

The best interest of the child

Yvonne Dausab

Approximately 60 per cent of people in Namibia are under the age of 25. Nearly 40 per cent of the population are under the age of 15. The fact that children make up such a large proportion of the population is reason enough to support the need for robust legislation on the care and protection of children ...¹

Introduction

Traditionally, children were only supposed to be seen and not heard; as a result, their views and interests often did not matter. These and other entrenched beliefs about the place and position of children in our societies have left them vulnerable, making them susceptible to physical, psychological, emotional and sexual abuse. But it is not their fault. They have done nothing wrong. The state of affairs in which children find themselves warrants their protection. Besides the right to protection, children in Namibia are entitled to all the other rights provided for them in the Constitution as well as other international human rights instruments.² Approaching the promotion and protection of children's rights from this angle serves to support existing legislation and the Constitution in adequately catering for the needs of our children.

It is evident that the plethora of legislative and other measures of protection that exist lack effectiveness when it comes to the monitoring and implementation of children's rights. Furthermore, the laws on children that currently exist are either completely silent on specifically providing for the principle on the best interest of the child, or where this principle can be inferred, it is not adequate. Still, this norm is used as a yardstick against

1 Rachel Coomer, cited in *The Namibian*, 9 October 2009; "Protecting the next generation: Have your say on the child care and protection bill". Available at <http://www.namibian.com.na/columns/full-story/archive/2009/may/article/protecting-t..2006/>; last accessed 7 October 2009.

2 Notably, they are entitled to the right to life, human dignity, freedom from slavery and forced labour, equality, and freedom from discrimination. In the Namibian Constitution privacy(article 13), family(article 14), and education(article 20), and the fundamental freedoms(article 21). Also see Naldi (1995:75–85) for a discussion on these rights. In regard to discrimination, see unreported judgement of *Lotta Frans v Inge Paschke & Others* 1548/2005, per Damaseb, JP, holding that the common law rule that discriminated against "illegitimate children" as far as intestate inheritance was concerned was unconstitutional as the differentiation amounted to discrimination.

which a wide range of issues from maintenance, custody, control and guardianship, rights of access, and all other ancillary matters are measured.

This contribution seeks to address the principle of the best interest of the child, which overarches all the above rights, freedoms and norms. However, no detailed reference will be made to exactly how this principle touches on the issues that affect children, since the other authors in the current volume do so adequately elsewhere herein. However, in an effort to elucidate the said principle, cursory reference will be made to some case law to illustrate its application, and to the international, regional and national human rights normative framework within which the principle applies.

Defining *child* and conceptualising the ‘best interest’ principle

A *child*, as a human being, is recognised by law as a legal subject. In other words, in the eyes of the law, a person³ acquires certain rights, duties and capacities at birth.⁴ This is so despite the child’s legal capacity being limited during the initial stages of its life.⁵ This limitation has to do with the ability to perform certain acts within the purview of the law. These include the ability to –⁶

- have or possess legal rights and duties
- perform juristic acts
- incur civil or criminal responsibility for wrongdoing, and
- be a party to litigation, i.e. to have *locus standi in judicio*.

It is also a limitation in the further sense that the child is not entirely excluded from participating in the processes made available through the law, and can partake, depending on the nature of the matter, through a guardian, and so forth.⁷ It makes sense, therefore, that only those that are able to deal with the consequences of their actions are allowed to acquire the necessary powers, rights and duties to interact in this manner. How does the law, then, define *child*?

In terms of the applicable legislation on children in Namibia, namely the Children’s Act,⁸ the Children’s Status Act,⁹ and the Child Care Protection Bill of 2008, a *child* is generally defined as –¹⁰

3 Boberg (1977:3) states that “every human being is a person in law”.

4 Barnard et al. (1990:8; cited in Cronje 1990).

5 Children go through various stages of development: newborn, infancy, early childhood, adolescence, and adulthood. See <http://en.cyberdodo.com/files/definition-of-the-child/2.html> last accessed 9 October 2009.

6 See Boberg (1977:530–531); cf. also Barnard et al. (1990:8; cited in Cronje 1990).

7 Boberg (*ibid.*) states that “active legal capacity, generally, inheres only in those of sound mind who have attained majority”.

8 No. 33 of 1960.

9 No. 6 of 2006.

10 See section 1, Children’s Act.

... a person, whether infant or not, under the age of 18 years, ... and includes a person who is over the age of 18 years but under the age of 21

In terms of these provisions, a child is within the age bracket 0–21 years. The proposal to make the age limit 18 years is arguably made in line with international trends and practices, which have lowered the age of majority to or have always had it at 18.¹¹ It is, of course, arguable whether this will necessarily make sense for a country like Namibia, where in many instances some 18-year-olds are still at school.¹²

Meaning of *best interest of the child*

Simply put, the *best interest of the child* means considering the child before a decision affecting his/her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests. These interests themselves are particularly sensitive as they often relate to family status matters in terms of divorce, maintenance, and custody and control.

The most commonly cited examples of where the norm relating to serving the best interest of the child becomes applicable is in custody and divorce matters. As will be shown through examples in case law, the process of deciding on what exactly is the *best interest* of the child is not an easy task. Courts and other institutions confronted with this question often have to ask themselves the following questions:¹³

- Which specific interest is at issue?
- What is the nature of such interest?
- Is the interest of a long-, medium- or short-term duration?
- Are the criteria for determining such interest objective or are they based on the child's subjective wishes?

As one may well imagine, the responses to these questions is varied.

The sad fact is that the test or standard regarding what is in the best interest of the child has failed the child in some instances,¹⁴ and is therefore not complete proof that the

¹¹ For instance, Article 1 of the Convention on the Rights of the Child (CRC) provides that *child* should mean “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”.

¹² “Although the SA Act 38 of 2005 lowered the age of majority to 18, Namibia will probably stick with the traditional age of 21, experts say” (Van den Bosch 2009).

¹³ See Mahlobogwane (2005).

¹⁴ Currie & De Waal (2007:618) state the following:

The concept of the best interest of the child is not without difficulty. It has become controversial because it has failed in the past to provide a reliable or determinate standard. In addition it creates

application of the principle in determining what is in the best interest of the child is flawed. When applied correctly, the principle does yield the required results in that the interest of the child is taken care of. However, the consistency in applying this principle correctly each time there is a matter that requires the determination of the best interest of the child may require some form of uniform guidelines from the courts, without imposing a standard that disregards the uniqueness and merits of each individual case.

The 'best interest' principle through the lens of the courts

The 'best interest' principle has been used to develop child care jurisprudence in Namibia since Independence in 1990.

Namibian law is based on Roman–Dutch law and the South African common law, which means its statutes continued to be applicable in Namibia even after the latter's independence. Despite independence officially having signalled a break from its past, Namibia has only partially addressed the relevance of its inherited laws in the new state.¹⁵ For example, most – if not all – the inherited archaic laws that still apply in Namibia have in the intervening years already been repealed, amended and/or modified in South Africa.

Thus, whilst Namibia has developed an impressive corpus of jurisprudence on constitutional matters and some legal principles on family law and persons, the country has not specifically looked at and laid down broad principles on the application of the 'best interest' standard. It appears there is still quite a heavy reliance on pronouncements made on the issue in South African case law. Reference to decisions in case law only has strong persuasive value, and given the historical ties and similarities to its southern neighbour in context, Namibian courts are likely to follow similar approaches should similar matters be decided after the Child Care and Protection Bill.¹⁶

In a relatively old but valuable Appellate decision, the court in *Fletcher v Fletcher*¹⁷ had to decide on the question of custody of a minor child and what the best interest of the said child was. The case involved an appeal from a judgment in the court a quo following an order of divorce. The appellant had committed adultery,¹⁸ and had consequently lost

the danger of social engineering through what the helping professional or social services consider to be in the best interests of the child.

15 Article 140 of the Namibian Constitution provides for legal continuity, as follows:
...all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

16 See remarks by Julia Sloth-Nielsen, cited in Van den Bosch (2009):
The current Namibian Act of 1960 is rooted in the same historical context as South Africa's old legislation, so Namibia's child protection practice is closer to South Africa than any other country

17 1948 (1) SA 130(A), at 130–148.

18 For brief facts of the case, refer to 141 of the judgment.

custody of her minor children. She appealed against the decision, but only on the issue of custody.

The majority decision¹⁹ in this case confirmed the court a quo decision, which was that custody of the minor children was granted to their father, the respondent. Thus, the children were to live with their aunt, whilst their father prepared himself to receive them. In coming to its decision, the court relied quite heavily on the fact that the father was innocent²⁰ (whereas his ex-wife, the appellant, had committed adultery), reaffirming the principle that the innocence of one spouse should not be ignored, but it should also not be the determining factor. The overriding consideration in this case (which is not apparent from the example, which focuses on the aunt, the father and the mother) was the interest of the child itself.²¹

Further to this the appellant shot herself in the foot by lying in court and showing herself as unreliable and unstable.²² Because of the position of the Appellate court, in that they do not get to assess the character of the witness, they are not likely to depart easily from the views expressed by the court a quo.²³ It is clear that due consideration was accorded to her character, and how this would influence her children in the long run. Therefore, she was not seen as a fit and proper person to look after her children.²⁴

Interestingly, in this case, the majority of the court granted custody to the father, who was not going to take custody and control of the children immediately. The character of the appellant was tested against that of the aunt (sister to the respondent). Understandably, the character of the respondent was not put in issue; but for determining whether or not he was a fit and proper person, this should have been part of the evidence before the court a quo.

Due regard to the dissenting judgment is prudent, therefore.²⁵ This judgment shows how courts should exercise their discretion without being limited by a cast-in-stone standard called the ‘best interest of the child’.²⁶ The application and interpretation of this principle

19 Centlivres, JA, with Greenberg, JA agreeing.

20 *Rogers v Rogers* was quoted in the *Fletcher* case, at 134:

When a mother confesses to adultery, I cannot say that she is *prima facie* the proper custodian of her daughter. When the action is heard, this Court, which is the upper custodian of minors, will have to consider the whole question from the point of view of the children’s interests.

21 (*ibid.*).

22 Delivered by Schreiner, JA, at 148:

... I do not think she has shown herself as a well-balanced person. I have referred to attacks she made on witnesses ... I do not think it is in the best interest of the child that they should be put in the care of a person who is prepared to behave in that way.

23 See *Fletcher* case, at 137:

... I have come to the conclusion, which I have already expressed, that the defendant has deliberately lied in the witness-box ... and this is a fact that must be taken against her

24 (*ibid.*).

25 Delivered by Schreiner, JA, at 141–148.

26 (*ibid.*:144):

is by no means easy. This is evidenced by the difficulties the court had in either setting a rule to guide or simply treating each case on its own merits.²⁷ The Judge of Appeal, in writing his minority judgment, quite aptly used the evidence presented in court, and showed how wholly inadequate it was to conclude that the father was suitable to have custody of the minor children. He stated the following in this regard:²⁸

Unfortunately, there is no finding by the learned judge as to his impressions of the respondent's qualities so far as they were disclosed in the course of the trial. His character was, of course, not in issue in the case to anything like the same extent as that of the appellant, *but when considering which parent ought to be awarded the custody it is important to consider the factors relating to each in order to be able to decide. Not whether the one or the other is likely to be a really good or bad custodian, but which is likely to be the better.* [Emphasis added]

Now it is not being suggested here that the respondent was not a fit and proper custodian; however, there was no evidence before the court to support the assumption that he was in fact the more suitable of the two parents. Indeed, had evidence been presented, it may well have suggested that he was not or that he in fact was.²⁹ This case is a good illustration of the manner in which the courts ought to deal with custody matters when applying the notion of *best interest of the child*. It also demonstrates that a misapplication or misinterpretation of evidence, or not allowing for sufficient evidence to be heard, can lead to an absurdity that can eventually hurt the children.

Other cases cited in the above judgment enunciated the following set of general principles. In *Stark v Stark*³⁰ it was stated that –

... it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse ...

In the matter of *Krugel v Krugel*,³¹ the court had to decide whether to maintain a joint custody order in respect of two minor children, following relocation by one parent. The allegation was that the relationship between the two parents had completely broken

It has been said to be inadvisable to lay down strict rules as to how the Court's discretion should be exercised. But where that caution has been most clearly stated, Courts have at the same time considered it useful to repeat the preponderating importance of the welfare of the children, thus at least furnishing some guidance to those who have to exercise this discretion.

27 (ibid.): I am at a loss to conceive how any general rule upon such a subject can be laid down"; and this was followed by another judge saying, "and it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration

28 (ibid.:147). The respondent's plan was to have his children live with his sister and her husband, and not even with one of their biological parents (ibid.:47). Given the evidence that was presented, the learned Judge may have regarded the respondent as an unsatisfactory custodian of his children, but may have thought the aunt's apparently being a suitable person to look after them sufficient, thus rendering a full consideration of the respondent's qualities unnecessary.

30 *Stark v Stark* (1910 P.190) as quoted in *Fletcher*, at 144.

31 2003 (6) SA 220 (TPD).

down and would make a joint custody arrangement unpleasant.³² The court in the aforementioned case, considering the best interest of the child, stated as follows:³³

As long as both parents are fit and proper persons, it is important that they should have equal say in the raising of their children. ... Disagreements and negotiations are part of life. Unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input ...

In the result, the court was of the opinion that in this particular case the best interest of the children would be served by keeping the joint custody order intact.³⁴ This shows that the courts are careful in stating a rule or practice that should be followed in all cases. It leaves room for treating each case on its own merits. Nonetheless, the paramountcy of the best interest of the child is a constant.

In terms of general considerations and principles, the position of how the best interest principle should be treated by other courts and institutions dealing with issues affecting children has not changed much. The factors considered when determining the best interest of the child are not different today than they were in the year 1948. The factors that the courts need to consider are perhaps more entrenched now than before a constitution which has a rich catalogue of constitutionally protected rights for children. For example, the South African Constitution specifically protects the principle.³⁵ In *Hlope v Mahlalela*,³⁶ the court held as follows:

‘The best interest of the child’ was the main criterion to be employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted, and irrespective of whether or not the parents are unmarried, or *lobolo* has been fully provided, applies to all disputes concerning children.

In other words, the application of the ‘best interest’ principle cannot be conveniently excluded on the basis of culture, historical context and/or any matter that may seem justified in the circumstances.

The legal basis for the best interest of the child

There are a number of legal instruments that specifically provide for the best interest of the child as a legal norm. This principle is a well-established principle of the international,

³² Reference is of course made to various cases supporting the traditional viewpoint against joint custody; see e.g. *Kastan v Kastan* 1985 (3) SA 235 (C); *Pinion v Pinion* 1994 (2) SA 725 (D), cited in the *Krugel* decision at 224–225.

³³ See *Krugel* case, 228C–D.

³⁴ (*ibid.*).

³⁵ Section 28(3), South African Constitution.

³⁶ *Maithufi* (2000:146). See also *Bannatyne v Bannatyne* CGE as *Amicus Curiae* 2003 (2) SA 363.

regional and national normative framework. The principle is also entrenched and provided for in United Nations human rights legal instruments,³⁷ in addition, the African Union's African Charter on Human and Peoples' Rights (the African Charter) and the African Charter on the Rights and Welfare of the Child (ACRWC) provide for it, and national constitutions in their children's rights provisions make reference to it.

There are a number of statutes such as the Maintenance Act, the Children's Status Act and the envisaged Child Care and Protection Act that either make specific reference to the principle of the best interest of the child, or such principle can be inferred from the provisions in the statutes that the factors will lead to a determination of the best interest of the child.

The best interest of the child in the Namibian context

The Namibian Constitution is the supreme law of the country,³⁸ and provides for the protection and promotion of a wide array of human rights.³⁹ This supremacy then also means that any law or conduct inconsistent with the provisions of the Constitution will be invalid.⁴⁰ Children's rights are provided for in terms of Article 15(1). Unlike the South African Constitution,⁴¹ which specifically provides that "A child's best interest is of paramount importance in every matter concerning the child", there is no such explicit provision in the Namibian Constitution. Instead, the supreme law of leaves this task to the legislator.⁴² This is problematic because, as the supreme law, the Constitution ought to be the guiding document. Legislators are supposed to seek guidance from the Constitution when drafting laws that will affect the rights of children. For example, in the Married Persons' Equality Act,⁴³ it is not clear on what basis custody and control of minor children are granted. Whilst the courts would probably refer to jurisprudence on the subject to make a determination, the law ought to be self-sufficient enough to ensure there is no prejudice to the beneficiaries of such law.

Despite the earlier lament that the principle of serving the best interest of the child is conspicuously absent in the highest law of the land, it does not mean the inclusion of the principle in other laws of general application is insufficient. Moreover, the comprehensive

37 Universal Declaration of Human Rights and the Convention on the Rights of the Child. See also the Hague Convention of 1980 on the civil aspects of international child abduction.

38 See Article 1(6), which states that "[t]his Constitution is the supreme law of Namibia".

39 In terms of its Chapter 3, the Namibian Constitution has an entrenched and justiciable Bill of Rights.

40 See Article 25(1) of the Constitution, which states that –
... Parliament ... shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid:

41 See Act No. 108 of 1996, section 28(2).

42 Naldi (1995:79).

43 No. 1 of 1996.

nature of the envisaged Child Care and Protection Act can possibly fill any lacunae that exist. Giving effect to the principle in question is further buttressed by Namibia's obligations under international and regional instruments. So, in the event that domestic law – including a country's Constitution⁴⁴ – does not adequately protect the rights of the child, the safeguards provided by, for instance, the Convention on the Rights of the Child (CRC) should be sought.

The 'best interest' principle as provided for under international law⁴⁵

Article 144 of the Namibian Constitution, although it remains arguable and subject to many interpretations, provides for international law and states that unless an Act of Parliament provides otherwise, international agreements and the general rules of public international law are applicable and part of Namibian domestic law. In other words, once Namibia ratifies an international instrument, it is supposed to be directly applicable into its legal system.⁴⁶ However, this is not entirely the position in practice because reality dictates that, for a law to be enforced, it requires an enforcement mechanism. It is clear that even the Namibian courts have not taken this provision into account when interpreting constitutional matters.⁴⁷ That the provision is binding is without question; but whether the citizenry can actually get an effective remedy using international law as a basis is questionable – albeit not impossible.

Since Namibia ratified the CRC,⁴⁸ it is applicable in the country. Article 3 of the Convention provides the following:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

In its General Comment No. 7,⁴⁹ the Committee stated the following:⁵⁰

The principle of the best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children's rights ...

44 Articles 5, 22 and 25 can be used to institute proceedings if a party is aggrieved.

45 See the contribution by Oliver Ruppel elsewhere in this volume.

46 See Horn (2008:141).

47 (*ibid.*).

48 This Convention entered into force on 2 September 1990, and Namibia ratified it on 30 September 1990; see United Nations (2002:183).

49 Committee of the Rights of the Child, General Comment No. 7, 2005 CRC/C/GC/7/Rev.1, para. 13, as quoted in Hodgin & Newell (2007:37).

50 (*ibid.*).

On the regional front, Namibia, as a member of the African Union, has an obligation to comply with the standards set out in the ACRWC.⁵¹ Namibia ratified this Charter on 23 July 2004 – approximately five years after its adoption, whereas it ratified the CRC in the same month that it entered into force in 1990. The latter could probably be attributed to the euphoria that came with Namibia's independence in that year.

The 'best interest' norm, as provided for in the ACRWC, was solidified by making the 'best interest' consideration the ultimate consideration – as opposed to simply being one of many, as in the CRC.⁵² Furthermore, the ACRWC slightly augmented the norm by the addition of Article 4(2). Article 4 provides for the opportunity for a child who is in the position to do so – i.e. that can communicate – that such child's views be heard and that such views be taken into consideration "by the relevant authority in accordance with the provisions of appropriate law".⁵³

The protection of children's rights is dependent, at least notionally, on the duties and responsibilities parents have in relation to their children. For children to enjoy their rights to the maximum requires parental guidance and support.⁵⁴ In addition to this, States Parties are obliged to enact legislation similar in tone and scope to the international instrument they ratify to ensure its effective implementation.

Other statutes

The Maintenance Act⁵⁵ provides for a tone that supports the best interest of the child. Previously, the issue of maintenance was a 'battle of the sexes'. The emphasis of the current legislation on maintenance is that it is about the welfare of the child.⁵⁶ For example, a father who pays maintenance faithfully cannot stop paying because he is refused access to the child; instead, he must fight the injustice as regards his reasonable access whilst he continues to pay.

The idea of *best interest of the child* is implied throughout the Act.⁵⁷ The Act also places considerable emphasis on the role played by maintenance officers, like obliging them

51 Adopted in Addis Ababa, Ethiopia, on 11 July 1990; it entered into force on 29 November 1999.

52 See Viljoen (2007:263):

In any event, the overriding consideration in resolving interpretive disputes should be the guideline that the best interest of the child shall be the *primary* consideration. [Emphasis added].

Also see Article 4(1) of the African Children's Charter, as quoted in Viljoen (*ibid.*:214).

53 See Article 4(1) and (2) of the African Children's Charter, which sets out the best interest of the child; see the full text in Heyns & Killander (2007:64).

54 (*ibid.*).

55 No. 9 of 2003.

56 See section 4(1), which sets out the principles that need to be considered in maintenance cases.

57 (*ibid.*). See section 16(2), (3) and (4), which provides for all circumstances.

to institute an inquiry almost immediately if payments are not made on time, in order to avoid financial hardships for the beneficiary.

The Child Care and Protection Bill quite comprehensively sets out the ‘best interest’ principle as well as the factors to be considered when making a decision in the interest of the child. For example, the Bill takes into account the nature of the relationship between the child and its parents and/or other caregivers, their capacity, their attitude, and the effect that a change in environment will have on the child.⁵⁸ Compared with previous legislation dealing with children’s issues, the envisaged Act will give adequate content to the principle of the best interest of the child. Similarly, the Children’s Status Act has as its objective the promotion and protection of the best interest of the child, and to this end provides the following:

When making any decision pertaining to custody, guardianship or access, the best interests of the child are, despite anything to the contrary contained in any law, the paramount consideration ...

It then enumerates the factors⁵⁹ that the Children’s Court or any other competent court

58 Please refer to the full discussion of the Bill in Dianne Hubbard’s contribution elsewhere in this volume. The provision is in terms of section 4(1) of the Bill.

59 See subsections (1) and (2) of section 4, which provide the list of factors that can be very useful guide, as follows:

- (1)...
 - (a) the child’s age, sex, background and any other relevant personal characteristics;
 - (b) the child’s physical, emotional and educational needs;
 - (c) the capability of each parent, and of any other relevant person, to meet the child’s physical, emotional and educational needs;
 - (d) the fitness of all relevant persons to exercise the rights and responsibilities in question in the best interests of the child;
 - (e) the nature of the relationship of the child with each of the child’s parents and with other relevant persons;
 - (f) the degree of commitment and responsibility which the respective parents have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child’s birth certificate;
 - (g) any harm which the child has suffered or is at risk of suffering, directly or indirectly, from being subjected or exposed to abuse, ill-treatment, violence or other harmful behaviour;
 - (h) in a case where an application has been brought before the children’s court, the reasons for the application in question;
 - (i) any wishes expressed by the child or his or her representative, in light of the child’s maturity and level of understanding;
 - (j) the practical difficulty and expense of present and proposed arrangements;
 - (k) the likely effect of any change in the child’s circumstances; and
 - (l) any other fact or circumstance that the court considers relevant.
- (2) When deciding what is in the best interests of the child, the children’s court must consider the financial positions of the parents, together with the guidelines enumerated in subsection (1), but –
 - (a) the financial positions of the parents are not the decisive factor; and
 - (b) the court may not approve an application for the custody of a child if the application is based on a desire to avoid the payment of maintenance in respect of that child.

must take into account when making these decisions.⁶⁰ These factors are comprehensive and offer a useful guide in determining what it entails to protect the best interest of the child.

Conclusion

This contribution was an attempt to look broadly at the well-established norm of serving the best interest of the child. Clearly, this principle cannot be adequately discussed unless reference is made to the issues that commonly affect children, such as divorce, custody, maintenance, and so forth. It can also only be adequately illustrated by using real-life cases, as was done here, to show how the principle is considered and applied. Despite the limitation that the examples were mostly South African cases, they reflected fairly well what courts, domestic legislation and international instruments provide for with regard to this paramount principle in efforts to protect children.

The paper also showed that the 'best interest' principle cannot be cast in stone; and even though there is an attempt in the legislation to provide a list of factors to consider when deciding a matter affecting a child, the list is by no means exhaustive: it is simply a guiding framework. Inherent in our court systems are the principles of *stare decisis*⁶¹ and judicial precedent. Courts tend to rely on each other's judgments, such that there is not always enough room for flexibility. It will require some judicial activism on the part of judges and judicial officers to ensure each unique case is attended to on its own merits.

In the end, the courts, the administrative bodies and all other relevant authorities that may be confronted with having to decide on matters affecting children are obliged to consider each case on its own merits. It is hoped that, in the near future, once the Child Care and Protection Bill has been enacted, Namibia will develop a rich corpus of jurisprudence that will, in turn, mould this norm into a legal legacy that will enhance the protection of children and truly establish whether or not this principle truly lives up to ensuring the best interest of the child.

References

Cronje, DSP. 1990. *The South African Law of Persons and Family*. Durban: Butterworths.

Boberg, PQR. 1977. *The law of persons and the family, with illustrative cases*. Cape Town: Juta & Co. Ltd.

Currie, I & J de Waal. 2007. *The Bill of Rights handbook*. Lansdowne: Juta & Co. Ltd.

Davel, T. 2007. "General principles". In Davel, CJ & AM Skelton (Eds). *Commentary on the Children's Act*. Lansdowne: Juta & Co. Ltd, pp 6–9.

Fouche, MA. 2007. *Legal principles of contracts and commercial law*. Durban: Lexis Nexis.

60 See sections 2 and 3 of the Act.

61 Fouche (2007:9): Meaning "to stand by previous judgements".

Heyns, C & M Killander. 2007. *Compendium of key human rights documents of the African Union*. Pretoria: Pretoria University Law Press, p 64.

Hodgkin R & P Newell. 2007. "Best interest of the child". In United Nations Children's Fund (Eds). *Implementation handbook for the Convention on the Rights of the Child*. New York: UNICEF.

Horn, N. 2008. "International human rights norms and standards: The development of Namibian case and statutory law". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia, p 141.

Kruger, J & B Currin (Eds). 1994. *Interpreting a Bill of Rights*. Kenwyn: Juta & Co. Ltd.

Mahlobogwane, F. 2005. "South African courts and the best interest of the child in custody disputes". *Codicillus*, 46(1).

Maithuhi, I. 2000. "The best interest of the child and African customary law". In Davel, CJ (Ed.). *Introduction to child law in South Africa*. Lansdowne: Juta Law, p 146.

Naldi, G. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Kenwyn: Juta & Co. Ltd.

The Namibian, 9 October 2009; "Protecting the next generation: Have your say on the child care and protection bill". Available at <http://www.namibian.com.na/columns/full-story/archive/2009/may/article/protecting-t...2006>; last accessed 7 October 2009.

Van den Bosch, Servaas. 2009. "Namibia updating child protection", 20 August 2009. Available at <http://allafrica.com/stories/printable/200908210002.html>; last accessed 9 October 2009.

Vincent, RJ. 1986. Human rights and international relations. Cambridge: Cambridge University Press.

Viljoen, F. 2007. *International human rights law in Africa*. Oxford: Oxford University Press.

United Nations. 2002. *Human rights: A compilation of international instruments*. New York United Nations.

