

EDUCATION, LAW AND LEADERSHIP THAT PROMOTES THE BEST INTERESTS OF STUDENTS IN SOUTH AFRICA¹

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This article focuses on the role of education managers in enforcing the principle of best interests of students in their schools. That is, this article explores the role of the judiciary in supporting schools in applying the principle of justice. On the one hand, education managers have to create an environment conducive to teaching and learning by ensuring that the learners' rights are protected and by treating them with fairness. On the other hand, school governing bodies, representing the school communities, are required to adopt school policies that reflect the communities' norms and standards. In the diverse educational context, the South African Constitution emphasises the rights of the individual learners, rather than the community standards. In this contribution, relevant constitutional rights, such as the right to religious freedom, the right to freedom of expression, the right to language and culture, and the right to education, are examined briefly in order to determine the impact of the best interest of the child principle when one of these rights is affected, or a conflict of fundamental rights affecting the child occurs. It will be shown that the 'best interests of the child' does not necessarily mean that the affected right of the child should prevail every time, and in a given case the principle may be served best if the rights (or wishes) of the parents, other children or the school community prevail over those of the individual child.

I INTRODUCTION

Even though the term *best interests* is used frequently, there is lack of clarity as to what constitutes a student's best interests. Courts and school leaders tend to interpret this phrase in a variety of ways, often disagreeing on the best course of action or what is truly in the best interests of a student.

Education in South Africa operates in a culturally diverse society.² The social disadvantages and exclusion experienced by the majority of the population during Apartheid presented significant challenges to the new education system.³ Educational reform has been a central part of South Africa's reconstruction and development programme since 1994.⁴ The transformation of education and the adoption of constitutional values such as equality, human dignity and freedom⁵ in education require that change is managed proactively. South Africa has since the inception of the democratic government focused on addressing the country's educational legacy. As a result, school leaders are faced with the challenge of transforming schools to comply with rapidly changing policies as well as ensuring that the full potential of every learner is unlocked to meet the needs of the changing society. The changing education environment in the new democracy has therefore brought to the fore the need for education leaders to be able to take the correct decisions

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in the best interests of the learners,⁶ but also in compliance with the principles of fairness, equity and justice.

Within all South African societies there is great concern not only to make schools more just, but also to provide equality of educational opportunity⁷ and to allow freedom of choice. Placing the principle of justice at the centre of education means that every parent, teacher and learner must be treated with equality, dignity and fairness. This often leads to paradoxical challenges for education managers. One of the paradoxes South African education managers face is that of individual rights versus community standards or individual rights versus transformational goals.⁸ This dichotomy emanates from individuals' desires to be unique, independent or to hold a strong self-identity.

This article focuses on the role of education managers in enforcing the principle of best interests of students in their schools. That is, this article explores the role of the judiciary in supporting schools in applying the principle of justice. On the one hand, education managers have to create an environment conducive to teaching and learning by ensuring that the learners' rights are protected and by treating them with fairness. On the other hand, school governing bodies, representing the school communities, are required to adopt school policies that reflect the communities' norms and standards. In the diverse educational context, the South African *Constitution* emphasises the rights of the individual learners, rather than the community standards.

II THE LEGAL POSITION OF EDUCATION MANAGERS IN APPLYING PRINCIPLES OF JUSTICE IN SCHOOLS

In terms of s 28(2) of the *Constitution*, as well as the *Convention of the Rights of the Child*⁹ (ratified on 16 June 1995), a child's best interests is of paramount importance in every matter concerning the child. This principle forms part of the rights of the child contained in section 28, but constitutes a constitutional right extending beyond the other rights in section 28.¹⁰ This means that the principle should be applied in all matters affecting the child and not only in matters relating to the other rights in section 28. The principle should also be considered when any other constitutional or legal right of a child is affected. It further means that the child has the constitutional right that his or her best interests will be given priority in every matter affecting that child.

The best interests of the child has developed as a common law principle in terms of which best interests of the child should prevail in family law disputes over issues such as custody of and access to children.¹¹ The universal acceptance of the principle has been stated as follows: 'Arguably, the standard of the best interests of the child is the universal principle guiding the adjudication of all matters concerning the welfare of the child.'¹²

What exactly is in the best interests of the child has to be determined in every individual case. The best policy for a specific child or for a group of children in general, cannot be determined by any degree of certainty. This uncertainty becomes even more pronounced when the rights or interests of groups of children come into conflict with those of other children. The question is whether the rights of an individual child or the rights of a group take precedence over the rights of other children.

Even though the term 'best interests' is used frequently, there is a lack of clarity as to what constitutes a learner's best interests.¹³ Education managers tend to interpret this phrase in a variety of ways, oftentimes disagreeing on the best course of action or what is truly in the best interests of the learners. The decisions taken by education managers are strongly influenced by their personal

values. It is not always easy to separate personal values from a justice perspective.¹⁴ The justice perspective focuses on rights and laws.

In applying justice principles, two different schools of thought are recognised.¹⁵ One school of thought sees the individual as central and social relationships as a type of social contract where the individual, using human reason, gives up some rights for the good of the whole or for social justice.¹⁶ The other school of thought tends to see the society, rather than the individual, as central and seeks to teach individuals how to behave within their communities.¹⁷ Education managers in societies who are committed to certain fundamental principles, such as tolerance and respect for the fair treatment of all persons tend to look at laws and policies to guide their decision-making.

The South African national education system strives to lay a strong foundation for the development of all the people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators.¹⁸

The *Constitution*¹⁹ commits everyone to the establishment of a society based on democratic values, social justice and fundamental human rights. Furthermore, the Constitution also confirms the values of accountability, responsiveness and openness.²⁰ Within schools, the rule of law is the graduator of accountability, for it holds all role players to a common code of appropriate behaviour. Accountability means that everyone is responsible for his/her individual behaviour. There can be no rights without responsibilities — whether as parents, educators or learners.

Considering the growing emphasis on the protection of human rights, it was inevitable that increasing attention would be given to the protection of learners' rights in education. The school must protect, promote and fulfil the rights identified in the Bill of Rights by ensuring that all learners and other stakeholders at a school have the democratic rights to due process²¹ and to participate in decision-making about matters affecting them at the school.

III THE BEST INTERESTS OF STUDENTS IN SOUTH AFRICA

In this contribution, relevant constitutional rights, such as the right to religious freedom,²² the right to freedom of expression,²³ the right to language and culture,²⁴ and the right to education,²⁵ are examined briefly in order to determine the impact of s 28(2) when one of these rights is affected, or a conflict of fundamental rights affecting the child occurs. It will be shown that the best interests of the child does not necessarily mean that the affected right of the child should prevail every time, and in a given case the principle may be served best if the rights (or wishes) of the parents, other children or the school community prevail over those of the individual child. On the other hand, the principle may take a backseat when observing it could undermine the orderly educational process in a school, for example if a child refuses to comply with the school's code of conduct. This approach to the application of the best interests of the child is in line with the nature of the principle as a constitutional right and, accordingly, it is subject to lawful limitations in terms of s 36. Recent case law dealing with the best interests of the child from a constitutional point of view is examined in the discussion, the objective being to determine the proper approach to the application of the principle in different situations arising in the school environment.

A Freedom of Speech: Individual Rights Versus Educator and Community Rights

Freedom of expression in the school context is manifested in many ways (for example, freedom to speak, to publish in the school magazine and through dress and hairstyle). In the

education situation freedom of expression should be balanced by specific education interests and the competing rights and freedoms of other learners and teachers.

In the case of *Antonie v Governing Body, Settlers High School and Others*,²⁶ the applicant, a 15 year-old Grade 10 female learner who embraced the principles of the Rastafarian religion, grew her hair in dreadlocks and covered her hair by wearing a cap. Although she had several times asked the principal's permission to wear this hairstyle to school, he forbade it. She was suspended from school for five days for serious misconduct because she had disobeyed the code of conduct for learners and disrupted the school. According to the school's code of conduct, learners' hair had to be neat and tidy and this was specifically detailed in ten subsections of the code of conduct. Not one of these, however, prohibited the growing of dreadlocks and wearing the headgear.

The court argued that the growing of dreadlocks was prohibited by the code of conduct for learners. However, to enforce this prohibition in a rigid manner would be in contrast with the values and principles of justice, fairness and reasonableness. The applicant's need to indulge in freedom of expression could not be seen as serious misconduct punishable by suspension. The school argued that the wearing of headgear and dreadlocks has caused disruption and uncertainty at school, but the court found that the school had not acted in a spirit of mutual respect, reconciliation and tolerance, and hence the setting aside of its decision by the court.

The *South African Schools Act* determines that school governing bodies, as the elected representatives of the school communities, are responsible for adopting a code of conduct for their schools.²⁷ The government's call for greater participation is based on the assumption that school governors are in the position to make decisions that would suit the particular needs of the school community because they are the ones who best understand the context, culture and the needs of the school. This fact strengthens the notion of governing bodies accepting responsibility for conduct in accordance with the norms and values of the particular community, of course within the constitutionally enshrined fundamental rights. The school principal has to implement the code of conduct adopted by the governing body after consulting the parents, educators and learners. The facts of this case clearly show that violation of appearance rules does not constitute serious misconduct, punishable by suspension. The dilemma for the school is how to deal with a learner who chooses not to comply with the code of conduct adopted by the parents, educators and learners.

Everyone has the right to freedom of expression.²⁸ Freedom of expression covers a variety of situations that could occur in schools, ranging from clothing selection and hairstyles to religious expression. However, learners' rights to enjoy freedom of expression are not absolute. When the expression leads to a substantial disruption in school operations and to subverting the code of conduct, this right may be limited, as the disruption of schools is unacceptable. Section 36 of the *Constitution* determines that there must be an appropriate balance between the limitation of the right and the purpose for which the right is being limited. The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is suspected of serious misconduct from attending school.²⁹

The Guidelines for a Code of Conduct for Learners³⁰ recommend that a code of conduct should contain a set of moral values, norms and principles for developing learners into responsible citizens. In this case the principal juxtaposed the learner's individual right to freedom of expression against the standards of the community and refused permission to wear dreadlocks, associated with the Rastafarian belief. One can assume that the school community viewed wearing a prescribed, neat hairstyle as an important aspect of the learner's conduct. Applying the learner's

best interest's perspective, the challenge for education managers in similar situations is to decide how to afford respect to the learner's right to freedom of expression without contradicting the norms and values of the community as reflected in the schools code of conduct.³¹

B Cultural and Religious Freedom

The relationship between a learner's right to cultural and religious freedom and the principle of the 'best interest of the child' is demonstrated in the case of *MEC for Education: Kwazulu-Natal v Pillay*.³² The facts of this case are briefly as follows.

Sunali Pillay was, until the end of 2006, a learner at Durban Girl's High School (DGHS). During the school holidays in September 2004 Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. When she returned to DGHS after the holidays, Ms Pillay was informed that her daughter was not allowed to wear the nose stud as it was in contravention of the code of conduct of the school. In May 2005, Ms Pillay was informed that the MEC supported the School's approach.

Ms Pillay took the matter to the Equality Court and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali. The question before the court was whether the school's code of conduct was discriminating against Sunali's religion.³³ However, the Equality Court held that although a prima facie case of discrimination had been made out, the discrimination was not unfair.³⁴ The Court held that no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred and concluded that DGHS had acted reasonably and fairly. This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court.

The High Court set aside the decision and order of the Equality Court and replaced it with an order declaring 'null and void' the School's 'decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners'.³⁵

The School then applied for leave to appeal to the Constitutional Court against the decision of the Pietermaritzburg High Court. The primary argument of the School was that allowing Sunali to wear the nose stud or allowing others like her similar exemptions would impact negatively on the discipline in schools and, as a result, on the quality of the education they provide.

Langa CJ found that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the *Equality Act*. The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on DGHS. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. He therefore confirmed the High Court's finding³⁶ of unfair discrimination. This judgment does not abolish school uniforms; it only requires that, as a general rule, schools should make exemptions for sincerely held religious and cultural beliefs and practices. Nine other Constitutional Court judges concurred in the judgment of Judge Langa.

O'Regan J held that although the applicant argued that the nose-stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than from personal religious beliefs. The applicant has established that the wearing of the nose-stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a

religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs.

However, she confirmed that a code of conduct is entitled to establish neutral rules to govern the school uniform. The only cogent complaint to be directed at the code of conduct of DGHS is its failure to provide expressly for a fair exemption procedure. The principle of reasonable accommodation³⁷ requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is that they think their desire to follow a cultural practice warrants the grant of an exemption. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which in a significant way constructs their identity.

Here we clearly have two different ways of dealing with learners who choose to wear jewellery to school. The nose stud is not central to Hindu culture or religion. Instead, wearing a nose stud is an optional practice for many Hindus and is a fashion accessory. For example, in this case, none of the learner's sisters wore a nose stud and the learner herself did not wear a nose stud when she enrolled in the school. Section 8 of the *Schools Act* states that nothing exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner. To apply the rule against learners wearing jewellery to school does not therefore violate the learner's cultural right.

On the other hand, the absence of an exemptions procedure was a serious obstacle to raising and resolving the dispute about wearing a nose stud. If the school had an exemptions procedure, it would have set strict procedural requirements for exemptions. Parents and learners would then have to explain why they require an exemption. The parties could then engage each other about reasonably accommodating the learner. Without an exemptions procedure, the learner had no means of raising and resolving the dispute in a non-adversarial way.

The paradox for education managers in dealing with similar dilemmas is making decisions that send the correct message to learners and the community. The judgments in this case demonstrate the dissension among judges, especially as related to religious and cultural rights and discrimination. What one principal may view as free expression of cultural rights, another may see as disruption. What some education managers think of as reasonable accommodation, others may condemn as discrimination. Education managers in societies who are committed to certain fundamental principles, such as tolerance and respect for the fair treatment of all persons tend to look at laws and policies to guide their decision-making. In this case there seems to be no violation of laws and policies by the school.

C Language in Education: Community Rights Versus Equity

The *Schools Act* stipulates that the Minister of Education determines norms and standards for language policy in public schools.³⁸ The Norms and Standards for Language Policy in Public Schools³⁹ were published on 19 December 1997. Section 6(2) of the *Schools Act* provides for the following:

The governing body of a public school may determine the language policy of the school, subject to the Constitution, this Act and any other applicable provincial law.

The provisions of the *Schools Act* must be read against the background of the preamble to the *Schools Act*. It refers specifically to the necessity to protect and promote the variety of cultures and languages of the people of South Africa.

In the matter of *Middelburg Primary School v Head of Department, Mpumalanga Department of Education*,⁴⁰ the provincial education department forced the single medium Afrikaans primary school to admit 26 learners to Grade 1 to receive education in English. The applicants contended that this order was not in accordance with the school's legally approved language policy that was in accordance with the provisions of the *Schools Act* and in line with the numerical formula model of the National Language Policy for Public Schools.⁴¹

The school applied to the High Court to have the State's decision set aside. Judge Bertelsmann found that the actions of the Mpumalanga Education Department were in flagrant contravention of the South African *Schools Act* as well as contrary to the Norms and Standards for National Language Policy. He also commented that the language policy issue was inordinately politicised to the detriment of education and that the Department's decision ignored the school's rights and lacked respect for the opinions and endearing value that was held towards the chosen language of Afrikaans.

However, the fact that about nine months had elapsed from the admission of the learners to the school until such time when the matter was taken to court, had a decisive effect on the outcome of the case. It was argued that s 28(2) of the *Constitution*, which provides that the best interest of a child is of paramount importance, has a direct bearing on every situation that affects the children including education. Moreover, the *curator ad litem* (the person representing the interests of the English learners), advocated that in an effort to make a juridical sound choice between the administrative illegality of the Department's action on the one hand, and the Constitutional principle of 'the best interests of the child' on the other hand, the latter outweighs the former. Time was an essential factor in this ruling and accordingly it was held to be in the best interest of the learners not to be inconvenienced by transferring them to another school. Judge Bertelsmann emphasised that had the application been made at the time when the educational authorities made the order, he wouldn't have hesitated to declare the departmental order null and void.

The effect of this decision was that the 'best interest of the children' was considered only from the point of view of the 26 learners that desired English education in an Afrikaans single medium school. The Court did not give reasons or consider the 'long term best interests' of the children whose minority language, Afrikaans, is threatened.

In contrast in the landmark decision in *Western Cape Minister of Education v Mikro Primary School*,⁴² the school was an Afrikaans-medium public school whose governing body had refused to accede to an order of the Western Cape Department of Education to change the language policy converting the Afrikaans medium school to a parallel medium Afrikaans/English school.

The court commented that to switch from a single-medium school and to introduce English as a second language would indeed have a profound influence on the customs, the traditions 'and almost every aspect of the atmosphere which pervades in the school'. Furthermore, Judge Thring held that in deciding what the best interests of the children were, the value of legality in the Constitution weighed more heavily than the time that had elapsed and the inconvenience to the children to move to another school. The value of legality requires that the state should obey the law. Moreover, as legality is fundamental to an orderly society, it will in the long run prove to be complementary to the best interests of the child. This ruling had the effect that in spite of a

number of months elapsing after admission, the 21 learners were ordered to be enrolled at another suitable school as soon as reasonably practicable.

Thereafter, the Western Cape Minister of Education appealed against the finding of the court *a quo*, and relied mainly on s 29(2) of the *Constitution* which provides that everyone has the right to receive education in an official language at a public educational institution if practicable. The appellants argued that the governing body's right to determine the language policy of the school was subject to the *Constitution*, the *Act* and any provincial law; and that the language policy was therefore subordinate to the constitutional right of the learners in question to be taught in English at the school. The Supreme Court of Appeal rejected this interpretation. Instead, it held that s 29(2) means that everyone has a right to be educated in an official language of his or her choice at a public school in general to be provided by the State if reasonably practicable, but *not* the right to be so instructed at each and every public educational institution subject only to it being reasonably practicable to do so.

Although the court in *Mikro* concluded that the school governing body has the authority to determine a school's language policy, a similar situation occurred in the Mpumalanga province. Ermelo High School was a single-medium Afrikaans school. The Mpumalanga Department of Education was faced by an alleged space shortage for learners from the district who preferred to be educated in English. The Mpumalanga Department of Education then made the controversial decision to withdraw the school governing body's competency to determine the school's language policy.⁴³ On 27 March 2009, the Supreme Court of Appeal delivered its judgment⁴⁴ in the appeal of the governing body and the school against a judgment of the High Court on the issue of the withdrawal of the functions of the governing body to determine the language and admission policy of the school. The Supreme Court of Appeal made the following significant comment:

Language is a sensitive issue. Great care is taken in the Act to establish a governing body that is representative of the community served by a school and to allocate to it the function of determining the language policy. The Act authorises only the governing body to determine the language policy of an existing school and nobody else. Nobody else is empowered to exercise that function.⁴⁵

In the *Mikro* matter, the Supreme Court of Appeal concluded that a school governing body has the sole authority to determine a school's language policy. No official or politician is therefore able to instruct schools regarding their language policy.

IV DISCUSSION

There are very few countries where a classroom is filled with learners of only one race or culture. Because of this situation, language policy in education is a very sensitive matter that sometimes provokes tension between different parties. There are 11 official languages in South Africa, and to keep every language group satisfied that it is not the subject of discrimination is a huge and challenging task for government. In South Africa education officials often claim the right to amend the language policy at a school unilaterally by 'declaring' that a school has become a double medium or parallel medium institution. The term 'double medium' is used to define a school that uses two or more languages of instruction simultaneously. Learners are accommodated in a single class room and the educator uses the different languages of instruction at the school alternately during the period of instruction to convey information on the subject matter.

The term 'parallel medium' is used to define a situation where the school uses two or more languages of instruction, but the learners that fall within the respective language groups are

accommodated in separate class rooms. A single language of instruction is used per period of instruction. Learners in the same grade receive instruction in the language of their choice, but in separate class rooms.

Approximately fourteen percent of all Afrikaans first language learners now receive education in English.⁴⁶ This turn of events came about as a result of the direct policy decisions and concerted efforts by Provincial Education Departments to impose changes of languages policies onto Afrikaans schools. The trend of government departments favouring the establishment and promotion of bilingual language policies for schools inevitably promotes the dominance of English. This trend clearly contradicts the constitutional imperatives to promote and enhance language diversity, because the dominance of English encroaches on the minority languages to such an extent that the less established languages face an ever diminishing prospect as languages of instruction in education. Section 6 of the *Constitution* of South Africa provides for eleven official languages. All official languages must enjoy parity of esteem and must be treated equitably.

The transformation of education and the adoption of constitutional values such as equality, human dignity and freedom in education require that change is managed proactively. School leaders are faced with the challenge of transforming schools to comply with rapidly changing policies as well as ensuring that the full potential of every learner is unlocked to meet the needs of the changing society. The changing education environment in the new democracy has therefore brought to the fore the need for education leaders to be able to take the correct decisions in the best interests of the learners,⁴⁷ but also in compliance with the principles of fairness, equity and justice.

V CONCLUSION

If it is true that law creates duties that could be seen as patterns of conduct creating social policy and protecting the interests of parties involved, then the main purpose of education should be to teach the skills, attitudes and values necessary to fulfil these prescribed duties. In other words, schools are the gymnasiums where learners are offered the opportunity to practice the required patterns of conduct necessary to be part of a democracy. A democracy is underpinned by critical thinking. Schools become the forums where children are guided to fulfil their place in a democratic society. A democratic society is not static and has restrictions on rights and freedoms that will be questioned persistently. However, a balance must be found between the legitimate best interests of learners and the duty of school governing bodies to develop policies for the proper governance of a school. This balancing of constitutional rights must be done in accordance with a broader social interest. The question then is how education managers can model respect for rights while ensuring that these rights are not abused.

The South African *Constitution* provides for just administrative action.⁴⁸ In terms of this provision everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Those whose rights have been adversely affected by administrative action have the right to be given written reason for the action. In the school context, just administrative action is particularly relevant in the area of school discipline. For example, before a governing body can suspend a learner, the learner is entitled to fair administrative action.

The facts of both the *Antonie* and *Pillay* cases demonstrate how individual learners challenged their school's code of conduct. In both cases the girls chose to violate the school's code of conduct in pursuit of their individual rights. In both cases the judiciary did not support the schools decision to enforce the school's code of conduct.

The crux of the decision and practical results of *Pillay* make it extraordinarily difficult to enforce school rules. The judiciary requires schools to provide for exemption procedures that permit learners, assisted by parents, to explain clearly why it is that they think their individual desires to follow a certain practice warrants the granting of exemption from complying with the schools code of conduct. In a situation similar to the *Antonie* case, a learner who chooses to wear a specific hair style or wear head gear not permitted by the school rules could then apply for exemption based on his or her individual desires. The paradoxical challenge education managers face in their decisions to grant exemption from complying with school rules, is the fact that not only do they have to protect community standards, but also acknowledge individuals' desires to exercise their fundamental rights or to be unique, independent or hold a strong self-identity.

The theme of equality balanced with diversity (that is, minority rights) runs like a golden thread through all matters concerning language rights and equal access to schools. It follows therefore, that to ensure equality of opportunities whilst promoting diversity, it is necessary to consider simultaneously the best interests of children requiring equal opportunities as well as the best interests of children requiring their minority language rights to be protected. This conclusion logically flows from the prerequisite that legality should always supersede any pragmatic considerations when determining the best educational interest of the child.

Keywords: best interest of the child; religious freedom; freedom of expression; language in education; education managers.

ENDNOTES

- 1 This article is based on a paper presented by the author at the ANZELA 17th Annual Conference, 8-10 October 2008, Christchurch, New Zealand.
- 2 The *Constitution of the Republic of South Africa* (1996) s 6 provides for eleven official languages and promotes the use of the Khoi, Nama and San languages, as well as all the languages commonly used by communities from Indian descent. The *Constitution* also provides for freedom of religion, belief and opinion (s 15) and guarantees that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language.
- 3 During the Apartheid years (1948-1994), South Africa had 18 distinct departments of education, each serving a different racially defined group of students. Separate education departments operated schools for each of the four main racial groups, namely, Whites, Indians, Black Africans and Coloureds, while additional educational departments operated for Blacks in each of the homelands. Students in each of the racially constructed groups were restricted from attending schools operated by another department of education. Huge discrepancies existed in the funding available to the different racial groups and this affected education standards.
- 4 The *South African Schools Act*, Act 84 of 1996, set out to provide for a uniform system for the organisation, governance and funding of schools by establishing a new national system for schools which would redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages.
- 5 The Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of freedoms (s 1 of the *Constitution*).
- 6 Jacqueline Stefkovich, *Best Interests of the Student* (2006) 17.

- 7 Ibid 19.
- 8 Ibid 33.
- 9 United Nations *Convention on the Rights of the Child* Art 3 states that all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child is of paramount importance.
- 10 *Minister for Welfare and Population Development v Fitzpatrick* [2000] 7 BCLR 713 (CC) [17]. The principle now also applies in customary law — *Hlope v Mahlalela* [1998] 1 SA 449 (T); see I Maithufi, ‘The Best Interests of the Child and African Customary Law’, in C J Davel (ed), *Introduction to Child Law in South Africa* (2000) 137.
- 11 *Fletcher v Fletcher* 1948 1 SA 130 (A). See PJ Visser and JM Potgieter, *Introduction to Family Law* (1998) 165; DSP Cronjé and J Heaton, *Die Suid-Afrikaanse Familiereg* (2004) 162.
- 12 Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002) 1.
- 13 Stefkovich, above n 6, 18-19 contends that school principals use the term in a variety of ways. Mostly they see children as the primary stakeholders in schools and their decision-making is based on the overall well-being of the children.
- 14 Stefkovich, above n 6, 20.
- 15 R J Starratt, *Building an Ethical School: A Practical Response to the Moral Crisis in Schools* (1994) 50.
- 16 Starratt sees the community as the context within which justice principles should be applied when decisions regarding the behaviour of individuals
- 17 Ibid 50.
- 18 The *South African Schools Act*, Act 84 of 1996.
- 19 *Constitution of the Republic of South Africa* (1996) s 7.
- 20 *Constitution of the Republic of South Africa* (1996) s 195.
- 21 Section 8 of the *South African Schools Act* determines that a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school. A code of conduct must contain provisions of due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings.
- 22 *Constitution of the Republic of South Africa* (1996) s 15.
- 23 *Constitution of the Republic of South Africa* (1996) s 16.
- 24 *Constitution of the Republic of South Africa* (1996) s 30.
- 25 *Constitution of the Republic of South Africa* (1996) s 29.
- 26 2002 (4) SA 738 (C).
- 27 *South African Schools Act*, Act 84 of 1996, s 8.
- 28 *Constitution of the Republic of South Africa* (1996) s 16.
- 29 *South African Schools Act*, Act 84 of 1996, s 9.
- 30 Government Notice 776 of 1998.
- 31 In the case of *MEC for Education: Kwazulu-Natal v Pillay Pillay* case [2008] 1 SA 474 (CC), the Constitutional Court judges determined that a school should provide for an exemption clause in the school’s code of code. In similar cases dealing with freedom of expression, the students and or their parents would then have to explain why they require an exemption. The parties could then engage each other about reasonably accommodating the learner. Applying this procedure a school could demonstrate respect for the learner’s right to freedom of expression without contradicting the norms and values of the community as reflected in the schools code of conduct.
- 32 [2008] 1 SA 474 (CC).
- 33 *Constitution of the Republic of South Africa* (1996), s 15 provides for freedom of religion, belief and opinion. Section 9 of the *Constitution* protects everyone against unfair discrimination *inter alia* on the ground of religion.
- 34 [2006] 10 BCLR 1237 EqC.
- 35 35. *MEC for Education: Kwazulu-Natal v Pillay Pillay* case [2008] 1 SA 474 (CC)
- 36 *Pillay v MEC for Education, KwaZulu-Natal* [2006] 6 SA 363

- 37 *MEC for Education: Kwazulu-Natal v Pillay* [2008] 1 SA 474 (CC).
- 38 *South African Schools Act*, Act 84 of 1996 s 6(1).
- 39 Department of Education.
- 40 *Middelburg Laerskool en die Skoolbeheerliggaam van Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* [2003] (4) SA 160 (T) (Judgment given in Afrikaans)
- 41 The Norms and Standards for language in education determine that there must be at least 40 learners per grade who request instruction in a language other than the existing language of a school before parallel medium instruction can be considered.
- 42 *Western Cape Minister of Education v The Governing Body of Mikro Primary School* [2005] 3 SA 436 (SCA).
- 43 In the case of *Hoërskool Ermelo v The Head of Department of Education Mpumalanga (219/08) [2009] ZASCA.*, the High Court determined that the Mpumalanga Department of Education was wrong to withdraw the functions of the school governing body and to appoint a committee to develop the school's language policy.
- 44 *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga (219/08) [2009] ZASCA.*
- 45 Ibid [14].
- 46 M Smit, 'Public School Language Policy: Theory and Practice, in Rika Joubert and Elmene Bray (eds), *Public School Governance* (2007) 59.
- 47 Stefkovich, above n 6, 17.
- 48 *Constitution of the Republic of South Africa* (1996), s 33.