This contribution contains an analysis of the ‘best interests of the child’ jurisprudence of the Constitutional Court of South Africa (the Court), in as far as this jurisprudence reflects the position of the Court that the constitutional provision of the best interests of the child recognises a self-standing right. The jurisprudence of the Court is not analysed from a critical perspective, but rather with a view of establishing what is, in the Court’s view, the independent legal content of the constitutional provision of the best interests of the child. A brief comparative analysis will show that the Court is not alone in viewing the best interests of the child as creating a self-standing right, and shares this position with the Committee on the Rights of the Child and other national courts. The analysis of the Court’s relevant case-law shows that certain entitlements and obligations can be sourced to the application by the Court of the constitutional provision of the best interests of the child. In this manner, the Court created various positive obligations for the state, which, arguably, could not have been created by relying exclusively on other constitutional rights which the children enjoy. While more conceptual clarity is needed in terms of how the best interests of the child operates as a self-standing right, the recognition of the best interests of the child as a self-standing right indicates nonetheless the position of the Court that children need child-focused legal institutions to respond to their needs as legal subjects.

1. Introduction

There is an abundant literature on the rights of children in South Africa and especially in relation to the consequences of their constitutionalisation in section 28 of the Constitution of the Republic of South Africa 1996 (the Constitution) (Sloth-
Nielsen, 1996; Bonthuys, 2005; Proudlock, 2009; Skelton, 2009). South Africa has a supreme Constitution (section 2 of the Constitution) and the Bill of Rights (Chapter 2 of the Constitution), of which section 28 is a part, ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state’ (section 8(1) of the Constitution). An important consequence of this heightened protection granted to the rights of children is that the courts, as the guardians of constitutional supremacy, may invalidate law or conduct (administrative, executive or judicial) which is inconsistent with section 28 of the Constitution. In terms of the substance of section 28, sub-section (3) defines a child as a person under the age of 18, and sub-section (1) provides for child-specific constitutional rights, such as the right to a name and nationality; the right to family and parental care, or to appropriate care when removed from the family environment; the right to basic necessities; the right to be protected against abuse and exploitation in various settings; rights when coming in conflict with the law; the right to legal representation in certain cases; and rights during armed conflict. Section 28(2), which is the focus of this contribution, reads: ‘A child’s best interests are of paramount importance in every matter concerning the child.’

This contribution has a narrow scope, and explores the constitutional jurisprudence in as far as it refers to the constitutional provision of the best interests of the child as a self-standing right.

Section 28(2) is widely applied by the Constitutional Court (hereafter ‘the Court’), and its jurisprudence indicates that it has three functions: being a tool for the interpretation of section 28(1) of the Constitution, when sections 28(1) and 28(2) are read together; a tool for establishing the scope of other constitutional rights and their potential limitations; and a self-standing right (Friedman et al, 2009). Section 28(2) creates ‘a right for children as children – because they are especially vulnerable and because we think they are precious and because their interests have all too often given way to the interests of others’ (Friedman et al, 2009: 47-45). Although section 28(2) ‘re-iterates the common-law standard of the best interests of the child’, a distinction is made between the common-law standard, which is applied by high courts as the upper guardians of children, and the constitutional standard of the best interests of the child, which applies to “every matter concerning the child”’ (Friedman et al, 2009: 47-40).

An unusual aspect of the Court’s jurisprudence is that of approaching section 28(2) as containing a self-standing right, although, unlike section 28(1), section 28(2) does not include the term ‘right’ (Visser, 2007). Whether such an approach is justifiable in the light of the Court’s own lack of clarity on the issue, has been queried (Bonthuys, 2006). Bonthuys (2006) argues that despite rhetorically referring to section 28(2) as a right, the Constitutional Court does not treat it as such. For example, it does not analyse its content, as it does with other rights and seldom uses the limitation inquiry.

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1 Notably, the constitutional rights of children are not limited to the child-specific rights in section 28, although certain age-related restrictions apply regarding certain rights. For example, the right to vote and to be elected is reserved for adults (section 19(3) of the Constitution).