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**THE RIGHT OF THE CHILD TO CARE AND CONSTITUTIONAL DAMAGES FOR
THE LOSS OF PARENTAL CARE: SOME THOUGHTS ON *M v MINISTER OF
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1 Introduction

The progressive nature of the South African Bill of Rights as enshrined in the *Constitution of the Republic of South Africa, 1996* (hereafter "the *Constitution*" and "the Bill" respectively) propelled the country into the position of being a world leader in the sphere of fundamental rights. The Bill is hailed as a guiding light for legal development even in established human rights law dispensations. However, such a radical change as that which has taken place in South Africa inevitably leads to legal uncertainty.¹ In the field of family and child law this has become evident not only with regard to aspects of the status of individuals wishing to enter marriage,² but also in the field of matrimonial property law, where marriage in community of property, on the basis of unfair discrimination, has been treated in a fashion similar to marriage out of community of property and *vice versa*.³

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¹ Robinson 2013 *THRHR* 409.

² Smith and Robinson 2010 *PER/PELJ* 30; Smith and Robinson 2008 *BYU J Pub L* 419-420.

³ See eg *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC); *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Buttner v Buttner* 2006 3 SA 23 (SCA). In *Van der Merwe* the Court found that s 18(b) of the *Matrimonial Property Act* 88 of 1984 drastically altered the common law position of marriage in community of property by permitting an injured spouse to recover damages for bodily injuries attributable to the fault of the other. However, it further found that there was no rational divide between patrimonial and non-patrimonial damages for the purposes of spousal claims against each other for delictual personal injury. The section consequently drew an impermissible differentiation between spouses married in and out of community of property in respect of the right to recover patrimonial damages suffered from bodily injury attributable to the fault of the other spouse (*Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) para 58) (see eg Robinson 2007 *PER/PELJ* 70-88; Mubangizi and Mubangizi 2005 *Dev South Afr* 278. In *Buttner* the parties were married to each other out of community of property and the accrual system did not apply. In respect of a claim in terms of s 7(3) the Court held "[f]airness demands that that effect be given, on divorce, to the *principle of equal sharing* which the parties

A further, though short-lived, development has recently occurred in the judgment of *M v Minister of Police*⁴ where the Gauteng North High Court substantially expounded the claim for damages for loss of parental care. It found that a child's claim following the wrongful death of his or her parent is not limited to the common law claim for loss of support but indeed extends to claims for constitutional damages since the notion of the right to parental care is entrenched in section 28(1)(b) of the *Constitution*.⁵ This extension of the claim of children was emphatically rejected by the Supreme Court of Appeal in *Minister of Police v Mboweni*.⁶

This contribution reflects on the reasoning of the two courts and the relevance of the same for the debate regarding the care of children in terms of section 28(1)(b) of the *Constitution* and section 1 of the *Children's Act* 38 of 2005⁷ (hereafter "the *Children's Act*"). Furthermore, brief reference will be made to the best interest of the child as reflected in section 28(2) of the *Constitution*. While *prima facie* it would appear to be a primary concern, neither of the decisions refers to this right of children.

2 M v Minister of Police (a quo)

2.1 The question

In the *a quo* judgment in *M v Minister of Police*⁸ (hereafter "*M*") a radical new approach was followed in respect of claims for the loss of parental care. The issue before the court was whether or not a child whose parent had died as a result of the wrongful conduct of the South African Police Services might sue for damages arising from the child's constitutional right to parental care in terms of section 28(1)(b).⁹ Put somewhat differently, the question was whether a claim for damages may be

consciously applied throughout their married life" (*Buttner v Buttner* 2006 3 SA 23 (SCA) para 25) (emphasis added).

⁴ *M v Minister of Police* 2013 5 SA 622 (GNP).

⁵ *M v Minister of Police* 2013 5 SA 622 (GNP) para 43.

⁶ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA).

⁷ Hereinafter "the *Children's Act*".

⁸ *M v Minister of Police* 2013 5 SA 622 (GNP).

⁹ *M v Minister of Police* 2013 5 SA 622 (GNP) paras 43, 44.

instituted on the grounds that children are, as a result of the wrongful death of their father, deprived of their constitutionally entrenched right to parental care. No such claim exists in common law.

2.2 The judgment - compensation for loss of parental care

Section 28(1)(b) of the *Constitution* provides as follows:

- (1) Every child has the right –
- (a) ...
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; ...

Section 1 of the *Children's Act* elaborates on the concept of care by providing as follows:

- "care", in relation to a child, includes, where appropriate –
- (a) within available means, providing the child with –
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
 - (b) safeguarding and promoting the well-being of the child;
 - (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and other physical, emotional or moral harm or hazards;
 - (d) respecting, protecting, promoting and securing the fulfillment of, and guarding against any infringement of, the child's right set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
 - (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
 - (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
 - (g) guiding the behaviour of the child in a humane manner;
 - (h) maintaining a sound relationship with the child;
 - (i) accommodating any special needs the child may have; and
 - (j) generally, ensuring the best interests of the child is the paramount concern in all matters concerning the child.

As the point of departure in the interpretation of the *Constitution* and the *Children's Act*, the Court explained that the duty of a parent to maintain his or her child no

longer arises from common law but is now governed by the *Children's Act*.¹⁰ The Court approvingly referred to *Heystek v Heystek*,¹¹ where the new position was explained as follows:

The Constitutional notion of parental care and the paramountcy of the best interest of the child require an attitudinal shift from an antiquated Germanic parent and child relationship, which formed the substratum of the common law, to the rights of the child, which includes parental care and family care. Common law needs to be aligned to serve the constitutional imperatives of the child in a heterogeneous society.

The Court in *M* found that the concept of loss of support had to be developed within the context of the rights of the child enshrined in the *Constitution* and the *Children's Act*.¹² In its common law context the concept is applied restrictively and relates only to what is currently contained in section 1(a) of the *Children's Act*; it relates almost exclusively to the extent of the contribution to defraying day-to-day living expenses (nutrition, medical care and accommodation).¹³ The other aspects are "almost always not considered or included in the award for damages arising out of a child's loss of support".¹⁴ The Court concluded that child care is widely defined in the *Constitution* and the *Children's Act* and that payment for the loss of support at common law is only a part of the care envisaged in the *Children's Act*. The Court illuminated its argument as follows, in paragraph [22]:

In my view ... the content of the right to parental care goes further than just the need for financial support. From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor. These would include teaching the child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform house chores, and to be present and supportive of the child during his/her participation in sport and art activities. The list is endless and no attempt is made here to create a *numerus clausus*. These parental care duties are performed to assist the child in preparing for life's challenges. They could be referred to as parental guidance, advice, assistance, responsibility, or simply parenting or child nurturing.

¹⁰ *M v Minister of Police* 2013 5 SA 622 (GNP) para 43.

¹¹ *Heystek v Heystek* 2002 2 SA 754 (T) 757 E-G.

¹² *M v Minister of Police* 2013 5 SA 622 (GNP) para 43.

¹³ *M v Minister of Police* 2013 5 SA 622 (GNP) para 44.

¹⁴ *M v Minister of Police* 2013 5 SA 622 (GNP) para 21.

The right to parental care *qua* a constitutionally entrenched right consequently deserves constitutional protection and enforcement. Damages for the infringement of this right should be compensated by means of the constitutional remedy of appropriate relief.

The Minister's contention that compensation for a child's loss of support included an award for loss of parental care was rejected by the Court on the basis that "[i]t is not one of those instances where the common law can be developed as stated in the *Fosé* case".¹⁵ The Court found support for its conclusion in section 15(2)(a) of the *Children's Act*. This section provides that a child who is affected by or involved in a matter to be adjudicated has the right to approach a competent court and allege that a right in terms of the Bill or the *Children's Act* has been infringed or threatened, upon which the Court may grant appropriate relief. However, the Court also found itself in agreement with *Jooste v Botha*¹⁶ that an action for damages arising out of section 8 of the *Constitution* will not be based on the child's deprivation of parental love and affection. This conclusion is based on the interpretation of the *Children's Act*, which does not make reference to a need to show love and affection to the child as one of the duties that a parent must perform.¹⁷

¹⁵ *Fosé v Minister of Safety and Security* 1997 3 SA 786 (CC). In this case the defendant was sued for damages arising out of a series of assaults allegedly perpetrated by members of the SA Police Services. It was alleged that this conduct constituted an infringement of the fundamental rights of the plaintiff. An amount was also claimed under the heading "constitutional damages ... which includes an element of punitive damages". The defendant excepted to the claim on the grounds that an action for constitutional damages did not exist in law and that an order for the payment of such damages did not qualify as "appropriate relief" in terms of s7(4)(a) of the interim *Constitution (Constitution of the Republic of South Africa Act 200 of 1993)*.

¹⁶ *Jooste v Botha* 2000 2 SA 199 (T). The court explained the position thus: "But not only in its relationship between a man and woman is marriage unique, so are the multiple relationships that flow from such union – mother father and child: and children mutually. There evolves a bond of kinship – blood is thicker than water - which society expects the parents, children and siblings to honour. But it does not grant rights to and impose concomitant obligations upon the parties except in the economic sphere." *Jooste v Botha* 2000 2 SA 199 (T) 206E-F.

¹⁷ *M v Minister of Police* 2013 5 SA 622 (GNP) paras 22-23.

2.3 Some conclusions to be drawn from M

The exposition above makes it clear that in the case of a child claiming for the loss of parental care there are three different categories of damages, being:

- damages for which a child still does not have a claim as per the acceptance of *Jooste v Botha*;
- damages as allowed at common law; and
- constitutional damages *qua* appropriate relief.

In paragraph 2.4 *infra* the appropriateness of constitutional damages under these circumstances will be discussed.

2.4 A new category of damages - constitutional damages

By way of introduction to the Court's explanation, reference should be made, albeit only briefly, to the concept of "appropriate relief" as set out by section 38 of the *Constitution*. It provides that anyone listed in the section (including children) has the right to approach a court alleging that a right in the Bill has been infringed, and that the Court may then grant appropriate relief. In *Fosé v Minister of Safety and Security*¹⁸ the Constitutional Court held that appropriate relief may include an award for damages where such an award may be necessary to enforce constitutionally entrenched rights. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*¹⁹ (hereafter *Modderklip*) and also *MEC, Department of Welfare, Eastern Cape v Kate*²⁰ (hereafter *Kate*) the Supreme Court of Appeal confirmed the concept of constitutional damages. In *Modderklip* a claim for damages by a landowner was granted against the State after he had lost ownership of his land. This was due to its occupation by squatters and the impossibility of evicting them due to the State's failing to arrange for alternative land to accommodate them. In *Kate* it was found that the unreasonable delay in considering a person's disability

¹⁸ *Fosé v Minister of Safety and Security* 1997 3 SA 786 (CC).

¹⁹ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA).

²⁰ *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA).

grant resulted in the denial of such a person's right to social assistance, which constituted a breach of her constitutional right. Under these circumstances the Court found that an award for constitutional damages was the most appropriate remedy.

It is clear not only that constitutional damages are recognised as part of South African law, but also that any party whose constitutional rights have been infringed may seek a remedy under the rubric "appropriate relief". In fact, in *Fosé* the Court held that, if necessary, courts may have to fashion new remedies to secure the protection and enforcement of constitutional rights.²¹ However, it has always been made clear that awarding constitutional damages would be considered as an exceptional remedy, since the concept is fraught with difficulties. Currie and De Waal points out that constitutional remedies should be forward-looking, community-orientated and structural.²² An award for damages in common law is typically not forward-looking but rather requires a court to look back to the past in order to determine how to compensate a victim or how to punish a violator.

Furthermore, in *Steenkamp v Provincial Tender Board, Eastern Cape*²³ the Constitutional Court explained that the breach of a constitutional or statutory duty is not wrongful solely on the basis of delict. In addition it must be in the court's appreciation of the community's sense of justice reasonable to compensate the plaintiff, for instance where an administrative decision was taken in bad faith or under corrupt circumstances. However, despite these difficulties Currie and De Waal contend that there are at least two reasons why the development of such a remedy is necessary.²⁴ In the first place there are certain circumstances where a declaration of invalidity or an interdict would make little sense so that an order for damages would then be the only form of relief to vindicate the particular fundamental right. Secondly, the possibility of a substantial award may encourage victims to litigate. In

²¹ *Fosé v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.

²² Currie and De Waal *Bill of Rights Handbook* 200 *et seq.*

²³ *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

²⁴ Currie and De Waal *Bill of Rights Handbook* 200 *et seq.*

this sense the *Constitution* is vindicated and further infringements may be deterred.²⁵

Private law actions for damages aim to compensate a victim for harm caused to him or her by the wrongful conduct of another. An action for constitutional damages *qua* public law action has other objectives in addition to compensation. In particular circumstances it may be that delictual damages may be sufficient to vindicate a plaintiff's constitutional rights. In *Fosé* the Court was not persuaded that punitive damages would effectively deter the police from torturing suspects. It found that in a country where there is a great demand for scarce resources, it would be inappropriate to use them to pay punitive damages to a plaintiff who had already been compensated by way of delictual damages. The following principles emerged from the decision:

- In a situation where the violation of a constitutional right entails the commission of a delict, an award for damages over and above those available under common law is not likely to be granted since it will amount to punitive damages.
- Even where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of a person's fundamental rights. This much emerged from the Court's reserved attitude towards the granting of an award for constitutional damages. It found that a declaratory order combined with a suitable order for costs would be sufficient to vindicate the right if no other remedy was appropriate.

Also, in *Government of the Republic of South Africa v Von Abo*²⁶ it was held that a plaintiff would at least have to show that there was a causal connection between his or her loss and the breach of a constitutional right.

The unqualified awarding of constitutional damages by the Court in *M*, despite the Constitutional Court and Supreme Court of Appeal repeatedly sounding a cautious

²⁵ Currie and De Waal *Bill of Rights Handbook* 201.

²⁶ *Government of the RSA v Von Abo* 2011 5 SA 262 (SCA).

note about this type of award, indicates a definite inclination to develop new remedies to compensate children. As such, it reflects a liberal view of the interpretation of a child's right to care as set out in the *Children's Act* and the *Constitution*. This unqualified award of an order for constitutional damages is problematic, as will be explained in paragraph 2.5 *infra*. Equally obvious is the Court's omitting to refer to the best interests of the children. This is remarkable in view of the fact that their care is directly related to their best interests. This aspect will be addressed in paragraph 3 *infra*.

2.5 The Court's views of care in terms of the Constitution and the Children's Act

In *M* the Court specifically focused its decision on parental care, which "[i]n general includes a show of love and affection by the parent to the child".²⁷ The Court should therefore have distinguished parental care from the other forms of care referred to in section 28(1)(b). It failed to do so, unfortunately, and awarded constitutional damages without any such differentiation. It is suggested that this omission bears testimony to an impoverished view of the nature of the care exercised by the respective bearers of care set out in section 28(1)(b).

While parental or family care is "exercised" in the family as an institution qualified by love,²⁸ the same cannot be said of "appropriate alternative care", which will normally be provided by an organ of State. While it is trite that organs of State are bound to protect and further the best interests of children, the same does not hold true for parents and the family of a child. This distinction is of particular importance: should an alternative care-giver fail to provide the child with one or more of the aspects identified by the Court, the child surely would be able to approach a court on the basis of the State's non-compliance with its statutory obligation to treat the child's best interests as a paramount consideration.

²⁷ *M v Minister of Police* 2013 5 SA 622 (GNP) para 23.

²⁸ See *Van Niekerk v Van Niekerk* 1959 4 SA 658 (GW); *Joshua v Joshua* 1961 1 SA 455 (GW).

However, should the parent or family fail to provide care for the child as set out in the Act, different questions arise. This interpretation stems from the fact that each family- or parent-child relationship is unique. As a consequence it is not possible to frame generally applicable legal prescripts to apply to all families generally. It is suggested that the incidents set out in section 1(a) of the *Children's Act*, as elaborated by the Court, are qualified by love in the parent- or family-child relationship. On the other hand, organs of State are duty bound by statute to perform these tasks. The child's right to the incidents of care espoused in section 1(a) and his or her best interests must be treated differently in the parent-child and state-child relationships respectively. This difference has a direct impact on the claim for damages for the infringement of the child's right to care.

Reference may be made to German law to illustrate the difference between care by organs of State and parents. Contrary to parents, who are primary care-givers, alternative care is exercised by secondary care-givers. The role of the State consequently is of an accessory nature.²⁹ In essence it is accepted that parents are the primary care-givers of their children and that the parent-child relationship is of a delicate and interwoven nature. It is the duty of the State to respect and protect it:

[D]ie Eltern haben das Recht die Pflege und Erziehung ihrer Kinder nach ihren eigenen Vorstellungen frei zu gestalten, und geniessen insoweit ... Vorrang vor anderen Erziehungsträgern.³⁰

The delicate nature of the relationship would accordingly be disturbed if it were to be seen as a legal relationship characterized by reciprocal rights and duties or as one determined by statutory provisions, the primary remedy for infringement of which is of a legal nature. The accessory role of the State requires of it to provide measures and means to assist parents to fulfill their responsibilities towards their children.

²⁹ See Robinson 1992 *SAPL* 228 and the sources referred to.

³⁰ Bundesverfassungsgericht Entscheidung (24) 119 in 1968 *Neu Juristen Woche* 2333 at 2335.

Robinson³¹ explains the position thus:

[d]aar nie 'n algemene reg vir die kind teenoor sy ouers bestaan waardeur hy hulle tot nakoming van hulle ouerlike reg ooreenkomstig die pligaard daarvan kan verplig nie, hoofsaaklik vanweë die feit dat die unieke, subjektiewe omstandighede in elke familie die toepassing van algemeen-geldende positiefregtelike voorskrifte ondoenlik maak. Die staat se verpligting om die grondregte van die kind te verwesenlik word egter geensins hierdeur beïnvloed nie. ... Die ingrype deur die staat is eers toelaatbaar wanneer die ouerlike optrede binne die raamwerk van artikel 1666 BGB tuisgebring kan word, naamlik wanneer die skending van die ouerlike sorgverpligtinge tot ernstige gevaar vir die kind sal lei. Die skending van ouerlike sorgverpligtinge wat nie tot sodanige gevaar lei nie, bly sanksieloos. Individuele beskermingsmaatreëls vir die kind wat steurend op die familie inwerk terwyl die kind nie aan ernstige gevaar blootgestel word nie, sou in stryd met artikel 6(1) van die Grondwet wees, en sou ook nie die belange van die kind bevorder nie. Verpligtinge en optrede binne die familie en ook die persoonlike ontwikkeling van die familielede is eng met mekaar verweef, sodat optrede wat as growwe skending van een van hierdie aspekte aangemerkt kan word, soms slegs aanduidend van 'n 'familiepatalogiese' sindroom kan wees. Die beste hulp vir die kind bestaan daarin dat die familie gehelp/ondersteun word om weer normaal te funksioneer en daar rus 'n verpligting op die staat om sodanige familieondersteunende maatreëls uit te put alvorens meer ingrypende maatreëls ter beskerming van die kind aangewend word. *'n Kind moet ook mindere inbreukmaking op sy individuele belange verduur aangesien die eenheid en integriteit van die familie eweneens belangrik is.* Die algemene standpunt is daarom dat staatlike ingrype in sodanige geval meer skade as goed binne die familieverband sal doen. (emphasis added)

From this brief exposition it emerges that:

- the nature of the care provided by parents/family differs essentially from that of organs of State. Parental care constitutes the primary care of a child and is of a *treuhand* nature, whereas care provided by organs of State is accessory and is often determined by statutory prescripts;
- parents are primary care-givers while the State's duty to care for children is merely of an accessory nature; and
- the nature of the relationship determines whether the best interests of a child apply within the relationship – if parents were to be kept liable on issues of good or better ("*Fragen von gut oder besser*"), this would simply mean that the relationship would be disturbed, as children would then be in a position to

³¹ Robinson 2013 *THRHR* 412.

enforce their own best interest against their parents, even in matters of lesser importance. It is suggested that it cannot be denied that the position of the parents determines the milieu within which the wellbeing of the child needs to be established.

It is suggested that the Court should have reflected more closely on the question of the identity of the party which is bound to provide the child with care for the purposes of awarding constitutional damages. If it is accepted that the right of the child to institute legal action to claim damages against its parent or family is limited by the very nature of the relationship, it goes without saying that the possibility of claims for constitutional damages will also be limited. On the other hand, the position is different where the claim is against an organ of State as the provider of "alternative care". In this instance the claim for lack of care will be based on an infringement of statutory duties. In this instance the nature of the relationship will not pose any limitations on the claim, and the child's best interests will prevail.

3 Minister of Police v Mboweni

The decision in *M* was emphatically overturned in a unanimous judgment by the Supreme Court of Appeal in *Minister of Police v Mboweni*³² (hereafter *Mboweni*).

Pointing out that upholding the *a quo* judgment would "break new ground" and would have "far-reaching ramifications",³³ the Court first dealt with procedural issues.

The appeal came before the Court on the basis of a special case/statement of facts "[a]s if there was a clear-cut issue of law capable of resolution with the barest minimum of factual matter being placed before the court".³⁴ This was an error, the Court found. In fact in *Fosé* and *Kate*, the only two cases in which constitutional damages were awarded, the Courts had been apprised of the facts on which the claims were based. *In casu*, no facts dealing with the issue of the loss of parental

³² *Minister of Police v Mboweni* 2014 6 SA 256 (SCA).

³³ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 4.

³⁴ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 5.

care were placed before the Court. In terms of Rule 33, which deals with statements of facts/special cases, the question of a remedy can arise only after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. To start with the appropriateness of the remedy is to invert the inquiry, which is what had occurred in the *a quo* decision.

The Supreme Court of Appeal found that the statement of facts prepared by the parties did not comply with the requirements of the rules, in that it neither set out the facts that were to serve as the basis for the proposed legal argument, nor did it define the question of law the Court was being asked to determine.³⁵ The Court emphasized that a special case must set out agreed facts, not assumptions. With regard to the claims of the two children, virtually no detail was provided save for a bold statement that the deceased had provided them with parental care. On that basis it was accepted by the parties that they were entitled to constitutional damages: they had been deprived of their biological father and therefore also of their constitutional right in terms of section 28(1)(b) of the *Constitution*.

The Court then proceeded to provide an exposition of the nature of the right of children in terms of the provision, as follows:

The right is couched in the alternative, not as three separate and distinct rights. Children have a right to family care *or* parental care *or* appropriate alternative care. The third of these, which presupposes the absence of the first two, demonstrates that there are alternative ways of ensuring the fulfillment of the right generally embodied in the section. *The right is thus a right that the child will be cared for, that can be fulfilled in different ways. That at least raises the possibility that the right is satisfied if any one of those alternatives exists as a matter of fact. ...* The fact that section 28(1)(b) expresses the right that it embodies in three alternatives, demanded that in the first instance there be a proper analysis of the different elements of the right and, in particular, the relationship between the right to family care and the right to parental care. (italics added)³⁶

The proper approach to the three alternatives, the Court held, is to ensure that children are properly cared for by their parents or families and that they receive appropriate alternative care if such is lacking. It concluded therefore that at least

³⁵ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 6.

³⁶ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) paras 10, 11 (italics added).

superficially the child's rights to care, as guaranteed by the section, are fulfilled if he or she is cared for by any one of those identified or at least that one of those responsible for that care indeed provides it.³⁷

The Court proceeded to illustrate the importance of having a comprehensive exposition of the facts for the purposes of Rule 33 by posing rhetorical questions.³⁸ In the first instance, what would the position have been if the family unit had been disrupted by the death of a parent and the child was thereafter cared for by the surviving parent; and furthermore whether it could be said that there was no infringement of the child's right because it was being fulfilled in a different way. In addition, was the right partly infringed because there was an element of deprivation in the sense that both parents were not participating in the life of the child any more, but only one parent was now carrying the total burden of the care of the child? in connection with the second major issue, the Court posed the question what the position would be if the parents were separated and one parent provided the child's day-to-day care and the other parent died. Would that constitute a deprivation of parental care or had the separation of the father and the mother already done so? *In casu* the Court explained that it did not have a clear picture of the *de facto* relationship between the deceased and his two daughters (the plaintiffs).³⁹

A further issue addressed by the Court related to the question whether, even if the children had been deprived of the care of their father, a right to claim damages had been established.⁴⁰ Did the police's failure to safeguard the deceased while in custody constitute a wrongful act in relation to the children? In order to answer this question, clarity had first be had as to whether the right operated horizontally in terms of section 8(2) of the *Constitution* so as to extend to the policemen *in casu* or, in case it did not, whether the position of state employees was different in view of section 8(1) of the *Constitution*. What was required was to establish whether the

³⁷ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 11.

³⁸ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 12.

³⁹ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 13.

⁴⁰ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 18.

police owed a legal duty to the children to prevent them from suffering the loss of parental care. Not every breach of a constitutional duty was equivalent to unlawfulness in the delictual sense, and not every breach of a constitutional obligation constituted unlawful conduct in relation to everyone affected by it.⁴¹

The Court concluded that the answer must be in the negative.⁴² The police were in breach of the deceased's constitutional rights to human dignity, life and freedom, and security of the person, but this did not necessarily mean that they were under a legal duty to his children to secure their rights in terms of section 28(1)(b).

Whether or not a legal duty to prevent loss occurring exists calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in view of the court, consistent with the common convictions of society.⁴³

The court *a quo* did not undertake this enquiry.

Even if it could be said that the police had a legal duty towards the children, the question remains whether constitutional damages were indeed the appropriate remedy for the breach. The Supreme Court of Appeal pointed out that the true question was whether the existing remedy for the loss of support was inadequate to compensate children for any breach of their right to parental care from their father. Referring to *Law Society of South Africa v Minister of Transport*,⁴⁴ the Court explained that in an appropriate case a private law delictual remedy might serve to protect a constitutionally entrenched right. A claimant who seeks "appropriate relief" may, therefore, "properly resort to a common law remedy in order to vindicate a constitutional right".⁴⁵

⁴¹ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 19.

⁴² *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 19.

⁴³ *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) para 19. Also see *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

⁴⁴ *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC).

⁴⁵ *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 21. Also see *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

The Court pointed out that the court below had not considered whether a claim for damages for the loss of support was an appropriate remedy in this case. The court *a qua* should first have considered the adequacy of the existing remedy and only if it was found to be inadequate should it have considered whether the deficiency could be remedied. Such a remedy would be the development of the common law to accommodate a claim more extensive than one for pecuniary loss. In fact, the Court found that the infringement of constitutional rights may often be appropriately vindicated by resorting to public law remedies.⁴⁶

Against this background the Court referred to *Fosé* to consider the nature of losses that may be compensated,⁴⁷ and found that it was a claim for pecuniary loss of the type ordinarily recoverable by way of the *Aquilian* action. It was not a claim for a *solatium* or for general damages.

4 Some general comments and a conclusion

It is suggested that the Court in *Mboweni* quite correctly indicated that the right to care, contained in s 28(1)(b), is couched in the alternative. However, it is a pity that the Court did not elaborate on the relevance of the identity of the bearer of the obligation to provide such care.

As explained above, this issue will determine whether the child can enforce his/her rights, including his/her best interests, within the relationship, and consequently whether damages may be claimed for the infringement of such rights. If a child cannot claim such damages because he or she has to endure minor infringements thereof, the very nature of the relationship militates against the awarding of damages if an infringement of such rights has taken place. On the other hand, if the infringement is in contradiction of an organ of State's statutory duty, no such limitation exists, and a child would be able to claim damages for such an infringement.

⁴⁶ *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 22.

⁴⁷ *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 24.

Secondly and contrary to the *a quo* decision, the Supreme Court of Appeal made no reference to the provisions of the *Children's Act* regarding the care of a child. It focused solely on the care of a child as the concept enshrined in section 28(1) of the Bill of Rights.

What the decisions of both Courts do have in common, though, is that neither of the courts refers to the constitutionally entrenched right, namely the best interests of a child. It is suggested that the approach of the courts indicates a sound understanding of the applicability of the concept and as such bears indirect fashion on the explanation regarding its interpretation in *S v M*⁴⁸ and *Minister of Welfare and Population Development v Fitzpatrick*.⁴⁹

It is indeed true that section 28(2) has become a key provision in Bill of Rights jurisprudence in the sense that it has helped to develop the meaning of some other rights enshrined in the Bill of Rights. It has also been used to determine the ambit of and to limit other competing rights. However, section 28(2) is not merely a principle that helps the interpretation of other rights – it is a constitutionally entrenched right in itself.⁵⁰ However, proper perspective must be had of the scope and function of section 28(2). It must be viewed against the background described by Sachs J in *S v M*,⁵¹ that no constitutional injunction can in and of itself isolate a child from the shocks and perils of harsh family and neighbourhood environments. The function of the law is to create conditions to protect children from abuse and to maximise the opportunities for them to lead happy and productive lives. The State can therefore not repair disrupted family life, but it can create positive conditions for such repair to take place. Where the rupture of the family becomes inevitable, the State is called upon to lessen the negative effects thereof on children as far as it can.⁵² It needs no further elaboration that this explanation essentially duplicates that of the position in Germany, as set out above.

⁴⁸ *S v M* 2008 3 SA 232 (CC).

⁴⁹ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

⁵⁰ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17; *S v M* 2008 3 SA 232 (CC) para 22).

⁵¹ *S v M* 2008 3 SA 232 (CC).

⁵² *S v M* 2008 3 SA 232 (CC) para 20.

Against this background the approach of the Courts to avoid referring to section 28(2) should be evaluated. It goes without saying that the best interests of the children *in casu* were indeed at stake when their breadwinner was killed. Reference to section 28(2) may easily have been made in view of the exposition in *S v M*⁵³ that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children.⁵⁴ After reflecting on the "very expansiveness" of the paramountcy of the best interests of children and the seemingly inherent weaknesses in the concept which "[c]reate the risk of appearing to promise everything in general while actually delivering little in particular",⁵⁵ the Court set out to establish an operational thrust for the paramountcy principle. It concluded that the word "paramount" is emphatic.

Coupled with the far-reaching phrase "in every matter concerning the child", and taken literally, *it would cover virtually all laws and all forms of public action*, since very few measures would not have a direct or indirect impact on children, and thereby concern them ... This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. *If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of s 28(2).*⁵⁶ (emphasis added)

The above explanation amply illustrates the appropriateness of both Courts' omission to refer to section 28(2). Even though of some relevance, the matter could clearly be dealt with sufficiently on a discussion of the nature of care in terms of section 28(1)(c). It is suggested that the position *in casu* is a fine example where application of section 28(2) would have defeated rather than promoted the objectives of the section.

Thirdly the decision of the Supreme Court of Appeal illustrates the relevance of the distinction between parents as primary care-givers and the State as a secondary care-giver. The respective positions of parents and the State give rise to substantial differences in their respective relationships *vis-à-vis* the child.

⁵³ *S v M* 2008 3 SA 232 (CC).

⁵⁴ *S v M* 2008 3 SA 232 (CC) para 15.

⁵⁵ *S v M* 2008 3 SA 232 (CC) para 23.

⁵⁶ *S v M* 2008 3 SA 232 (CC) para 25.

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List of abbreviations

BYU J Pub L	Brigham Young University Journal of Public Law
Dev South Afr	Development Southern Africa
PER/PELJ	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SAPL	Southern African Public Law
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg