the image, the court found that the reasonable observer would associate Dr Dey and the principal with the indecent situation that the picture portrayed.<sup>37</sup> The answer to the second part of the inquiry was also answered in the affirmative: 'the average person would regard the picture as defamatory of Dr Dey'.<sup>38</sup> The court could not agree with the applicants' contention that the image was meant as a joke or a

<sup>30</sup> Ibid para 47.

<sup>31</sup> Ibid para 48. In fact, Harms JA remarked that he 'may have awarded more but since [his] award would not have been substantially more an interference [could not] be justified'. The minority of the SCA, per Griesel AJA, placed emphasis at the attempted humour by the three children and found that 'it would be inappropriate in this case to postulate the reactions of "ordinary right-thinking persons generally", instead of restricting the inquiry to the microcosm comprising the particular school community and examining the way in which they understood the picture' (para 63). According to Griesel AJA, it was important to interpret the image in the context of the school, and the intended viewers of the image, namely fellow learners of the school who 'immediately recognised the attempt at humour and laughed at the incongruity conveyed by the picture' (para 61). He found that Dr Dey failed to prove that 'the meaning conveyed by the picture is the one relied on in the particulars of claim' (para 63) since the onus was on him to prove that the image could be taken up in no other light by a reasonable person than that of being defamatory (para 62). He nevertheless found that Dr Dey's dignity was impaired and consequently agreed with the majority of the SCA as to quantum and costs (paras 64–6).

<sup>32</sup> *Le Roux v Dey* (CC) supra note 18.

<sup>33</sup> Being the judgment prepared by Brand AJ, at paras 82–152 of the decision, in which Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurred.

<sup>34</sup> Ibid para 83.

<sup>35</sup> The order of the court may be found in para 10 of the judgment.

<sup>36</sup> Ibid para 89. In para 90 the court held that '[b]ecause the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question' (footnote omitted).

<sup>37</sup> Ibid paras 97–105.

<sup>38</sup> Ibid para 107. This was so since 'the whole purpose and effect of the association created by the picture is to tarnish the image of the two figures representing authority; to reduce that authority by belittling them and by rendering them the objects of

schoolboy prank, and therefore not meant to be defamatory, since it found that the whole purpose of the ‘joke’ was to belittle, ridicule and show contempt and disrespect for the plaintiff.<sup>39</sup> This, it found, would also be the way in which the reasonable observer would view the image.<sup>40</sup> The court, did, however, concede that it should be taken into account that the image was created by schoolchildren and that the reasonable observer would ‘accept that teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously’.<sup>41</sup> This did not mean, though, that children are exempted from delictual liability since,<sup>42</sup> in the court’s ‘value judgment’,<sup>43</sup> these children crossed the line by publishing a hurtful joke.

As to the wrongfulness of the conduct of the children, the court summarised the recent jurisprudential development in this regard by stating that

‘(a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on *considerations of public and legal policy in accordance with constitutional norms*’.<sup>44</sup>

The court continued to explain that in *Khumalo & others v Holomisa*<sup>45</sup> the Constitutional Court had found that the common law allows for a balance to be struck between conflicting constitutional rights of freedom of expression on the one hand, and the rights to dignity and privacy on the other. It is important to note that the court found that the ‘grounds of justification are still not closed’ and that courts ‘may in appropriate cases thus recognise *new grounds* or *adapt existing grounds* to give effect to considerations of legal policy and constitutional norms’.<sup>46</sup> In terms of the latter ground, the court immediately dismissed the argument by the Freedom of Expression Institute (‘FXI’)<sup>47</sup> that one such ‘rather radical ground based on the alleged right of children to develop their satirical skills’ could be used as a proposed ground of justification.<sup>48</sup> This was so since the argument was never pleaded or raised in any manner or form at the trial, and, in any event, derived ‘no support from

contempt and disrespect; and to subject these two figures of authority to ridicule in the eyes of the observers who would predominantly be learners at the school’.

<sup>39</sup> Ibid paras 110–14.

<sup>40</sup> Ibid para 115.

<sup>41</sup> Ibid para 117.

<sup>42</sup> The court in para 118 illustrated this point by explaining that if a child were to, for example, cause physical damage to a teacher’s car, he would still be liable for the damages.

<sup>43</sup> Ibid para 119.

<sup>44</sup> Ibid para 122 (emphasis supplied, footnote omitted).

<sup>45</sup> 2002 (5) SA 401 (CC) paras 43–4.

<sup>46</sup> *Le Roux v Dey* (CC) supra note 18 para 73 (emphasis supplied).

<sup>47</sup> The Freedom of Expression Institute was admitted as *amicus curiae*.

<sup>48</sup> *Le Roux v Dey* (CC) supra note 18 para 127.



our law as it stands'.<sup>49</sup> Had the argument been properly canvassed, so the court said, a fine balancing act between the right of the child to freedom of expression and the right to dignity of teachers would have had to have been investigated.<sup>50</sup>

The majority of the Constitutional Court also found that, since the boys clearly had the intention to humiliate their teacher, they possessed the *animus iniuriandi* required for the delict of defamation.<sup>51</sup> The applicants did not raise a defence that they were unaccountable or *culpa incapax* because of their immature emotional or intellectual development. They simply alleged that they were unaware that they were committing a delict and doing something wrong.<sup>52</sup>

The majority of the Constitutional Court mentioned the fact that the defendants in this case were children on only one occasion: in paragraph 152 the majority stated that 'too little was made of the fact that the defendants were schoolchildren, as well as the fact that they had already been subjected to other forms of punishment for the same act in more than one way'. The court opined that Dr Dey should 'have taken substantial consolation from the fact that he had to some extent been vindicated in the eyes of members of the school community — who observed the picture — by the punishment that the wrongdoers had already endured'<sup>53</sup> and for this reason reduced the quantum to R25 000.

(ii) *The joint opinion of Froneman J and Cameron J*<sup>54</sup>

Froneman and Cameron JJ agreed with the minority judgment in the SCA<sup>55</sup> in that they found that the applicant's defamation claim should have failed. However, they held that Dr Dey's dignity claim should have succeeded. They found that he was not defamed since the facts of this case were not exceptional: children attempt to ridicule and undermine the authority of their teachers on a daily basis.<sup>56</sup> Because this schoolboy prank had taken place

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* para 128.

<sup>51</sup> *Ibid* paras 132 and 135.

<sup>52</sup> *Ibid* para 134.

<sup>53</sup> Para 152.

<sup>54</sup> *Ibid* paras 153–206 of the judgment.

<sup>55</sup> See note 31 above.

<sup>56</sup> *Le Roux v Dey* (CC) *supra* note 18 para 158. Cameron and Froneman JJ explained: 'What the applicants did here is not exceptional. Every generation of schoolchildren includes individuals who try to make fun of their teachers, who attempt to ridicule them and who attempt to undermine their authority. Some of their peers may laugh at their jokes, or guiltily enjoy the attempt to ridicule and undermine authority; many others will disagree. But for none of them, we suggest, would the jokes, the attempted ridicule or undermining of authority made by the few, in the eyes of the reasonable observer, imply that the teacher is now somehow someone different to the person they knew, diminished by the attempted joke, ridicule or subversion of authority. And that, we think, will also be the reaction of teachers, parents and outsiders who come to know of it. The children's conduct will be recognised as naughty, or worse, but hardly ever as lowering the public esteem of



in a school setting where the reasonable viewer would not have taken it seriously or as a factual averment about the deputy-principal, the image did not impair Dr Dey's good name or reputation. Despite the fact that the public aspect of the right to dignity (that is, Dr Dey's public esteem or reputation) was not infringed, Froneman J and Cameron J were of the opinion that the image hurt the vice-principal's subjective feelings. In this way Dr Dey's dignity was impaired since his self-esteem was violated and he was deeply affronted by the depiction of him in a sexually compromising position.<sup>57</sup>

### III THE BEST INTERESTS OF THE CHILD

During the interpretation and implementation processes of the best interests of the child, a number of practical questions need to be answered. Some of these practical concerns which courts and academics alike have tried to address include that of determining who decides what is in the best interests of a child; whether the proposed outcome should be in the interests of a particular child in particular circumstances or for all children as a group; whether the decision to be taken should meet the short, medium or long-term interests of a child; and what it means to use the best interests as a primary consideration,<sup>58</sup> the primary consideration,<sup>59</sup> or as a consideration of paramount importance.<sup>60</sup> The notion of the best interests of the child has been hailed as evolutionary, responsive, and flexible, but at the same time also as vague, broad and indeterminate.<sup>61</sup> The nature of these descriptors could be interpreted as posing a danger to the full realisation of children's rights. They

the teacher. In most, if not all, cases the converse will be true: the offending children will be thought less of, not the teacher. Everybody would accept that the conduct was wrong and that the offenders need to be punished, not because the teacher's public esteem was probably diminished, but because the children did not measure up to the public standard expected of them at the school.'

<sup>57</sup> Ibid paras 176 and 187–90. Two other aspects of this minority judgment warrant mention: these two judges also paid particular attention to the arguments raised by one of the amici curiae in this case, the Restorative Justice Centre. Froneman J and Cameron J held that their submission that the law be developed in such a manner that aspects of restorative justice, such as the amende honourable, could be effected, was met with practical difficulties since the matter had already ended up in court. This minority indicated, however, that it was 'time for our Roman Dutch common law to recognise the value of this kind of restorative justice' (para 197). Yet, they were still not prepared to adopt the approach of a balance between children's right to freedom of expression against privacy and dignity. Although they considered such an approach, which was adopted by Yacoob J, to be 'thought-provoking', Froneman and Cameron JJ found 'that in the particular circumstances of this case a more conventional approach accords with the dictates of the Constitution' (para 153).

<sup>58</sup> As provided in art 3 of the CRC.

<sup>59</sup> As provided in art 4 of the ACRWC.

<sup>60</sup> As provided in s 28(2) of the Constitution.

<sup>61</sup> R Mnookin & E Szwed 'The best interests syndrome and the allocation of power in child care' in H Geach & E Szwed (eds) *Providing Civil Justice for Children* (1983) 8, as cited by R Malherbe 'The constitutional dimension of the best interests of the child as applied in education' 2008 *TSAR* 267 at 269.

could, however, also be seen as providing the concept with enough room to be responsive to the normative values of the CRC, the ACRWC and the South African Constitution, and in particular to their implementation in particular circumstances. So, for example, the Constitutional Court declared in *S v M*<sup>62</sup> that 'it is precisely the contextual nature and inherent flexibility of s 28 [of the Constitution] that constitutes the source of its strength'. Heaton neatly addresses and summarises many of these questions and uncertainties when she argues for an individualised, contextualised and child-centred determination of the child's best interests.<sup>63</sup> This too was the call by the Constitutional Court in some of its previous decisions where it indeed considered the best interests of the child.<sup>64</sup>

The South African courts have also confirmed on a number of occasions that s 28(2) of the Constitution has expanded the application of the best interests from the traditional sphere of family law to 'every matter concerning the child'. In *S v M*<sup>65</sup> the Constitutional Court held that

'taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children.'

This has the effect that the concept of the child's best interests has been elevated to the supreme issue in any matter concerning the child.<sup>66</sup> Yet, it does not mean that the best interests of children must always prevail, or that other constitutional rights must be ignored.<sup>67</sup> Once again, the Constitutional Court in *S v M* provided the necessary guidance in this regard when it called for an approach which applies 'the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests'.<sup>68</sup>

Given the attention to the best interests principle in the sources cited above, it is peculiar that in various judgments of the high court,<sup>69</sup> and the Constitutional Court decision in *Le Roux v Dey* in particular, there is no

<sup>62</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

<sup>63</sup> J Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34(2) *Journal for Juridical Science* 1.

<sup>64</sup> See for example *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 18 and *S v M* supra note 62 para 24.

<sup>65</sup> Supra note 62 para 25.

<sup>66</sup> Heaton op cit note 63 at 4.

<sup>67</sup> In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (2) SACR 445 (CC) para 55 the court held that 's 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36'.

<sup>68</sup> Supra note 62 para 25.

<sup>69</sup> See for example the decisions of *Mthembu v Letsela* 1997 (2) SA 936 (T); 1998 (2) SA 675 (T) and *Van Zijl v Hoozenhout* [2004] 4 All SA 427 (SCA) mentioned by Elsje Bonthuys 'The best interests of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23 at 29.

systematic examination or elaboration of children's rights, let alone the best interests of the child. Moreover, where children's best interests are considered by the courts, it was not clear whether these interests are to be applied as an independent right, a principle, or a standard. Thus, for example, in *Christian Education South Africa v Minister of Education*<sup>70</sup> the Constitutional Court referred to the best interests of the child as a 'right which every child has'.<sup>71</sup> In the next sentence, the concept of the best interests of the child is referred to as a principle.<sup>72</sup> In *C v Department of Health and Social Development, Gauteng*,<sup>73</sup> both the minority judgment of Skweyiya J<sup>74</sup> as well as the majority decision by Yacoob J<sup>75</sup> performed a limitation inquiry and found that the 'impugned provisions of the Children's Act inflict[ed] a limitation on the right in s 28(2), in that they do not provide for adequate consideration of the best interests of the child'.<sup>76</sup> Yet, in *Minister of Welfare & Population Development v Fitzpatrick*<sup>77</sup> the Constitutional Court referred to the 'best interests standard' and in *Du Toit v Minister of Welfare & Population Development*<sup>78</sup> it declared the exclusion of same sex life partnerships from adopting children jointly to be 'in conflict with the principle enshrined in s 28(2) of the Constitution'.<sup>79</sup> The Children's Act seems consistently to refer to the best interests of the child as a 'standard' to be applied as a matter of paramount importance. Heaton<sup>80</sup> and Bonthuys<sup>81</sup> explain that the problem with the use of mixed terminology is that the content and effect of implementing a rule, as opposed to a right, or a standard or a principle is not the same. The courts appear to not have grappled with the true nature of s 28(2) yet<sup>82</sup> and, as is apparent from *Le Roux v Dey*, are certainly not applying it as a rule.

The CRC has now, however, in its General Comment No 14,<sup>83</sup>

<sup>70</sup> 2000 (4) SA 757 (CC) para 41.

<sup>71</sup> See also *Minister of Welfare & Population Development v Fitzpatrick* supra note 64 where the court stated that s 28(2) of the Constitution 'creates a right that is independent of those specified in s 28(1)' (para 27). See also Bonthuys op cit note 69 at 26–9 where the author discusses some of the cases in which different terminology has been used.

<sup>72</sup> Ibid para 27: 'The principle is not excluded in cases where the religious rights of the parent are involved.'

<sup>73</sup> *C & others v Department of Health and Social Development, Gauteng, & others* 2012 (2) SA 208 (CC).

<sup>74</sup> Froneman J concurring.

<sup>75</sup> Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurring.

<sup>76</sup> *C v Department of Health and Social Development, Gauteng* supra note 73 para 27 of the decision by Skweyiya J. At para 77 the majority found that '[i]n this sense, and to this extent, the laws are not in the best interests of children. They therefore limit the rights contained in s 28(2).'

<sup>77</sup> Supra note 63 para 18.

<sup>78</sup> 2003 (2) SA 198 (CC) para 22.

<sup>79</sup> Emphasis supplied.

<sup>80</sup> Jacqueline Heaton *South African Family Law* 3 ed (2011) 278.

<sup>81</sup> Bonthuys op cit note 69 at 26–9.

<sup>82</sup> Heaton op cit note 80 at 278.

<sup>83</sup> General Comment No 14 op cit note 10.

confirmed<sup>84</sup> that the concept of the best interests of the child is a multifaceted one, existing as a substantive right; a fundamental, interpretative legal principle; and as a rule of procedure.<sup>85</sup> Since it is a dynamic concept, encompassing a variety of issues which are continuously evolving,<sup>86</sup> the CRC's comment provides a framework intended to promote a real change in attitudes towards the respect for the rights of the child. It is not a general prescription of exactly what is best for a child in a particular situation. The comment calls for the development of a rights-based approach to promote the full application of the concept of the best interests.<sup>87</sup> Of relevance to this discussion is the fact that the CRC reiterated that an assessment and determination of the best interests of the child required procedural guarantees. The justification for a decision must 'show that the right has been explicitly taken into account'.<sup>88</sup> Furthermore it must be explained how the right has been respected in the decision, 'that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.'<sup>89</sup> As a result, State Parties to the CRC have, *inter alia*, the duty to ensure that

- (a) the child's best interests are *appropriately integrated and consistently applied in every action* taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;
- (b) all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.<sup>90</sup>

It is interesting that even prior to this General Comment, the Constitutional Court had addressed the question concerning who should raise the interests of children in court proceedings, particularly in instances where it may have not been properly raised or argued, in the matter of *Van der Burg v National Director of Public Prosecutions*.<sup>91</sup> The court came to this conclusion:

'Of course, it is expected that parents must invoke the interests of their children in proceedings like these and it is important that they do so. But state institutions bear a responsibility to address this issue, even when the parents have not raised it. The high court is not only the upper guardian of children,

<sup>84</sup> See for example Zermatten op cit note 8 at 483–99 offering many of the same views on the three facets of the concept.

<sup>85</sup> General Comment No 14 op cit note 10 at 4.

<sup>86</sup> Ibid at 5.

<sup>87</sup> Ibid at 4.

<sup>88</sup> Ibid at 4.

<sup>89</sup> Ibid at 4.

<sup>90</sup> Ibid at 5.

<sup>91</sup> *Van der Burg & another v National Director of Public Prosecutions & another* 2012 (2) SACR 331 (CC) para 68.

Zbut is also obliged to uphold the rights and values of the Constitution. *In all matters concerning children*, including applications for the forfeiture of property which provides a home or shelter to children, *it is the duty of the court to consider the specific interests of the children*. In this, officers of the court like the NDPP are expected to assist the court to the best of their ability with all relevant information at their disposal. The failure of parents to emphasise the interests of their children, or the possible manipulation of the children's situation to suit the objectives of parents, may not be held against the children.<sup>92</sup>

#### IV AN ASSESSMENT OF THE MAJORITY DECISION

When one considers the explicit injunctions set out by the court in the *Van der Burg* case, two important questions need to be asked. Why did the majority of the Constitutional Court (as well as the Gauteng North High Court and the SCA) consider it unnecessary to consider how these defendant children's best interests could be served? By contrast, how should the courts instead have approached the matter?

Neither one of these questions is easy to answer. One may only speculate as to why the courts failed to consider these children's interests: perhaps it is because they did not present themselves as innocent children and were not defended by their legal representatives in this way, and this distracted the courts from accepting that these children still had substantive rights which needed to be taken into account. Maybe it was the fact that the particular circumstances of the case were so unique that it clouded the courts' vision in not realising that an appropriate balancing exercise needed to take place. These were children who had done wrong. They did not quite fit the mould of the juvenile offender<sup>93</sup> who needs rescuing from his or her evil delinquencies. Nor were they the innocent victims of an abuse of power by cruel adults, in desperate need of care and protection of their welfare and interests. They were children who thought it would be funny to make fun of their teachers. It probably was not funny — and it certainly was not for Dr Dey. His dignity and reputation were most probably harmed and I agree that the three boys should have been made to bear the consequences of their actions. The crucial point of departure, however, which was ignored by the majority of the Constitutional Court, was that the best interests of these children needed to be considered in the process.

Since any interpretation of the best interests must be consistent with the spirit of the entire CRC,<sup>94</sup> one must be informed and guided by the other

<sup>92</sup> Emphasis supplied, footnotes omitted.

<sup>93</sup> Although their crime had been diverted through the relevant processes offered, at the time, by the Criminal Procedure Act.

<sup>94</sup> Kinderrechte 'CRC on best interest of the child' available at [http://www.kinderrechte.gv.at/home/upload/crc\\_on\\_best\\_interest\\_of\\_the\\_child.pdf](http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf), accessed on 14 July 2009.

articles of the CRC<sup>95</sup> to ensure that the set of values used by the interpreter is measured against those values and principles prescribed by international law.<sup>96</sup> Therefore, throughout the process of establishing the best interests of children, one must also consider some of the other applicable rights of children as enshrined by the CRC and other international treaties. In *Le Roux v Dey* the children should have had their interests assessed as substantive rights. Such rights would have included their rights to freedom of speech, not to be discriminated against, to have their voice and opinion heard, especially in the context of their evolving capacities, and the right to certain procedural safeguards. I would argue that it was incorrect for the majority of the Constitutional Court merely to dismiss the ‘rather radical ground based on the alleged right of children to develop their satirical skills’ as it was not ‘properly canvassed’.<sup>97</sup> It is the duty of the court to raise the question of the interests and rights of the child in the event that the child’s legal representative does not do so.<sup>98</sup> It is probable that the courts would have found that these rights of the children could not justify the infringement upon the rights of Dr Dey. Perhaps the courts would have found that it was in the children’s best interests that they learn to respect authority and other people’s dignity by paying delictual damages. Perhaps the courts might have considered other methods such as restorative justice<sup>99</sup> to be more appropriate to promote the children’s best interests. Perhaps this question would not have needed a definitive answer: the CRC merely requires proof that the right of the children’s best interests has explicitly been taken into account.

As a result, it is submitted that the first sentence of Skweyiya J’s judgment summarises the approach which was the only possible route from which to decide the matter in this particular instance. It reads: ‘This is a case concerning children. In and amongst all the other considerations relevant to this matter, this is the inescapable and overarching fact of this case.’<sup>100</sup>

The judge also identified one of the most important questions which need to be answered: that is, how the best interests standard should be applied in this type of matter.<sup>101</sup> Skweyiya J tried to answer this by drawing on the

<sup>95</sup> See also J Tobin ‘Beyond the supermarket shelf: Using a rights based approach to address children’s health needs’ (2006) 14 *International Journal of Children’s Rights* 275 at 287.

<sup>96</sup> J Tobin & R McNair ‘Public international law and the regulation of private spaces: Does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?’ (2009) 23 *International Journal of Law, Policy and the Family* 110 at 114.

<sup>97</sup> See *Le Roux v Dey* (CC) supra note 18 para 127.

<sup>98</sup> See the quotation from *Van der Burg v National Director of Public Prosecutions* supra note 91.

<sup>99</sup> Something briefly considered Froneman and Cameron JJ, as I discussed in note 57 above.

<sup>100</sup> Skweyiya J essentially agreed with Yacoob J’s reasoning, but felt it necessary to provide his own reasons, which may be found in *Le Roux v Dey* (CC) supra note 18 paras 207–15.

<sup>101</sup> *Ibid* para 211.

international guidelines on the matter found in the CRC and the Constitution. He then concluded that the best interests consideration is not something which is elevated above all other aspects, but rather forms the point of departure from which the matter is to be considered. He found that only once the correct starting point is established, can one begin to examine the other relevant rights concerning the matter, 'without losing sight of the fact that the best interests of the child remain "of paramount importance"'.<sup>102</sup> Skweyiya J admitted that he did not condone the children's actions in this matter, and he expressed the view that they certainly should have faced the consequences and be punished for their actions. However, in deciding the outcome of the case, a 'judicial officer would be remiss if consideration were not properly given to the effect of one's decision on the rights of the child'.<sup>103</sup> It is this fundamental interpretative legal principle which, it is submitted, the majority of the Constitutional Court missed when they made their decision.

Using the same line of reasoning as Skweyiya J, Yacoob J<sup>104</sup> identified the issues in this particular matter to be that of balancing the rights of dignity<sup>105</sup> and privacy on one hand, with that of freedom of expression and the rights of children on the other.<sup>106</sup> Yacoob J furthermore subscribed to the approach of the Constitutional Court in the *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others*,<sup>107</sup> where it was confirmed that because the best interests of the child are paramount, this does not mean that they are absolute.<sup>108</sup> Here the court too held that s 28

'imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and protection of children.'<sup>109</sup>

It followed, said the court in that case, that courts and reasonable observers are obliged to give consideration to the effect of their decisions on the rights and interests of children.<sup>110</sup>

In order to evaluate the image created by the children, Yacoob J considered it important to do so within the context in which the facts occurred, namely a school setting, where the offenders were children, as well as that the power relationship between the wrongdoers and the target of the injury.<sup>111</sup> After a brief discussion of the importance of freedom of expression

<sup>102</sup> Ibid.

<sup>103</sup> Ibid para 214.

<sup>104</sup> Ibid paras 11–81 of the judgment. For extensive criticism of this decision see Buthelezi op cit note 21 at 719.

<sup>105</sup> This being the right to dignity not only of Dr Dey but also of the children involved. See ibid para 46.

<sup>106</sup> See ibid paras 32, 35 and 44.

<sup>107</sup> 2009 (4) SA 222 (CC) (hereafter the *Phaswane* case).

<sup>108</sup> Paras 71–80.

<sup>109</sup> Para 73 of the *Phaswane* decision.

<sup>110</sup> Para 74 of the *Phaswane* decision.

<sup>111</sup> *Le Roux v Dey* (CC) supra note 18 para 46.



in our country, as well as the significance of children's rights as contained in s 28 of Constitution,<sup>112</sup> he explained that courts and reasonable observers are obliged to give consideration to the effect of their decisions on the rights and interests of children.<sup>113</sup> In Yacoob J's opinion, it was clear that s 28 of the Constitution would require the reasonable observer to understand that the applicants had the right to be cared for at the school; to be protected from maltreatment, neglect, abuse or degradation; and that the best interests of the children are paramount in all matters concerning them.<sup>114</sup> He found that it is important to protect children from their own lack of judgement,<sup>115</sup> given their inclination to give confused messages, particularly in non-verbal communication, and their ability to react, sometimes unreasonably, but spontaneously and without thought, to the exercise of authority at any institution.<sup>116</sup> Consequently Yacoob J and Skweyiya J found<sup>117</sup> the reasoning of the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development & others*<sup>118</sup> to be of crucial importance in this delictual setting (albeit that the context in the *Centre for Child Law* case was that of criminal law proceedings). The court held in the *Centre for Child Law* case that

[t]he Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. . . . We distinguish them because we recognise that children's crimes may stem from immature judgement, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.<sup>119</sup>

As a result, Yacoob J found that the 'reasonable observer would also try to strike an appropriate balance between defamation and privacy concerns on the one hand and freedom of expression and children's rights on the other hand'.<sup>120</sup> This meant that the

<sup>112</sup> Ibid paras 47–9.

<sup>113</sup> Ibid para 74.

<sup>114</sup> Ibid para 57.

<sup>115</sup> See also Skweyiya J's reasoning ibid para 212: 'In effect, we seek to create different "worlds" for our children in an effort to protect them, to help them develop, and to give them a forum to make mistakes and then learn from these mistakes. One is not hard-pressed to find examples of ways in which we treat children differently, or offer them greater protection. We give children a measure of leeway, and in many instances hold them to a lower standard of account, as we accept that they lack the emotional maturity and wisdom to clearly distinguish right from wrong when there is a grey area. In my view, the facts of this case present such a grey area.'

<sup>116</sup> Ibid para 57.

<sup>117</sup> Ibid paras 50 and 212.

<sup>118</sup> 2009 (6) SA 632 (CC) paras 26–8.

<sup>119</sup> Ibid para 26.

<sup>120</sup> *Le Roux v Dey* (CC) supra note 18 para 57.

‘reasonable observer would also recognise that over-sensitive reaction to the conduct of immature children by people in authority at institutions at which the children are, would result in the diminution of sensitivity to the needs and requirements of children. In this sense the lack of sensitivity might be counter-productive’<sup>121</sup>

and

‘an over-emphasis on the rights of a good name and reputation of a deputy principal in relation to the rights of powerless children . . . will be harmful to the interests of children.’<sup>122</sup>

Skweyiya J found it rather unreasonable that ‘precisely because they were children, the learners have been subjected to an additional round of punishment through the school’s disciplinary measures’.<sup>123</sup> He also remarked that in an environment such as a school, where children are supposed to be taught right from wrong, fear of the law and the legal process should not be instilled, and freedom of speech should be encouraged. When children transgress, they should be held accountable in an appropriate and commensurate manner. In some instances this may lead to their criminal and civil liability, but in this particular instance Skweyiya doubted the efficacy of litigation and the monetary awards made against the children.<sup>124</sup> Reacting to the argument that the generally serious disciplinary problems in school necessitated a strict approach,<sup>125</sup> Yacoob J responded that there was no link to be made between school discipline and defamation cases.<sup>126</sup> Both Yacoob J and Skweyiya J came to the conclusion that the image was neither defamatory of nor injurious to Dr Dey’s dignity.<sup>127</sup>

## V CONCLUSION

Ascertaining what it means to consider the best interests of the child of paramount importance requires a continuous integration of children’s rights into all aspects which affect them. It does not mean that children’s rights will triumph over all other competing interests, but it does mean that children should be recognised as rights holders. We need to move away from the concept of child welfare rights and appreciate children’s rights and responsibilities in all other contexts too — especially in relationships where children’s rights have an impact on those of others. Children’s rights may, like any fundamental right, of course be limited. However, in order to adjudicate the extent of that limitation, these rights, first and foremost, have to be acknowledged. This acknowledgment should then be developed into an

<sup>121</sup> Ibid para 57.

<sup>122</sup> Ibid para 68.

<sup>123</sup> Ibid para 214.

<sup>124</sup> Ibid para 215.

<sup>125</sup> Ibid para 67.

<sup>126</sup> Ibid para 68.

<sup>127</sup> Ibid para 78.

assessment of the specific circumstances that make the child unique<sup>128</sup> — of all the factual circumstances regarding the child, including what elements have been found to be relevant in the best-interests assessment. The content of the elements must be explained in each individual case, and how they have been weighed up to determine the child's best interests.<sup>129</sup> The explanation must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh other considerations in cases where this is the ultimate result.<sup>130</sup> This was not what the majority of the Constitutional Court, or any of the lower courts in this matter understood their duty to be. As I have argued above, to consider the children's best interests in this particular matter would not necessarily have resulted in the children escaping delictual liability. On the contrary, the paramountcy of this principle cannot simply justify the violation of someone else's rights. However, like with all other fundamental rights, it was essential that a proportionate balance of all applicable rights had to be struck in order for the court to make its decision.

While it is certainly true that some aspects of the minority judgments of Yacoob and Skweyiya JJ may be criticised,<sup>131</sup> it cannot be denied that theirs were the only judgments which approached the matter from the proper perspective. I cannot agree with Buthelezi's comment that Yacoob J 'was misdirected by his unwarranted bias towards the children's rights'.<sup>132</sup> Nor can I approve of his submission that 'the two justices failed to weigh properly the competing interests — probably being blinded by the fact that the applicants were minors'<sup>133</sup> or the sentiment that Yacoob J portrayed the children as helpless victims.<sup>134</sup> Although I may agree with Buthelezi's assessment that it was not in the children's interests 'to absolve them from liability for salvaging the dignity of others',<sup>135</sup> it should be emphasised that only Yacoob and Skweyiya JJ truly comprehended what was required of them. The other members of the judiciary involved in this matter, it is respectfully submitted, failed to comply with international and national legislative imperatives, failed to enhance and develop the common law, and in the end failed these rather mischievous children who had made fun of their teachers.

<sup>128</sup> General Comment No 14 op cit note 10 at 12.

<sup>129</sup> Ibid at 20.

<sup>130</sup> Ibid at 20.

<sup>131</sup> See for example Buthelezi's fairly detailed exposition op cit note 21. As I indicated from the outset, the aim of this article is not to comment on the court's pronouncements on the particular aspects of the law of defamation, but rather to discuss its approach to assess defamatory actions committed by children.

<sup>132</sup> Buthelezi ibid at 723.

<sup>133</sup> Ibid at 729.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid at 731.