

Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?

Latiefa Albertus* and Julia Sloth-Nielsen**

1 Introduction

In the 1990s, before South Africa entered the democracy which was born with the adoption of the Interim Constitution and an all party settlement in 1994, the world press had highlighted the 'Zulu Boy' story. To recapitulate, the central question in the case was whether or not it was in the interests of a nine-year-old South African boy to remain in the United Kingdom with foster parents, or to be returned to his biological – Zulu – South African family. The child had been brought to England in 1992 when the child was 18 months old, by the foster mother, a former employer of the child's mother (who was her domestic worker). The parents had consented to the removal on the basis that it would benefit the child's education; however, the parents launched proceedings two years later to have the child returned, upon discovering that the foster mother had commenced adoption proceedings in the United Kingdom. The substantive hearing took place when the child had already been in England for some years (four), and in the care of the foster mother for even longer. Giving judgment,¹ Lord Justice Neill said that the child had the right to be reunited with his Zulu parents and with his extended family in South Africa.

The conflicts in this case were sharply drawn between the interests of prospective adoptive parents *versus* the interests of biological parents; the views of the child who had stated that he did not wish to return to South Africa, *versus* the views of his biological parents; between culture and biology on the one hand and nurture on the

other. But in a clear allusion to the importance of culture, the Court was swayed by the child's primary cultural background:

'the child's development must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development'².

Reports have it that the return order was not successful and that the child did not settle in South Africa and that after six months in South Africa, he had returned to England with his biological parents' consent.³

When this case was decided, 16 years ago, race was the dominant criterion for much welfare-related decision making in South Africa, although it was wrapped up in cultural packaging for most of the time.⁴ So what has changed, if anything? Do culture, language and religion play a role, definitive or otherwise, in international relocation decisions in contemporary South Africa? It is quite clear that the applicable standard for adjudication is the best interests of the child,⁵ that this standard has differential application from case to case and from one set of facts to the next. What we seek to examine is whether the peculiarities of South Africa, as highlighted by factors such as culture, language and religion are in any way at stake, and to what extent these three factors are considered in determining the best interests of the child in relocation decisions.

Cultural and religious rights are for many largely communal in nature, a means of expressing a common sense of identity, values and traditions.⁶ As a result of South Africa's multi-cultural and linguistic framework,

*Latiefa Albertus LLB (Western Cape), LLM (Western Cape), Lecturer, Faculty of Law, University of the Western Cape (lalbertus@uwc.ac.za);

**Julia Sloth-Nielsen (BA LLB (Stel); LLM (Cape Town); LLD (Western Cape), Dean, Faculty of Law, University of the Western Cape (jsloth-nielsen@uwc.ac.za). The contribution of the National Research Foundation to this publication is hereby acknowledged.

¹ *Re M* (Child's upbringing) (1996) 2 FLR 441; see J. Fortin 'Children's rights and the developing law' [2003] London: Butterworths 435; M. Freeman 'Article 2: the best interests of the child' in A.L. Alen et al (eds) *A commentary on the United Convention on the rights of the child* [2007] Leiden/Boston: Martinus Nijhoff Publishers 29.

² *R v M* (child's upbringing) *op cit*.

³ See Fortin (note 1 above) 427. B. Mezmur *Intercountry adoption in an African context* (unpublished LLD thesis, University of the Western Cape, 2010 at 122 notes that the English judgment was the subject of much criticism: *The Independent* 10 March 1996).

⁴ For a fascinating account of the use of children's courts and the apparatus of welfare legislation to enforce racial segregation of children deemed, by appearance to be other than 'white', see N. Zaal, *Court services for the Child in Need of Alternative Care: a critical Evaluation of Selected Aspects of the South African System*, unpublished LLD thesis, University of the Witwatersrand (2008), chapter 2.4.

⁵ Section 7 of the Children's Act 38 of 2005, elaborated more fully below.

⁶ I. Currie and J. de Waal [2005] *The Bill of Rights Handbook* [5ed] Juta and Co 624.

culture, language, and religion are constitutionally protected⁷ and in practice remain hotly contested - for example, in the educational context with respect to the language policies of South African schools.⁸

The first part of this article turns to culture, language and religion as constitutional constructs in South Africa, in an attempt to clarify their importance generally. The position prior to the Children's Act⁹ will then briefly be discussed. Thereafter, the article will review available case material, and legal criteria and practical trends will be drawn from this. Finally, the threads drawn from this will be pulled together in attempting to provide some insight into contemporary judicial views in South Africa on the influence of culture, language and religion in the field of relocation disputes.

2 The importance of the constitutional rights to culture, language and religion

In terms of section 15 (1) of the South African Constitution everyone has the right to freedom of conscience, religion, thought, belief and opinion, which includes the right to have a belief; to express that belief publicly; and to manifest that belief by worship and practice, teaching and dissemination.¹⁰

Section 30 of the Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice, provided that the exercise of such rights is not in conflict with provisions in the Bill of Rights. In terms of section 29 (2) everyone has the

right to receive education in the official language or languages of their choice¹¹ in public educational institutions where that education is reasonably practicable.

Section 31 (1) provides that persons belonging to a cultural, religious or linguistic community may not be denied, with other members of that community the right to (a) enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The notion of culture remains a contested concept as a result of its many possible multi-layered and context-dependant meanings.¹² However, as a general concept, culture ensures that group identity is protected so that one cultural group can be distinguished from another.¹³ Cultural identity has been held as being one of the most important parts of a person's identity as it flows from belonging to a community.¹⁴

Cultural rights are also dependent on the right to education, thus, the right to participate in cultural life is linked to the right to education, which it is argued, can only be meaningfully exercised once a certain minimum level of education has been achieved.¹⁵ In addition, cognitive development expands from social interaction and is directly influenced by culture. The extent and degree of one's social development are both arguably also determined by one's cultural background and identity.¹⁶

⁷ See section 31 of the Constitution of the Republic of South Africa Act 108 of 1998 (hereafter the Constitution), which is based on Article 27 of the International Covenant on Civil and Political Rights 1966 which provide "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" I. Currie and J. de Waal (note 6 above) at p623; see also J.D. van der Vyver 'Cultural identity as a constitutional right in South Africa' [2003] *Stell LR* 51 at p52 where the author states that 'these provisions were intended to afford constitutional sanction to the international norm proclaiming the right to self-determination of the cultural, religious and linguistic communities within the body politic'.

⁸ See Minister of Education, *Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA); *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC); M.H. Smit 'Language rights and the best interests of the child' [2008] 71 *THRHR* 38.

⁹ 38 of 2005. Hereafter the 'Children's Act'.

¹⁰ I. Currie and J. de Waal (note 6 above) at p339.

¹¹ It should however be noted that the right only applies to the 11 officially recognised languages and not all languages (such as various San languages). The right also does not provide for a right to mother-tongue education, as the right is subject to the limitation provision that education in the preferred language must be reasonably practicable see R. Malherbe 'The constitutional dimension of the best interests of the child in education' [2008] *TSAR* 267 at p 283.

¹² A.A. du Plessis and C. Rautenbach 'Legal perspectives on the role of culture in sustainable development' [2010] *PER* 27 at p30.

¹³ T.W. Bennet and C.H. Powell 'Restoring land: The claims of Aboriginal title, customary law and the right to culture' [2005] *Stell LR* 431 at p 441.

¹⁴ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 493D.

¹⁵ B. Bekink and M. Bekink 'Children with disabilities and the right to education: a call for action' [2005] *Stell LR* 125.

¹⁶ Du Plessis and Rautenbach (note 12 above) 40-41.

In what is regarded as the leading case on the right to religion, coincidentally involving a child, *MEC for Education, Kwazulu-Natal v Pillay*,¹⁷ the South African Constitutional Court, without attempting to provide definitions for culture and religion said:

religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two: religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.¹⁸

Religion is said to play a significant role in 'believers' lives and in their search for life's ultimate meaning. Furthermore, it is a source of identity that is closely connected to self-respect and dignity, as well as moral values.¹⁹ Religious rights also impact on the right to education, as section 15 (2) of the Constitution provides that religious observances may be conducted at state or state-aided institutions.²⁰

Language is critical for cognitive development as it provides the concepts for thinking and therefore a means for expressing ideas. Language is also considered to be both a precondition for thought and a bearer of thought, and ultimately influences the extent to which a child's intelligence is actualized. Furthermore, we use words to construct our interpretation of experience; our experiences shape our language; and in the culture of schools, a concept does not exist until it has been named

and its meaning shared with others. Language also enables learners to interact with more capable peers and adults (including parents) and later with written material which allows them to share their accumulated knowledge. Since all teaching is given through the medium of language, language and education are interrelated.²¹

3 The position before the Children's Act

Prior to the Children's Act commencement, relocation applications by the primary caregiver were generally granted by the courts.²² The approach adopted in the older cases was that the primary caregiver had the right to decide where the child should live, unless the non-primary caregiver could demonstrate that the proposed relocation would be detrimental to the child. Although the interests of children were taken into account, they were not central to the inquiry. Instead, the rights of the primary caregiver were seen as being paramount²³. This approach was later rejected, and the paramount consideration in relocation disputes became the 'best interests of the child' principle.²⁴ This standard was, nevertheless, applied in a rather vague and general way, with no guidelines or list of factors to assist the courts; the result was different outcomes on whether or not relocation should be allowed.²⁵ Although the standard eventually became a constitutional imperative,²⁶ the Constitution, too, did not provide guidance on how the best interests of the child should play a role, other than to provide that these interests should be of paramount concern.

Broadly speaking, the jurisprudence prior to the Children's Act has been reasonably well traversed²⁷ and the following factors highlighted as relevant to judicial decision-making in the context of relocation: contact

¹⁷ Note 14 above.

¹⁸ 491B-D.

¹⁹ P Lenta 'Taking diversity seriously: Religious associations and work-related discrimination' [2009] *SALJ* 827 at p833.

²⁰ R. Malherbe 'The constitutional dimension of the best interests of the child as applied in education' [2008] *TSAR* 267 at p280.

²¹ H. Botes and A. Mji 'Language diversity in the mathematics classroom: does a learner companion make a difference?' [2010] *South African Journal of Education* 123 at p124.

²² E. Bonthuys 'Clean breaks, custody and parents right to relocate' [2000] 26 *SAJHR* 489.

²³ Bonthuys (note 22 above) at p 489.

²⁴ Bonthuys (note 22 above) at p 490 relying on *Shawzin v Laufer* 1968 4 SA 657 (A).

²⁵ See also L. Albertus 'Relocation disputes: has the long and winding road come to an end? A South African perspective' [2010] *Speculum Juris* 70.

²⁶ C.J. Davel and A. Boniface 'Cross border relocation of children and custodial parent: *Jackson v Jackson* 2002 2 SA 303 SCA' [2003] *THRHR* 139.

²⁷ Bonthuys (note 22 above) at p 486; J.M. Kruger 'Immigration by a custodial parent after divorce' [2001] *THRHR* 452; G.M. Barrie 'The approach of the courts regarding South African custodian parents going into the diaspora' [2008] *TSAR* 571; A.M. Skelton 'Child Law, The Child and South African Private Law' in C.J. Davel *Child Law in South Africa* [2009] Juta and Co at p88-90; B. van Heerden 'Judicial Interference with the Parental Power; The Protection of Children in *Boberg's Law of Persons and the Family* [1999] Juta and Co, Cape Town at p568.

with the non-primary caregiver, the child's relationship with the primary caregiver, any conflict between the parents, the bona fides of the primary caregiver (reasons for emigrating), the need for stability, the children's preferences and the relationship with new family members.²⁸ Kruger adds to this list as a separate factor the 'fundamental rights of the custodian parent', which would include such constitutionally protected rights as the right to freedom of movement (s 21(1) of the South African Constitution), the right to leave the Republic (s 21(2)), not to mention the right to freedom of association and dignity rights. Barrie makes more explicit the 'requirement', if it can be termed such, that the 'reasons' must be grounded in 'reality, that is, they must be concrete rather than comprising 'wish lists''. Maternal preference as a basis for decisions involving care of children has diminished considerably in recent times. Indeed, any evident bias towards mothers who are primary care-givers is now eschewed by courts.³¹

A brief discussion of cases decided before the commencement of the Children's Act now follows, in an attempt to illustrate the extent to which factors such as culture, language and religion were considered in their respective contexts.

In *Shawzin v Laufer*,³² one of the main arguments raised by the appellant (father) was that the children's standard of living would not be as high in Canada as it is in South Africa. A higher standard of living did not carry much weight. It was said by Rumpff, JA:

'I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life'.³³

Another concern of the appellant was that his

children would not be brought up in the atmosphere of the Jewish faith if relocation was allowed. The respondent (mother) assured the court that the children will have proper religious training including the observance of religious holidays and the Sabbath; her current husband was also fluent in Hebrew.³⁴ The religious factors do not appear to have been considered further, nor were they material in the context of the best interests of the child test which was applied to grant the relocation application.

In *Van Rooyen v Van Rooyen*³⁵ the applicant sought the court's consent to relocate to Australia permanently; her support system – parents and siblings – being located there. Her financial position was poor, and her employment opportunities would allegedly be better in Australia- her being a foreigner and unable to speak Afrikaans resulted in her not being able to find employment in South Africa.

The court acknowledged that the children's lives having been disrupted by the divorce would be further disrupted by the limited contact they would have with their father should the court grant consent. Their mother would, however, be equipped to cope and assist the children with the initial difficulties they may experience.³⁶ Although the children would have to adapt to a new culture, the court was satisfied that they would have the necessary support structures to assist in coping with the change.

In *Godbeer v Godbeer*,³⁷ the applicant mother adduced her status as a single mother, being fearful of driving at night and being anxious of her children's well-being when they were alone at home. These concerns, she alleged, would magnify in nature as the girls grew older and became more socially active. The Court allowed the application to the United Kingdom (UK),

²⁸ Bonthuys (note 22 above) 490-499.

²⁹ Kruger (note 27 above) 457.

³⁰ Barrie (note 27 above) 571.

³¹ *van der Linde v van der Linde* 1996 (3) SA 509 (O); *van Pletzen v van Pletzen* 1998 (4) SA 95 (O).

³² 1968 (4) SA 657 (A). .

³³ 669A-B.

³⁴ 660C-G.

³⁵ 1999 (4) SA 435 (C).

³⁶ Before granting the application for relocation, King, DJP stated: 'I trust that it will be recognised and accepted by both parents that there is no winner and no loser in this matter; there are two concerned parents each seeking what is best for the children; a Court can only lay down the rules, the parents must see that they are observed' (at 441C- D).

³⁷ 2000 (3) SA 976 (W).

citing the stable job environment to which the mother would proceed, her 'at least average' earnings there, and the plan to live in 'acceptable surroundings' close to a school. Although a slightly lower standard of living might ensue, the Court noted that 'the composites of life are manifold and other things might fall to be balanced against that'.³⁸

In *Schutte v Jacobs*³⁹ the applicant sought an order which would allow her to relocate to Botswana with her child, aged four and a half. She sought such order as her partner had been transferred to Botswana for work purposes. The evidence indicated that suitable arrangements were or would be made in future regarding the accommodation, schooling and church membership of the child. That the child was only four and a half would also not result in a serious disruption in her life as she had not yet started primary school, and would easily adapt to a new environment.⁴⁰

*F v F*⁴¹ further illustrates pessimism about life in South Africa. Indeed it was alleged by the applicant in the lower court that the quality of life in Gotherinton, in the UK (to which she wished to relocate) was better than in South Africa. The crime rate in South Africa was unacceptable and she was living in an area constantly patrolled by armed guards. She averred that the social security system in the United Kingdom was better and that the standard of schools in South Africa was deteriorating and had not kept pace with international standards.⁴²

In this case, the court was swayed by the vague nature of the custodian parent's plans which were, in short, fluid: by the time the matter went to oral evidence, she had only secured a temporary low-paying job in the UK. There was uncertainty about her employment prospects, aftercare for the child, and a variety of other long-term issues relevant to the child's future.⁴³ In summary, the applicant's motives were indeed relevant, however, her implementation prognosis of those

intentions was insufficiently concrete and certain to warrant dislodging the *status quo* in South Africa. It was this that provided the major objection to the application to relocate: indeed the Court left open the possibility of a different verdict were more solid evidence to be placed before a court at a later stage of the minutiae of the planned move. This signals that the court neither accepted nor rejected the claims that a safer and educationally more advantageous environment obtained in the UK as factors which could influence their decision.

In *H v R*⁴⁴ the reasons for wishing to relocate were employment opportunities as well as the high crime rate in South Africa, the uncertain state of the economy, the overburdened social services in South Africa, the limited opportunities for white male South Africans and the impact of HIV in South Africa. The applicant, who had remarried, had, however, found good schools in the UK and 'done her research'. Despite the father's very close bond with the child and the excellent education opportunities for both schooling and higher learning in South Africa, his objections were overruled. The main reasons were the fact that the relocating parent had carefully considered the move and done everything possible to ensure that minimum disruption to the child's relationship with his father would ensue. The order of the Court reflected considerable detail as to the form and shape of such future contact.

In general terms, the leading South African case is *Jackson v Jackson*.⁴⁵ The applicant (custodial parent) was the father of two girls aged 7 and 9½. He brought an action for leave to remove the children from South Africa to Australia. Such leave was granted by the trial court of first instance, but was overturned by the full court of the Natal Provincial Division. An appeal against this latter decision was lodged with the Supreme Court of Appeal. In examining the factors relevant to the decision as to whether it was in the best interests of the children to emigrate to Australia, Cloete AJA focused on the

³⁸ At 980H.

³⁹ (Nr 1) 2001 (2) SA 470 (W).

⁴⁰ 476E-F. It should be noted that the court required certain matters to be investigated further by the Family Advocate before a decision was made. The application was however granted in *Schutte v Jacobs* (Nr 2) 2001 (2) SA 478 (W).

⁴¹ (2006) 1 All SA 571 (SCA).

⁴² Barrie (note 27 above) 568.

⁴³ At 579 (20)-(21).

⁴⁴ 2001 (3) SA 623 (C).

⁴⁵ 2002 (2) SA 303 (SCA).

following: the custodial parent (appellant in the Supreme Court of Appeal) in responding to the trial court's questions had stated that in his opinion, people in Brisbane were happier and safer than in South Africa and that specifically in Durban things had become worse; that people in South Africa were depressed and had forgotten how to have fun; that children (like his two girls) were suppressed and could not lead a normal life as he did as a child; and that South Africans had become burdened with crime, AIDS, education problems and health care problems that would be passed on to his children. Such factors, he concluded, convinced him that it would be in the best interests of his children to move to Australia. These statements are quoted at length in the reported SCA judgment, and, in the words of Cloete AJA (who penned a separate judgment), were not disputed.

Scott, JA, for the majority, did not detail the impact of 'crime free' Australia in so many words, other than to note that:

'Although it would suit him to live in Australia, his principal reason for wishing to emigrate was his conviction that Australia was a better country in which to bring up children and that it was in their best long term interests that they make Australia their home rather than remain in South Africa'.⁴⁶

In the event, the decision did not turn on the relative merits of Australia versus South Africa as a destination, but of course, on the relationship between the children and their non-custodial mother, and the effects of the envisaged separation upon that. Nevertheless, it is clear that the attractions of Australia were relevant as to the motive of the parent wishing to relocate.

Marais, AJA, for the minority, made the following point about 'country comparisons':

'The reluctance of the Courts to make or to be seen to be making findings of fact which may reflect adversely about the quality of life in the countries in which they are situated is entirely understandable. It is an invidious task. However,

if they are to do their duty by children whose future is in their hands, it is, in my respectful view, an obligation which cannot be avoided if that quality of life is the dominant reason advanced for the contention that it would be in their best interests to emigrate...'⁴⁷

However, the learned judge did note that the comparison made between South Africa and Australia did not relate to trivial things, but to aspects of life which are critical and fundamentally important to the growth and development of healthy, happy and stress-free children.⁴⁸

It can be asserted that culturally speaking, Australia and South Africa might be regarded as quite similar for certain groups of the South African population as regards lifestyle, educational standing and so forth. Some might question whether 'quality of life' issues are relevant to 'culture' at all. This point is addressed in conclusion.

On balance, the leading cases reviewed here demonstrate that language, culture and or religion were not central to determining the best interests of the child in the period before the Children's Act.

4 Culture, Language and Religion in the Children's Act

The main features of the Children's Act that affect relocation concern section 7 (the best interests of the child), section 10 (child participation) and the new rules concerning parental rights and responsibilities, which, seen as a whole, replace the common law concepts related to parental authority (access and custody). Section 11 (dealing with the rights of children with disabilities) has also assumed some relevance with regard to relocation. As a general proposition, children's rights to language, religion and culture feature particularly strongly in the Children's Act, as will be apparent from some examples cited below.

Cases are only now emerging in which the real impact of the Children's Act is coming to the fore.⁴⁹ It cannot be said, at this relatively early stage, that the Act has had a

⁴⁶ 320A.

⁴⁷ 325H-I.

⁴⁸ 325J-326A.

⁴⁹ The principal sections dealt with in this article came into force on 1 July 2007. These include the chapter on children's rights (chapter 2) and the chapter on parental responsibilities and rights (chapter 3). The remainder of the Act, with its accompanying Regulations and Forms, was put into effect on 1 April 2010. Judges and lawyers alike took a while to cotton on to the newly operationalised sections on parental responsibilities and rights, which to some extent explains the relative lack of contemporary jurisprudence on the new provisions.

major impact from the case law perused. However, the Act could be the locus of quite a shift in emphasis in future, as will now be explained.

The starting point for discussion is section 7, which enshrines the South African equivalent of the so-called 'welfare checklist'.⁵⁰ However, as might be expected, the adaption of the checklist to South African exigencies is apparent.⁵¹ Section 7 contains a long list – more than fourteen subsections in all – of factors which comprise the best interests of the (South African) child. Two of the most prominent in the context of relocation concern the nature of the personal relationship between the child and the parents or any specific parent and the child and any other caregiver or person relevant in those circumstances (section 7(1)(a)); and the attitude of the parents or any specific parent, towards the child and the exercise of parental responsibilities and rights in respect of that child (7(1)(b)). However, relocation features more directly than this: for instance, it is now a legal principle that consideration be given to:

'the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
(i) both or either of the parents; or
(ii) any brother or sister or other child or any other care-giver or person, with whom the child has been living' (section 7(1)(d)).

Here we find not only explicit mention of the wider family circle (a notable feature of the Act as a whole insofar as the extended African family kinship system acquires legislative recognition in a variety of different ways), but also reference to the interests of other siblings, which must include the siblings attached to newly-formed family units (as is evident from the phrase 'any other child').⁵²

This line of thinking is reinforced by section 7(1)(f) which explicates the principle of the

'need for the child –

(i) To remain in the care of his or her parent, family and extended family; and

(ii) To maintain a connection with his or her family, extended family, **culture** or tradition'⁵³

as factors to be taken into account in determining the child's best interests. These, as we have seen, had not surfaced explicitly in relocation case law hitherto.

Another factor which warrants consideration in this analysis is that contained in section 7(1)(e), insofar as it brings the practical difficulty and expense associated with maintaining 'personal relations and direct contact' with the parents or any specific parent on a regular basis directly to bear. In short, independent of the personal relationship between child and either parent (section 7(1)(a)) and their capacity to provide for the needs of the child, including the child's emotional and intellectual needs (section 7(1)(c)), a range of other relevant and relocation-oriented considerations are now statutorily relevant.

Section 7(1)(h) is thus not irrelevant, insofar as it speaks of the need to consider 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development' (emphasis inserted).. A particular feature of the Act is its sensitive treatment of disability and this is emphasised in a variety of different areas of legislative concern. Not least of these is section 11 (which falls in the overarching chapter dealing with children's rights) in which it is stated that due consideration must be given to striving for certain outcomes if a matter concerns a child with a disability, to be achieved in ways spelt out in this particular article.⁵⁴

It must be stated that it appears at first glance that

⁵⁰ The leading discussion on the Children's Act (C.J. Davel and A.M. Skelton, *Commentary on the Children's Act* [2007] Juta and Co, Cape Town) does not dissect the contents of the checklist in section 7 in minute detail.

⁵¹ For instance, the Australian Family Law Act of 1975 from which this provision is clearly derived is, on the face it, quite similar: yet two substantive differences can be discerned: the Australian variant does not expressly refer to brothers and sisters as are alluded to in section 7(1)(d) (but only to 'any other child'), nor does the Australian Family Law Act mention 'care-givers'. Care-givers occupy a very special place in the Children's Act overall, in recognition of the large numbers of children being raised by persons who are not biological mothers (for instance). Hence care-givers can even, in some instances, consent to medical treatment and to HIV testing, a necessary development given the HIV aids pandemic in South Africa.

⁵² The intention of this article was also to give practical effect to the CRC and ACRWC presumptions against separation of children from their families: article 9 CRC and article 25 ACRWC.

⁵³ Emphasis inserted. The Australian Family Law Act 1975 refers to the Aboriginal or Torres Strait Island culture of the child, though there are also references generally to children's lifestyle and background (including lifestyle, culture and traditions): section 60(3)(h).

⁵⁴ Providing the child with parental care, family care or special care as and where appropriate; making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have; providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and providing the child and the child's caregiver with the necessary support services; section 11(1)(a)-(d).

the principles in section 7 function independently of each other: that is, they may 'weigh in' separately from factors such as the personal relationship a child has with either parent (section 7(1)(a)), and the capacity of parents to provide for the child's needs (section 7(1)(c)). This reading is reinforced by a textual analysis, as the subsections of section 7 are not linked with the word 'and'. However, the fact that each principle counts independently does not entail rejecting the approach of the court in *AC v KC*,⁵⁵ discussed in more detail in section 4 of this article.

Parenting plans are a new feature introduced by the Children's Act,⁵⁶ in an effort to encourage disputing parents to work out their differences in an orderly manner. Indeed, the Act seeks to prevent litigation from ensuing by requiring parties to first seek to agree on a parenting plan in some situations⁵⁷, if needs be with the assistance of a social worker, psychologist or family advocate, or after mediation.

The contents of a parenting plan are not detailed in any way in the Act, nor do the Regulations provide further enlightenment.⁵⁸ However, it is worth recording that in providing examples of what may be included in a parenting plan (s 33 specifies that a parenting plan may determine **any matter** in connection with parental responsibilities and rights), and apart from providing the child with a place to live and maintaining contact with the child, the Act makes mention of only two further incidents of parental responsibility, namely: the schooling and the religious upbringing of the child.⁵⁹

The legislature was alive to the difficulties occasioned by child rearing in a multi-cultural and multi-religious society where schooling-related issues frequently provide the fulcrum for disputes about culture. As will be shown briefly in conclusion, 'schooling' is for many South Africans a pseudonym for language and heritage claims, or, seen differently, a roundabout way of alluding to

culture in practical terms.

In the next section we undertake a brief discussion of relocation cases since the advent of the Children's Act. These focus only on case law where language (and implicitly, culture) or religion surfaced.

5 The impact of the Children's Act

In *K v K*⁶⁰ the relocation was sought by a father wishing to go to Israel where his parents and sisters lived, and where he was born. He averred that his daughter would enjoy a better education in Israel, and there is some suggestion that the application for relocation was motivated by a robbery during which the applicant's current wife and the child for whom the order was sought were held at gunpoint at the home of the applicant, which left the child traumatised.⁶¹

However, the future plans of the applicant appeared to be uppermost in the mind of the court:

'It appears that if she goes to Israel that L will be attending a school where the classes will be given in Hebrew. It is not in dispute that L does not speak Hebrew. The applicant in reply says that L is attending Hebrew lessons and that the Israeli Immigration Department and the Modiin Municipality provide intensive Hebrew study programmes to facilitate integration into the community and the country. No detail is provided of either of the programmes nor is any detail provided of how L is coping with her Hebrew lessons. Whilst it is probable that L would eventually learn sufficient Hebrew to enable her to communicate it is not possible to determine how long this would take nor what effect her inability to speak Hebrew would have on her school career. It is self-evident that if she cannot speak Hebrew, which is the language of

⁵⁵ (A389/08) [2008] ZAGPHC 369 (13 June 2008).

⁵⁶ Sections 33 and 34, read with sections 30 and 31 and the Regulations promulgated on 1 April 2010.

⁵⁷ Section 33(2) provides that '[i]f the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child'.

⁵⁸ This is in contrast to earlier versions of the Regulations and Forms which contained a *pro forma* parenting plan: the author of this article was the main contractor who drafted the Regulations for Government.

⁵⁹ Section 33(3)(d).

⁶⁰ (17189/08) [2009] ZAGPJHC13 (6 May 2009).

⁶¹ With some irony, the court continues to point out that 'since the robbery appears to be an isolated incident and no further incident has occurred since January 2008'. The applicant provides no details of the incidents of crime in the area in which he lives, nor is there any detail provided of crime statistics in Modiin. As pointed out by the Judge, the applicant simply ignores the fact that Israel is in a constant state of war with the Palestinians or its neighbours...! at p 14-15 (17.7).

instruction, that this could have a detrimental effect on her schooling. No detail has been provided of whether L will be able to integrate socially and culturally in Israel. In particular whether she will be able to make friends in Israel having regard to the language barrier'.⁶²

As a result the Court was not in a position to determine whether it would be in the child's best interests that she be removed from her school and friends in South Africa. Although the child expressed the view that she wished to emigrate to Israel as it would take away hurtful memories and solve her problems, the Court felt that her views were naïve and unrealistic and could not be decisive. The Court held that she was not of an age to appreciate the effects of a removal her from her established friends and familiar school and surroundings and then being thrust into a foreign environment, where she does not speak the language required for schooling or social activities. Furthermore, no assessment had been made regarding the suitability of the child to be educated in a language that she could not speak.⁶³ The necessary permission to relocate was therefore not granted.

*AC v KC*⁶⁴ provides another recent example. The applicant mother (who was successful in the court *a quo*, and who was therefore the respondent on appeal) was a cytologist who had received an attractive contract offer (for three years) to work in Abu Dhabi. The applicant had a job in South Africa, but the job offer to which she was attracted was reportedly destined to pay three times as much, once tax breaks and allowances were added.

The children had been schooled in Afrikaans, and one assumes from this that Afrikaans was their mother tongue. Nevertheless, the oldest child (aged about 10-11) was a 'top 10' learner and was 'proficient in English'. The second child, aged about 9-10, was an average learner with a concentration problem. Both children attended an Afrikaans medium school. The children were obviously not able to be educated in Arabic, but the plan

was to attend an American English medium school in Abu Dhabi, with Arabic as a subject. Afrikaans would clearly not be part of the curriculum.

The report by the Family Advocate, the statutory authority with the responsibility to provide the Court with an assessment of the best interests of the child,⁶⁵ contained reservations about the younger child, citing his 'possible problems with education through the medium of English' given his learning problems.

The appellant raised concerns regarding the lack of information concerning the respondent's financial position generally, the education of the children, the possible problems relating to where they would live, and whether the court was in a position to make a determination about all the aspects in section 7 of the Children's Act. He alleged that her decision was *bona fide* but not reasonable, and complained that the lower court did not deal 'with all the aspects that the legislature regarded as important as contained in section 7'.⁶⁶

However, the court was informed that there was quite a large Afrikaans community in Abu Dhabi as well as an Afrikaans church, from which one can discern an intention on the part of the respondent to maintain cultural ties.

With reference to the section 7 checklist, Hartzenberg, J opined that the court had to take an overall view of the situation:

'...it is not like marking a mathematics test where the score is counted and one can see whether the candidate has passed ... it is more like marking an essay where one reads it and takes cognisance of the contents thereof and then makes a value judgment to decide on the mark that is to be given...'.⁶⁷

We deduce that the approach is not to take each aspect of section 7 *seriatim* and tick them off, as it were, but obviously, equally, the factors enumerated in section 7 which now constitute the legislative embodiment of the child's best interests cannot be ignored or

⁶² 11-12 (17.1).

⁶³ 15 (18).

⁶⁴ (A389/08) [2008] ZAGPHC 369 (13 June 2008).

⁶⁵ The Office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987.

⁶⁶ par 9.

⁶⁷ Par 11.

overlooked. The impression obtained is that a composite approach is what is required, and a weighing up of all the relevant factors elaborated in section 7 will suffice.

Stating that:

'if the bread winner gets a job offer which looks as if it would be to the advantage of the family, usually it will be accepted....'⁶⁸

the court premised its final decision virtually exclusively on the reasonableness of the applicant's decision and motives. The court quaintly reminisced about the *bonus paterfamilias* or reasonable man (*sic*)... who is 'not a timorous faint-heart... but on the contrary... ventures out into the world, engages in affairs and takes reasonable chances'.⁶⁹ But the further educational and cultural 'fit' of the proposed move for the children received barely a mention. It is thus obvious that the appeal court was swayed by the perceived advantages of the move, which sounded almost purely in money. Economic betterment of the parent's position, it must be concluded, was the primary rationale for allowing the relocation.⁷⁰

One could argue that the children's cultural needs would be catered for because of the Afrikaans community in Abu Dhabi, but no mention is made of the support structures that would be in place to assist the younger child to cope with his educational and intellectual needs - as is clearly required by the Children's Act.

*Cunningham v Pretorius*⁷¹ saw an application for relocation to Austin, Texas. A remarriage and new life

with the reconstituted family was at stake.⁷² The child's mother tongue was Afrikaans, and it was common cause that even at the age of four, a significant 'backlog' existed: he could be said to have a 'language disability'.⁷³ He struggled with Afrikaans and as a result, it could be inferred that section 11(1) of the Children's Act was of application; it will be recalled that this section concerns the rights of children with disabilities and requires that the child be provided with appropriate care within the family and community, making it possible for the child to actively participate in sound cultural, religious and educational activities in such a way as to promote the child's dignity, self-reliance and active participation.

The Afrikaans language problem notwithstanding, according to one expert report, the child appeared more comfortable speaking English, chose to play with English speaking children and understood English instructions better than Afrikaans. However, another expert was of the view that schooling in a second language could pose a barrier to the child's learning, on the basis that language is a significant predictor of academic success overall.⁷⁴

It was contended by the applicant that the child would benefit from a better education system and superior facilities in Texas. However, the respondent argued that it would not be in the best interests of the child to be schooled in English, when he had not yet mastered his first language.⁷⁵

The issue did not seem to revolve around language as a method of communication with the left-behind parent,

⁶⁸ Par 12.

⁶⁹ Par 13.

⁷⁰ This decision has been criticised by one of the authors in Albertus (note 25 above). She argues that the 'reasonable man' test should not have been allowed to displace the best interests of the child, as seems to have occurred. Further that the allegations of the appellant father that related to the second child's emotional and intellectual needs should have been properly addressed; and, at minimum, due consideration should have been given to the child being provided with support systems whilst abroad. Finally, she points out that 'although appropriate weight should be attached to the primary caregiver's interests, courts must guard against the assumption that a decision taken by the primary care-giver is equivalent to the child's best interests as was emphasised in *F v F* (2006) 1 All SA 571 (SCA) at 577(13)'.

⁷¹ (31187/08) [2008] ZAGPHC 258 (21 August 2008).

⁷² Interestingly, the father alluded to his new family - a new sibling was on the way - but this was regarded only as a potential vehicle providing him with comfort in the absence of the relocating child! The implications for the child of the removal away from his siblings in section 7(1)(d), noted above, were not explored. In *B v M* [2006] 3 All SA 109 (W), the applicant (mother) had remarried and wished to relocate to Cape Town as a result of her current husband being offered a once in a lifetime opportunity in his field of expertise. One of the factors taken into account in determining the best interests of the children was their relationship with their half-brother (born of the mother and her current husband). In fact, the court held that as upper guardian of the half-brother, his best interests also needed to be considered in the application. This approach more readily approximates the stance we advocate of considering independently each of the factors in section 7, insofar as they are relevant to a particular case.

⁷³ Reports from an educational psychologist, speech therapists, social workers and other were presented: six reports in all.

⁷⁴ 16-17 (26).

⁷⁵ 17-18 (27).

but rather the more abstract notion of language as a learning medium **generally**.⁷⁶ The judge was extremely sensitive to the child's language needs:

'...whether it is an intrinsic developmental deficit or a product of his present acrimonious environment, all of the options he faces will pose additional challenges....whichever way it goes... will impact on his language and intellectual development. The relatively privileged environment to which he will move in Texas, the equal if not superior support systems likely to be on offer there, as well as his mother's adaptable, focussed and efficient character lead me to believe that his disability, if it is indeed such, will be adequately managed in Texas with dignity and in a manner promoting his ultimate self reliance'.⁷⁷

It is axiomatic that the application was granted. It could be argued as the child was young, it would not have an unduly adverse effect on him if his mother tongue were to be forgotten and his culture (possibly) lost altogether. In the Zulu boy case, the child's culture was as foreign to him as the country itself by the time he returned. The *Pillay* case⁷⁸ sets international standards in recognising the child's right to practice her religion, and it is to be questioned whether courts would adopt the same position with regard to a child's culture or language, more especially where a young child is concerned. However, if the child is of an age where his culture has been ingrained, then such factor should be considered in detail by our courts.

6 Analysis and Conclusions

First, the discussion above has revealed an uneven pattern in which culture and language (in particular) have been brought to the fore in relocation cases. Religion has played a marginal role thus far and has not been central to the courts' inquiry. The reason for this could be that where religion became a point of concern, the applicant had indicated that the child would continue to practice

his/her religion.

Second, in the majority of cases where language and culture were raised in relation to proposed relocation applications, these were raised in opposition to the relocation. Therefore, it has only been in answer to the opposing parent's concern that courts have taken into account language and cultural factors.

Third, South African jurisprudence can be singled out for the reason that the rights isolated for discussion in this article are not mere principles of domestic law, but find constitutional expression. Hence the right to religion, for instance, is as much a right of the child as any other:

'A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'.⁷⁹

It is also said that:

'Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions'.⁸⁰

It is argued that as culture, language and religion are constitutional rights, they should be central to the court's enquiry in those instances where they are at stake. After all, it is not the adaptability of the primary caregiver in the foreign country or ex-home country that is at issue, but that of the child.

That brings out the fourth issue, namely the continued dominance of parental interests in the actual decisions of courts, even in the face of a newly enacted charter which expressly sets out the interests of the child.⁸¹ The conclusion is inescapable that the cultural rights of the child are still regarded as inextricably bound up in those of the relocating parent, and even mother-tongue education rights have not dislodged that premise

⁷⁶ If this is true, then language issues may be more relevant in relocation disputes involving younger children, as for older children, it may be argued that their learning techniques and skills are ordinarily more assured.

⁷⁷ 43 (71).

⁷⁸ Note 14 above.

⁷⁹ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 496-497G.

⁸⁰ 493D-E.

⁸¹ It can be deduced that the central theme of child participation which runs through the Children's Act is one that will yet play a role in influencing relocation decisions.

(provided the relocating parent's plans are reasonably clear and concrete).⁸²

As for indigenous culture, of the Zulu variety referred to in the introduction, it is apparent that the cases adduced concern predominantly Afrikaans, and Xhosa, Sotho and Pedi language rights (for instance) have not surfaced. This may be a function of the socio-economic reality that relocation applications must be pursued in the high cost environment of the High Court, often only accessible to 'high net worth' English and Afrikaans speaking clients; but it may also indicate that in the case of other South African indigenous peoples - that is, in the case of other language groups - it is perceived to be inevitable that children will be exposed to multiple languages during their youth. It is even possible that for language groups other than English and Afrikaans, exposure to new languages is seen as an asset and not a liability.

A further possibility is that that Afrikaans language speakers identify language with the preservation of their culture and heritage in a way that is different from other language speakers, which then also explains why the language policy of schools has been hotly contested in South African jurisprudence.

Sixth, a note on 'culture', crime and HIV: earlier cases discussed in this article evince a strong 'cultural' argument that life in other culturally similar countries, including the UK and Australia, may be preferable to growing up in South Africa. Indeed, South African emigrants (and others) refer quite frequently to the culture of crime, the dropping of educational standards, the prevalence of HIV/Aids and other ills of this society. However, these are not truly cultural factors, as constitutionally understood, and simply pertain to **parental** motivation. Thus, these concerns should not be

considered under section 7 of the Children's Act, unless they relate to the need to protect the child from physical or psychological harm (section 7(1)(l)) or the 'child's need for development and to engage in play and other recreational activities appropriate to the child's age' (section 6(2)(e) which falls under the heading 'General Principles').

However, in a country which lacks a comprehensive social security system to provide for workers who lose their jobs, or persons who are unemployed, the realities of employment opportunities abroad for the parent who wishes to relocate, or his or her partner, cannot be underestimated, nor can the economic imperatives be dealt with on the same basis as they may be in jurisdictions where there is a safety net for non-working care-givers. And in a country where the child maintenance system has been sorely tested through chronic non-payment of child support by parents,⁸³ we would argue that a parent's need to provide economic support for a child must weigh heavily against the child's right to culture, religion and language.

Finally, it has been asserted in this article that the major change that the Children's Act as whole has brought about is the child-focussed nature of the enquiry that is required: no longer can relocation be approached solely from the basis of the vantage point of the parents. It is recommended that in those instances where language, culture and religion are at stake, courts should be conscious of these rights being diminished as a consequence of relocation. These factors should independently form part of the balancing process to determine the best interests of the child, especially if the child is of school going age and his or her culture, religion and language is established.⁸⁴

⁸² The primary caregiver's need, for example, to return to her home country; accompany her new spouse; or career opportunities are always mentioned first. Then comes the reassurance that the child's educational needs will either be of a higher standard or adequately provided for.

⁸³ *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC).

⁸⁴ J. Heaton 'An individualized contextualized and child centre determination of the child best interests, and the implications of such an approach in the South African Context' [2009] *TSAR* 1 at 14 agrees that 'in view of our constitutional values of tolerance of and respect for diversity and pluralism, the child's best interests must be determined in a manner that takes cognizance of and is sensitive to culture and religion. Like all other factors, culture and religion must be viewed in a child centre manner. The focus should be the role that culture and religion play in the child's life.'