

Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate*

T Boezaart

BA LLB LLD

Professor and Head, Department of Private Law, University of Pretoria

DW de Bruin

BA LLB LLM LLD

Presiding Officer, Children’s Court, Heidelberg

OPSOMMING

Artikel 14 van die Kinderwet 38 van 2005 en die verskyningsbevoegdheid van 'n kind

Artikel 14 van die Kinderwet bepaal dat elke kind die reg het om 'n saak na 'n hof te bring asook om bygestaan te word om 'n saak aldus te bring. In hierdie bydrae word artikel 14 en die invloed/gevolge daarvan op 'n kind se verskyningsbevoegdheid ondersoek. Met die oog hierop word die gemeenregtelike beperkings op 'n *infans* en 'n minderjarige se verskyningsbevoegdheid oorweeg. Daar word ook aangedui hoe hierdie beperkings in die verlede gehanteer is en hoe die rol van byvoorbeeld die kurator *ad litem* in regspraak aangewend en ontwikkel is. Die Grondwet het in artikel 28(1)(h) vir kinders 'n reg op regsvertenwoordiging in siviele sake op staatskoste beding, mits dit andersins tot wesenslike onreg sou lei. Die regspraak het daartoe bygedra dat die onderskeie rolle van 'n kurator *ad litem* en 'n artikel 28(1)(h)-regsvertenwoordiger uitgeklaar is. Alhoewel artikel 14, veral in samewerking met artikel 10, 'n bydrae lewer om kinders se deelname in die regsproses te verseker, word aan die hand gedoen dat artikel 14 nie met die gemeenregtelike beperkings op 'n kind se verskyningsbevoegdheid weggedoen het nie.

1 Introduction

The Children’s Act¹ introduces new possibilities regarding child litigation in South Africa. The inclusion of section 14 in the Children’s Act raises the question whether it is possible for children to institute proceedings in a court. Section 14 states that “[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court”. One of the objectives of the Children’s Act is “[t]o give effect to certain rights of children as contained in the Constitution”.² The Constitution contains a general provision granting “everyone” (thus including children) the right to access to

* We express our gratitude to Professor Johan van der Vyver who read the manuscript and who, through his suggestions and comments, contributed very meaningfully to its refinement. However, we take full responsibility for the views expressed herein.

1 38 of 2005.

2 The introductory part of the long title of the Children’s Act 38 of 2005, hereafter the Children’s Act. See also s 2(b) Children’s Act.

courts.³ Furthermore it adds in the children's section⁴ the right to be assigned a legal practitioner in civil proceedings affecting the child.

The aim of this article is to investigate the common-law rules applicable to a child as a party to litigation in South Africa. Furthermore, it is to determine to what extent section 14 has amended the common-law rules and whether a child can litigate in person without the assistance of his or her parent or guardian and if not, to consider the feasibility of such a development in South African law.

Common-law rules in respect of the child as an *infans*⁵ and a minor have remained unchanged and unchallenged until the partial commencement of the Children's Act in 2007.⁶ The Children's Act *inter alia* pioneered a new era in child participation in legal proceedings which necessitated the consideration of the child's right of access to a court as indicated in section 14 of the Children's Act.⁷

2 Common-law Rules Regarding a Child's Capacity to Litigate

2 1 *Infans*

When considering the child's capacity to litigate, the common law distinguished between the child's capacity as an *infans* and as a minor.⁸ In common law the *infans* had no capacity to litigate, at least not in his or her own name.⁹ Consequently an *infans* could not sue or be sued in his or her own name.¹⁰ The parent or guardian of the *infans* had to sue

3 S 34 Constitution of the Republic of South Africa, 1996, hereafter the Constitution. This section deals with the right of everyone "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". See Davel "General principles" in *Commentary on the Children's Act* (eds Davel & Skelton)(2007) 2-19.

4 S 28(1)(h) Constitution.

5 Minors below the age of seven years.

6 With effect from 2007-07-01 by proclamation published in GG 30030 of 2007-06-29.

7 See De Bruin *Child Participation and Representation in Legal Matters* (LLD thesis 2010 UP) 151, 288 *et seq.*

8 Voet 2 4 4. However, it must be borne in mind that "minor" sometimes refers to all children, thus including *infantes* and sometimes in the narrow sense, only referring to children aged seven and above.

9 Voet 2 4 4, 26 7 12. This incapacity of the *infans* originated from Roman law and was incorporated in common law as part of the Roman law influence in Holland. Compare De Groot 1 8 4; Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

10 Voet 2 4 4; *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A) 66G. Compare Hahlo & Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 376 n 48; Hosten *et al Introduction to South African Law and Legal Theory* (1995) 567; Van der Vyver "Verskyningsbeoegdheid van minderjariges" 1979 *THRHR* 129 130-131; Van der Vyver & Joubert *Persone- en Familiereg* (1991) 174 who refer to an *infans* as "volkome selfverskyningsonbeoeg".

for or be sued on behalf of the *infans*.¹¹ However, the *infans* was the party to the lawsuit¹² and not the parent or guardian.¹³ Therefore, any rights or obligations arising from the court order were the rights and/or obligations of the *infans*.¹⁴ The parent or guardian had to represent the *infans* in court because the *infans* did not have independent standing in court.¹⁵

2.2 Minors¹⁶

In general, a minor had limited capacity to litigate¹⁷ as a plaintiff, defendant, applicant or respondent in a civil lawsuit.¹⁸ The general tenor regarding litigation in the common law involving minors was that minors had no *persona standi in iudicio*¹⁹ and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.²⁰ The minor had to be assisted by his or her natural guardian when issuing summons or be assisted by his or her guardian in a representative capacity when being sued. Alternatively an action could

-
- 11 De Groot 1 4 1, 1 6 1, 1 7 8. He confirms at 1 8 4 that all legal proceedings must be conducted in the name of the guardian. Compare also Voet 2 4 4, 5 1 11, 26 7 12; Van Leeuwen *Rooms-Hollands Recht* 5 3 5; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 4 1 and 1 8 4; Van der Linden *Koopmans Handboek* 3 2 2.
 - 12 Spiro *Parent and Child* (1985) 199.
 - 13 Voet 2 4 4 informs that an *infans* cannot in any way issue summons or be summoned but is represented by his or her parents or guardians.
 - 14 Van der Vyver 1979 *THRHR* 131; Van der Vyver & Joubert 174.
 - 15 Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.
 - 16 Ie "minor" in the narrow sense: children aged seven or more but below the age of majority. See n 7 above.
 - 17 De Groot 1 4 1, 1 8 4. Compare Van der Vyver 1979 *THRHR* 131; Spiro 202 *et seq.*
 - 18 *Van Rooyen v Werner* (1892) 9 SC 425 430; *Lasersohn v Olivier* 1962 1 SA 566 (T); *Wolman v Wolman* 1963 2 SA 459A-B; *President Insurance Co Ltd v Yu Kwam* 1963 3 SA 766 (A) 772C; *Jones v Santam Bpk* 1965 2 SA 542 (A) 546D; *O'Linsky v Prinsloo* 1976 4 SA 843 (O) 846-847; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 386E-F.
 - 19 De Groot 1 4 1 mentions the exception in criminal matters where minors had to appear in court themselves.
 - 20 De Groot 1 4 1 explains that minors do not have the capacity to litigate because they do not care for themselves or manage their own affairs. See also De Groot 1 6 1, 1 7 8, 1 8 4; Groenewegen *De Leg' Abr* 3 6 3 2; Van Leeuwen 5 3 5. Voet (2 4 4) mentions that minors may not be summoned without the authority of a guardian. He adds (5 1 11) that a minor ought not to institute proceedings without a guardian and explains (26 7 12) that a guardian's duty is to appear on behalf of his ward in legal proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 where he explains that a minor could not appear in court either as plaintiff or defendant without the assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that the principles in law did not allow whatsoever that minors who institute proceedings or defend such proceedings could do so in their own name. Compare Van der Linden 1 5 5 and 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summoned.

be brought by or against the minor assisted by his guardian. A minor who had not reached the “age of discretion”²¹ had to sue or be sued in the name of his or her parent or guardian. Where the minor had reached the “age of discretion” he or she could either act as plaintiff or defendant assisted by the guardian, or had to sue or be sued through the agency of the guardian.²²

3 Interpreting Section 14 of the Children's Act

Section 14 of the Children's Act is one of two predominant sections relating to child participation in legal proceedings, the other being section 10. In terms of section 14 every child has the right to bring, and to be assisted in bringing a matter to court. Section 10 provides for “every child that is of such an age, maturity and stage of development ... to ... participate in an appropriate way”. It also adds that “views expressed by the child must be given due consideration”. The child's right to participate in judicial proceedings can either occur through direct participation “or through a representative or an appropriate body, in a manner consistent with ... procedural rules”.²³ Section 14 thus provides an opportunity to realise section 10 as it links a child's right to participation with his or her right of access to a court.²⁴

Section 14 of the Children's Act has a general application and is thus not confined to matters relating to the Children's Act.²⁵ The Children's Act places a corresponding duty on parents and guardians to represent children and to assist them.²⁶ For the present discussion the question if section 14 has any effect on the common-law rules regarding the child's capacity to litigate, and if so, to what extent, is to be considered. One view is that an extension of the child's capacity to litigate may be derived from a literal interpretation of the words “every child” in section 14.²⁷

Heaton explores the possibility of section 14 amending the common-law rule that an *infans* does not have the capacity to litigate.²⁸ She mentions that it is arguable that section 14 amends the common law by conferring limited capacity to litigate on an *infans* thereby entitling the *infans* to assistance that will supplement the *infans'* limited capacity. She doubts whether the legislature intended to change the common law.²⁹ The reason for this is that it would lead to the extraordinary result that an

21 The “age of discretion” mentioned in *Sharp v Dales* 1935 NPD 392 396 ostensibly refers to an age when the minor knows what is being done on his or her behalf. In *Sharp v Dales* the child was fourteen years old.

22 Compare *Sharp v Dales* 1935 NPD 392 396; *Mokhesi v Demas* 1951 2 SA 502 (T).

23 Art 12(2) United Nations Convention on the Rights of the Child, 1989 (CRC).

24 Albeit not the only opportunity, see s 28(1)(h) Constitution.

25 The only requirement is jurisdiction of the court. The jurisdictional aspect of the children's court is dealt with in s 45 Children's Act.

26 S 18(3)(b) Children's Act.

27 Considered by Heaton *Law of Persons* (2008) 92.

28 90.

29 90, 92.

infans would be able to litigate with his or her guardian's assistance while being unable to enter into an elementary contract with his or her guardian's assistance.³⁰ When entering into a contract is considered, the parent or guardian will have to do so for and on behalf of the *infans* and mere assistance will be insufficient.³¹ Heaton³² comments that a child over the age of seven years has the right in terms of section 14 to insist on having his or her limited capacity to litigate be supplemented by means of his or her parent, guardian, *curator ad litem* or the High Court.³³ It must be noted that section 14 makes no distinction between children below seven and children aged seven and above. It is therefore difficult (or impossible) to read the differentiation into the section.

It has been correctly pointed out that there is a distinction between participation and representation.³⁴ However, will a child not sometimes need the assistance of a legal representative to bring a matter to court? If this is the case, then the interrelatedness of section 14 of the Children's Act and section 28(1)(h) of the Constitution is apparent. The fact that a child sometimes has no capacity to litigate on his or her own does not deprive that child of the right of access to a court in terms of section 14 of the Children's Act.³⁵

Section 39 of the Constitution which deals with the extension and development of the common law in an open and democratic society applies in this regard.³⁶ Reading section 14 of the Children's Act (which includes the phrase "every child") in conjunction with section 39(2)³⁷ of

30 Boezaart "Child law, the child and South African private law" in *Child law in South Africa* (ed Boezaart)(2009) 22-23 agrees that although legislature intended that every child should have access to the courts, it is doubted that this intention included supplementing the *infans's* capacity to litigate.

31 Except if the *de minimis non curat lex* principle applies.

32 *Op cit* 90.

33 The High Court has inherent jurisdiction over all children as upper guardian.

34 Heaton 89 n 44. Because the *infans* has no *locus standi in iudicio*, the parent, guardian or *curator ad litem* institutes the action on behalf of the *infans* and thereby complies with the aim of s 14 of the Children's Act that "every child has the right to bring and to *be assisted* in bringing a matter to a court".

35 Compare *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) where the court appointed a *curator ad litem* to safeguard and investigate the interests of the thirteen children who were held in detention at Dyambo. The court later appointed the same legal representative in terms of s 28(1)(h) of the Constitution so as to allow the wishes and desires of the children to be placed before court (59A-B). See also discussion by Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: An update" 2008 *SAJHR* 500-501.

36 *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 20 - 26.

37 S 39(2) Constitution provides that "[w]hen interpreting any legislation, and when developing the common law, every court ... must promote the spirit, purport and objects of the Bill of Rights". See *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 20.

the Constitution raises the question whether the legislature intended to amend the common law and if so, to what extent has the common law been amended in respect of children's capacity to litigate. The extension and development of the common law in an open and democratic society requires scrutiny of the applicable common-law rules.³⁸ If the legislature intended to amend the child's capacity to litigate the Bill of Rights has to be scrutinised for such an interpretation.³⁹ There is no indication in the Bill of Rights that the legislature intended to supplement the common law in relation to the *infans'* capacity to litigate. There is also no indication in the Children's Act that the legislature intended to supplement the *infans'* capacity to litigate.⁴⁰ The same applies to minors. Section 14 does assure a child of the right to be assisted in bringing a matter to court, thereby complying with the general provision of section 34 of the Constitution.

On the other hand, the Children's Act in some instances where the child's participation is vital, provides a mechanism to enable the child to have access to court. The following are examples:

- (a) The Children's Act provides for participation by the child with regard to parental responsibilities and rights agreements.⁴¹ A child, *with leave of the court*, may bring an application to amend or terminate a parental responsibilities and rights agreement.⁴² If section 14 of the Children's Act granted the child capacity to litigate, why would section 22(6) require the court's permission in this instance? The most likely interpretation seems to be that in this instance the child's right of access to a court in terms of section 14, entails an entitlement to obtain assistance in seeking leave to bring an application to amend or terminate a parental responsibilities and rights agreement. As mentioned above,⁴³ the interrelatedness between section 14 of the Children's Act and section 28(1)(h) of the Constitution becomes apparent because the child will need assistance.⁴⁴
- (b) Similarly section 28 of the Children's Act, when dealing with a court-ordered termination, extension, suspension or restriction of parental

38 Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (eds Mokgoro & Tlakula)(1998) 1A19 mentions that section 39(2) at all times applies to the interpretation of all legislation and the determination of the contents of all rules of common law and not only when considering their constitutionality.

39 Whether directly or indirectly. S 8(3) Constitution states that when applying the provisions of the Bill of Rights in order to give effect to a right in the Bill of Rights, a court must apply or if necessary develop the common law to the extent that legislation does not give effect to that right.

40 Heaton 92 doubts whether it was the intention of legislature.

41 S 22 Children's Act read with regs 7, 8 General Regulations Regarding Children, 2010 contained in GN R261 in GG 33076 of 2010-04-01 and Form 5 issued in terms of Annexure A General Regulations Regarding Children.

42 S 22(6)(a)(ii), 22(6)(b)(ii) Children's Act. See Heaton "Parental responsibilities and rights" in *Commentary on the Children's Act* (eds Davel & Skelton)(2007) 3-16 on which court should be approached for permission to amend or terminate the agreement.

43 See par 3 above.

44 Du Toit in "Legal representation of children" in *Child Law in South Africa* (ed Boezaart)(2009) 106 regards it as implicit that in order to bring a matter to court, a child will need the assistance of a legal practitioner.

responsibilities and rights, grants the child permission to bring such an application.⁴⁵ However, the court's leave is again required for him or her to do so.

(c) The same applies when a parenting plan that was made an order of court has to be amended or terminated: The child acting *with leave of the court* may bring the application.⁴⁶

These examples seem to indicate that section 14 was not intended to deal with the formal requirements applying to litigation by or on behalf of a child. It seems that section 14 grants a child a right to bring his or her case to court without setting out procedural requirements on how that right is to be realised.

4 The Minor's Capacity to Litigate

The parent or guardian of a minor will normally litigate for and on behalf of the child.⁴⁷ The minor (aged seven or more) may sue or be sued in his or her own name assisted by his or her parent or guardian.⁴⁸

Furthermore, courts have a wide discretion to appoint someone to substitute the guardian, commonly known as a *curator ad litem*, in conducting litigation in the name and in the interests of the minor.⁴⁹ Four established instances exist in South African law where a *curator ad litem* may be appointed by a court to represent a minor in legal proceedings.⁵⁰ These instances are where the minor has no parent or guardian,⁵¹ where the interests of the minor clashes with those of the parent or guardian or if a possibility of such a clash exists;⁵² where the

45 S 28(3)(c) Children's Act.

46 S 34(5)(b) Children's Act.

47 See par 2 2 above.

48 Whether the minor is assisted by his or her parent or guardian in litigation the result is the same. It is the minor who is party to the suit and not the parent or guardian. Compare in general Van der Vyver & Joubert 176-177; Cockrell "Capacity to litigate" in *Boberg's Law of Persons and the Family* (eds Van Heerden, Cockrell & Keightley)(1999) 897-900 and authority cited. Boezaart *Law of Persons* (2010) 88 suggests that the two forms, representation and assistance, are interchangeable. See also Heaton 112-113.

49 *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (2011-03-29) par 12. An "ad hoc guardian" as explained in *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1036I.

50 Davel "The child's right to legal representation in divorce proceedings" in *Gedenkbundel vir JMT Labuschagne* (ed Nagel)(2006) 25; Cockrell 902.

51 *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T); *Wolman v Wolman* 1963 2 SA 452 (A) 459; *Mort v Henry Shields-Chiat* 2001 SA 464 (C); *Ex parte Visser: in re Khoza* 2001 3 SA 524 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 175H-J. The court is reluctant to appoint a *curator ad litem* where the minor's guardian is alive and available as mentioned in *Ex parte Opper* 2002 5 SA 125 (C) 128I-J where the court indicated that only in exceptional cases will a *curator ad litem* be appointed.

52 *Curator ad litem Letterstedt v Executors of Letterstedt* 1874 Buch 42; *Wolman v Wolman* 1963 2 SA 452 (A) 459B-D; *B v E* 1992 3 SA 438 (T). See *Martin NO v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035A and 1035C.

parent or guardian of the minor cannot be found,⁵³ or where the minor's parent or guardian unreasonably refuses to assist the minor.⁵⁴ The *curator ad litem* has the child's interests at heart.⁵⁵ This is amplified by the reported judgments to date on the appointment of a *curator ad litem* to assist a child in matters that may possibly affect the interests of that child.⁵⁶ A few examples serve to illustrate such appointments:

(a) The case of *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*⁵⁷ dealt with the joint adoption of children by a same-sex couple. The court had a thorough report filed by a *curator ad litem* appointed by the court *a quo* regarding the welfare of the couple's teenage children and of children (born and unborn) in general.⁵⁸

(b) The case of *S v M (Centre for Child Law as Amicus Curiae)*⁵⁹ involved the sentencing of the primary caregiver of young children. The court appointed a *curator ad litem* to represent the interests of the children of the appellant.⁶⁰

53 As was the case in *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45; *Ex parte Bloy* 1984 2 410 (D). Compare Cockrell 902; Heaton 112-113.

54 *Ex parte Oppel* 2002 5 SA 125 (C) 131. This can be regarded as a form of conflict of interests between the parent or guardian and the child. See further Van der Vyver & Joubert 178; Cockrell 903 n 12.

55 The *curator ad litem* will generally be an advocate whose function will be to present legal argument in favour of the minor: *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035B-C and 1036B. See Kassan *How can the voice of a child be adequately heard in family law proceedings* (LLM dissertation 2004 UWC) 48; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: an update" 2008 *SAJHR* 495 500-502.

56 Eg *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) par 3 201E/F-202A-B; *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T).

57 2003 2 SA 198 (CC).

58 Par 3 201F/G-G/H where the court held that "where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children". Skweyiya AJ observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". Sloth-Nielsen 2008 *SAJHR* 501 rightly questions whether a child's legal representative fulfils or should equate to, a *curator ad litem*. The legal representative does not represent the views of "non-clients" not before court, such as children generally, nor is it clear that all the foreign children as clients in the *Centre for Child Law* case would necessarily have given their legal representative the same instructions.

59 2008 3 SA 232 (CC).

60 Par 6 (240) read with par 30 (250). Sloth-Nielsen 2008 *SAJHR* 501 mentions that the court did not explicitly consider whether the *curator ad litem's* appointment afforded sufficient representation of the children's views as opposed to the children's interests. In par 36 (252-253) of the judgment it is seen that the court did not indicate that the appointment of a *curator ad litem* is not called for when considering the best interests of the child in a criminal matter such as where the best interests of the child are accounted for when considering an appropriate sentence for the child's parent.

In some other instances a minor has full capacity to litigate in civil matters. These are the following:

- (a) When the High Court grants a minor *venia agendi* for purposes of particular proceedings.⁶¹
- (b) Where an unmarried father who is himself a minor is sued in the maintenance court for maintenance of his child.⁶² Likewise a minor complainant has *locus standi in iudicio* to claim maintenance.⁶³
- (c) When a minor intending to get married applies to the High Court for the substitution of parental consent.⁶⁴ It is necessary to distinguish between two situations in this regard. Firstly, where the minor has no parent or guardian or is for any good reason unable to obtain the consent of the parent or guardian the application must be brought to the children's court.⁶⁵ Secondly, where the

61 Applications for *venia agendi* where minors could approach the High Court for an order to institute a civil action may in exceptional circumstances still occur but it is doubtful seeing that the age of majority has been lowered. However, the requirement is that the minor has attained an "age of discretion". In the majority of the applications the applicants were close to majority. See in this regard *In re Cachet* (1898) 15 SC 5 where the petitioner was nineteen years old, but the court refused the application. (The age of majority was twenty one at that stage.) In *Mare v Mare* 1910 CPD 437 the age of the petitioner was not indicated. The court held (438) that the law regarding *venia agendi* had become obsolete. However, in *Ex parte Goldman* 1960 1 SA 89 (D) the court granted an application for *venia agendi* to a twenty-year-old man who was an orphan. (The age of majority was still twenty one.) See further Van der Vyver 1979 *THRHR* 133; Cockrell 904-905 and authority cited; Himonga in *Wille's Principles of South African Law* (gen ed Du Bois)(2010) 188; Heaton 113.

62 *Govender v Amurtham* 1979 3 SA 358 (N) 362B-C. At 362A-B the court held that an order made against an unmarried minor father is not invalid because the minor had no *locus standi*.

63 *Govender v Amurtham* 1979 3 SA 358 (N) 362A-B.

64 Application for substitute consent can be brought to the children's court or the High Court as upper guardian of minors. Applications brought to the children's court are governed by the provisions of s 25(1) Marriage Act 25 of 1961. If the parent, guardian or children's court refuses consent to the marriage of a minor, the minor may on application apply for consent to be granted by a judge of the High Court. See in this regard *Lalla v Lalla* 1973 2 SA 561 (D) 563A-B where the court held that "the very nature of the proceedings disqualifies [the minor] from such assistance as is normally given"; *De Greeff v De Greeff* 1982 1 SA 882 (O); *B v B* 1983 1 SA 496 (N) where a seventeen-year-old girl successfully brought an application for consent to marry. Compare Van der Vyver & Joubert 179 who opine that a minor ought to have capacity to litigate in all cases where application is made to substitute parental consent with that of the High Court as upper guardian of all minors. The phrase "parental substitution" includes that of a person who has received specific parental responsibilities and rights in terms of s 18(1) Children's Act to consent, in terms of s 18(3)(c)(i) Children's Act, to a child's marriage.

65 Reasons abound, eg the parent could have disappeared or has left the country and cannot be traced or is in a coma or is suffering from a mental illness. An application in terms of s 25(1) Marriage Act 25 of 1961 will only be considered by the children's court of the district where the minor is resident if the minor has no parent or is for any good reason unable to obtain the consent of the minor's parents or guardian. The children's court

continued on next page

parent, guardian, or the children's court unreasonably refuses consent.⁶⁶ A judge of the High Court can overrule a refusal by the children's court and can authorise the marriage irrespective of the refusal of the child's parents or guardian.⁶⁷

In exceptional cases, usually in urgent matters, the court will grant permission to persons other than a parent, guardian or *curator ad litem* to act on the minor's behalf.⁶⁸ The court may also use its inherent power as upper guardian of minors to assist a minor.⁶⁹ When a minor institutes proceedings without assistance or required consent, it has been argued that the proceedings are void.⁷⁰ The correct view is deemed to be that

may refuse consent. S 25(1) Marriage Act provides that if the commissioner of child welfare of the district or area in which the minor is resident is satisfied after proper inquiry that the minor has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, such commissioner of child welfare may at his or her discretion grant written consent to such child to marry a specified person. A commissioner of child welfare may not grant consent if any or both parents or guardian of the child refuse to grant consent to the marriage. A minor may not bypass the children's court and approach the High Court in terms of s 25(4) Marriage Act: see *Ex parte Visick* 1968 1 SA 151 (D) 154; *Ex parte Balchund* 1991 1 SA 479 (D). Compare also Van der Vyver & Joubert 510; Sinclair assisted by Heaton *The Law of Marriage* (1996) 367 381; Heaton 106-107. Although the Child Care Act 74 of 1983 has been repealed with effect from 1 April 2010, s 25 Marriage Act 25 of 1961 still applies to the children's court and reference to the commissioner of child welfare and Child Care Act should be substituted with children's court and Children's Act.

- 66 S 25(4) Marriage Act 25 of 1961 allows for such refusal to consent to the marriage of a minor to be considered by a judge of the High Court on application.
- 67 Ss 25(1), (4) Marriage Act 25 of 1961. Compare *Allcock v Allcock* 1969 1 SA 427 (N) 429 where the court explained what s 25(4) required of a judge to apply his mind to: (i) whether the parental refusal is "without adequate reason" and (ii) whether it is contrary to the interests of the minor. Unless he or she is of the opinion both that the parental refusal is without adequate reason and that such refusal is contrary to the interests of the minor, he or she shall not grant consent to the proposed marriage. See also *Ex parte F* 1963 1 PH B9 (N); *Coetzee v Van Tonder* 1965 2 SA 239 (O); *Kruger v Fourie* 1969 4 SA 469 (O); *Jinnah v Laattoe* 1981 1 SA 432; *Ward v Ward* 1982 4 SA 262 (D); *Lalla v Lalla* 1973 2 SA 561 (D) 563A-B.
- 68 See *Ex parte Nader* (an unreported decision discussed by Smit "Ex parte Nader 1975 (O)" 1976 *THRHR* 84) where a third party filed an application for consent to the High Court on behalf of a minor who had to undergo an appendectomy. The required consent was granted by the court. The court did not enquire into whether the applicant had the necessary competency to represent the minor. In *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T) the biological father had instituted an action on behalf of his minor child under the mistaken impression that he was the legal guardian of his child. Compare Van der Vyver & Joubert 179; Cockrell 906.
- 69 As was the case with *Vista University, Bloemfontein Campus v Students Representative Council, Vista University* 1998 4 SA 102 (O) where the court assumed the responsibility for assisting all the minors who were not assisted by their guardians.
- 70 *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T) 69B. As the father, acting *bona fide*, had such a close relationship with the minor, the court

continued on next page

the proceedings are not necessarily void and that a judgment in favour of the minor is valid and enforceable, but not a judgment against the minor.⁷¹

Whether an emancipated⁷² minor has *locus standi in iudicio* is as yet undecided. The question of *locus standi in iudicio* was considered in *Ahmed v Coovadia*⁷³ and *Sesing v Minister of Police*.⁷⁴ In *Ahmed v Coovadia* the court accepted that a minor could be sued without parental assistance if he was bound to an agreement on the basis of his emancipation. It was mentioned that “[t]he authorities seem to show, though not as clearly as one would like, that liability, and therefore *locus standi in iudicio*, is limited to transactions that are connected with the business or other sphere of emancipation”.⁷⁵ In *Sesing v Minister of Police* it was necessary to distinguish between absolute or complete emancipation and relative or incomplete emancipation. The facts of this case are that a minor sued the Minister of Police and a policeman for damages arising from physical injuries sustained in a shooting incident and claimed, *inter alia*, that he was tacitly emancipated. The court decided that there is a difference between the case where a minor, free from parental authority, is permitted to manage his own affairs and the case where a minor, because of disinterest shown by his parent, is left to his own devices. The court ruled that a minor is emancipated when his parent or guardian agrees, either expressly or tacitly, that he can act as an economically independent person. The court came to the conclusion that the minor had not succeeded in proving that he was in fact emancipated. The court left the question open whether emancipation

without any hesitation appointed a *curator ad litem* and granted permission to amend the pleadings (69E-F).

71 Boezaart (2010) 90 adds that this aligns with the principle that a minor acting without authority can improve but not burden his or her position. The general rule in South African law is that minors cannot incur liability without the assistance of their parent or guardian. See Cockrell 906 who informs, with reference to Voet 5 1 11, that it is only a judgment against the minor that is void; a judgment in the minors favour is valid and enforceable against the other party. See too Spiro 201-202; Van der Vyver 1979 *THRHR* 129 141; Van der Vyver & Joubert 182-183.

72 Emancipation was received from Roman-Dutch law. Compare *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Le Grange v Mostert* (1909) 26 SC 321; *Dickens v Daley* 1956 2 SA 11 (N) 13D-E; *Ex parte Van den Heever* 1969 3 SA 96 (EC) 99A-B; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 3 SA 221 (C) 224A-B; *Ex parte Botes* 1978 2 SA 400 (O) 402B; *Sesing v Minister of Police* 1978 4 SA 742 (W) 745H-746A. See also Heaton 115; Himonga 191.

73 1944 TPD 364 366.

74 1978 4 SA 742 (W) 745, 746C. Cockrell “The Law of Persons and the Bill of Rights” in *Bill of Rights Compendium* (eds Mokgoro & Tlakula) (1996) 3E22 in a sound criticism of the judgment based on the Constitution questions whether s 28(2) Constitution might now render a different result on identical facts. His conclusion is that the best interests of the child (based on the paramountcy of s 28(2) Constitution) should not mandate a differential application of settled rules of law in an effort to promote short-term interests of the child. Compare Boezaart (2010) 80.

75 The court also stated that the minor would not be liable on the agreement if the parent retracted the emancipation (366).

includes *locus standi in iudicio*. This case illustrates the precarious position of a minor relying on emancipation to support his *locus standi in iudicio*. In *Sesing v Minister of Police* the minor was left without a remedy.

It is concluded that emancipation does not include *locus standi in iudicio* because emancipation does not create majority status and the consent of the parent can be withdrawn at any time⁷⁶ and in doing so terminate the emancipation of the minor. It appears that in the past courts have frequently assumed that an emancipated minor has *locus standi in iudicio*.⁷⁷ As the age of majority has been lowered, it is probable that it may become less important in the future.⁷⁸ Furthermore, section 28 of the Children's Act will provide a solution as an application can be made in terms of this section to terminate parental responsibilities and rights if circumstances so require.⁷⁹ It is suggested that justice did not prevail in the *Sesing* case. The common law provided solutions such as *venia agendi* or the appointment of a *curator ad litem*. In the *Vista* case the court of its own accord assisted the minors.⁸⁰ However, if all the traditional mechanisms fail, it is suggested that section 14 of the Children's Act should/can in future prevent minors from being denied justice in this way.

76 See Van der Vyver & Joubert 155; Kruger & Robinson "The legal status of children and young persons" in *The Law of Children and Young Persons in South Africa* (ed Robinson)(1997) 28-29 support this viewpoint. See also Cockrell 908-910 nn 29, 30; Heaton 117; Himonga 192 n 203.

77 *Cairncross v De Vos* (1876) 6 Buch 5 where De Villiers CJ said that it had been proved that a eighteen-year-old had been emancipated and acquired a "*persona standi in iudicio*"; *Orkin v Lyons* 1908 TS 164 where the court held that a seventeen-year-old had been emancipated and assumed that he had *locus standi in iudicio*; *Dama v Bera* 1910 TPD 928 where the defence of *locus standi in iudicio* was specifically raised, the court assumed *locus standi in iudicio* and found that the respondent had been emancipated. See also *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 2 SA 11 (N).

78 S 17 Children's Act repealed the Age of Majority Act 57 of 1972 as a whole and with it the possibility of applying for an order to be declared a major. In the majority of cases involving tacit emancipation the minors alleged to have been emancipated were older than eighteen years, with the exception of *Steenkamp v Kamfer* 1914 CPD 877 and *Pleat v Van Staden* 1921 OPD 91 where the minors were seventeen years old and *Ahmed v Coovadia* 1944 TPD 364 where the minor was fifteen-and-a-half years old. See also Cockrell 473; Heaton 115.

79 S 28 Children's Act provides for the termination, extension, suspension or restriction of any or all parental responsibilities and rights. The child in question may bring this application himself or herself, with the court's consent: s 28(3)(c) Children's Act.

80 Especially in child-headed households that are increasingly found in South Africa where a child does not have a parent or guardian. Does this mean that the child does not have a remedy in law? It is submitted that s 14 should be applied and the child may approach the Legal Aid Board for assistance, especially in view of the decision in *Legal Aid Board v R* 2009 2 SA 262 (D).

5 What Has Section 14 of the Children's Act Achieved?

One of the very first cases in which the litigation project of the Centre for Child Law at the University of Pretoria was involved, was *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk*.⁸¹ In *casu* Hartzenberg J observed that the children⁸² involved in a disputed access (now contact) application had an interest in the outcome of the proceedings.⁸³ The court considered the question whether the children ought to be joined as parties in the proceedings and observed that unless they were joined as parties, they would not be able to appeal against an adverse order.⁸⁴

At the request of the mother an application for the appointment of a *curator ad litem* for the children was brought before De Villiers J, who agreed that the children required legal assistance, but was in favour of an appointment in terms of section 28(1)(h) of the Constitution. Section 14 was not operative at that stage. Subsequently a legal practitioner was appointed in terms of section 28(1)(h).⁸⁵ The court voiced its concern regarding the failure of children in general to be granted the opportunity to communicate their views or to have their interests independently placed before the court.⁸⁶ The court emphasised that the Constitution enjoins the court to protect the best interests of children and only if the children or somebody on their behalf presents the views of the children to the court, will the court have a balanced presentation of the situation.⁸⁷ The two children were later joined as parties to the proceedings.

81 [2005] JOL 14218 (T).

82 Two girls aged fourteen and twelve years of age.

83 Par 8. The mother refused the children's father contact with his daughters because of his alleged violent behaviour. The court ordered the parents and children to submit themselves to therapy to try and normalise family relationships. However, the children refused to submit to treatment.

84 Par 8 with reference to *Re Children Aid Society of Winnipeg and AM and LC Re RAM 7 CRR* where the court held that in a matter dealing with the guardianship of a child, the child can be joined as a party in order to allow the child to appeal an adverse order affecting the child. Furthermore, that this gives proper effect to the provisions of section 28(1)(h) Constitution.

85 Par 5. De Villiers J indicated that he was of the view that it would be better for the State Attorney to appoint a legal practitioner in terms of s 28(1)(h) Constitution. Following this suggestion, the State Attorney appointed Adv Scales as representative of the children.

86 Par 6.

87 Par 7 and 8 where the court remarked that the appointed legal practitioner will be best equipped to present the case for the children if he can do so independently from both parents. See also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 53 (787H-788A/B) where Sachs J remarked that the court has not had the assistance of a *curator ad litem* to present the interests of the children. In the High Court it was accepted that the state would represent the interests of the children which the court found "unfortunate". The children, many of whom would have

continued on next page

The question now remains whether section 14 would have made any difference if the section was in effect at the time. It is apparent from the wording of section 14 that the legislature intended to align this right of the child with the general provision contained in section 34 of the Constitution.⁸⁸

Comparing section 10 of the Act with the provisions in article 12⁸⁹ of the Convention on the Rights of the Child and article 4(2) of the African Charter on the Rights and Welfare of the Child,⁹⁰ justifies the conclusion that section 10 should be read with section 14 of the Children's Act to extend the child's participatory right to be heard in matters affecting the child.⁹¹ Section 14 in turn enhances the child's participatory right by extending this right of the child to matters where the child initiates civil litigation.⁹² When comparing section 14 with article 12(2) of the

been in their late teens and capable of expressing their views, were not given that opportunity. The court made the very important remark that "[a]lthough both the State and the parents were in a position to speak on their [the children's] behalf, neither was able to speak in their name". This view was reaffirmed in *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) par 3 (201E/F-202A-B) by Skweyiya AJ; see n 57 above.

- 88 "[E]veryone" in s 34 Constitution includes a child and s 14 Children's Act transmits this right to children in the Children's Act. S 34 Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. Compare Davel (2007) 2-19; Heaton 89.
- 89 Art 12(1) CRC provides that states parties are obliged to ensure that children who are capable of forming their own views are given the opportunity to express those views in all matters affecting them. Furthermore, the views of children must be considered in accordance with the age and maturity of those children. Art 12(2) CRC enables state parties to enact procedural rules obliging the participation of children in any matter affecting them but not to restrict the participation of children. Compare Van Bueren *The International Law on the Rights of the Child* (1995) 139; Lückner-Babel "The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child" 1995 *IJCR* 391 397-398.
- 90 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) (ACRWC).
- 91 Art 4(2) ACRWC provides that children who are capable of forming their own views have the right to express those views freely in all judicial or administrative proceedings affecting them. Davel (2007) 2-14 comments that the right of the child to be heard as provided in art 4(2) ACRWC may at first glance appear to be more restricted than the scope of art 12 CRC. However, the ACRWC is specific with its provision that the child may be heard as a party to the proceedings either directly or through an impartial representative. The importance of this provision is found in the determination of how the child is to be heard. See further Davel (2006) 20-21.
- 92 S 28(1)(h) Constitution does not refer directly to the child's right of participation but implies such a right in civil proceedings. The same argument prevails for the child's right of access to a court. It may be argued that s 28(1)(h) Constitution implies such right of access for the child. Therefore, it is submitted that both sections 10 and 14 align with s 28(1)(h)

continued on next page

Convention on the Rights of the Child⁹⁵ and article 4(2) of the African Charter,⁹⁴ the section should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered in court.⁹⁵ Therefore it can be argued that section 14⁹⁶

Constitution. Davel (2007) 2-23 points out that the limitation of “substantial injustice” in s 28(1)(h) Constitution is not found in s 14 Children’s Act. The word “assist” further enhances the participatory right of the child.

- 93 Art 12(2) CRC provides for the participation of a child and the representation of the child in judicial proceedings. Art 4(2) ACRWC has a similar though different worded provision. The provision that the child “shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child” is the execution of the assurance given in art 12(1) CRC and therefore the precursor “[f]or this purpose”. Art 37(d) CRC provides that every child deprived of his or her liberty shall have the right to “prompt access to legal and other appropriate assistance” as well as the right to challenge the legality of such deprivation of liberty before a court or other competent, independent and impartial authority. Where a child is removed and placed in temporary safe care without a court order in terms of s 152 Children’s Act, the removal is to be “reviewed” by the court as soon as possible. The deprivation of the child’s liberty in a children’s court matter is no less traumatic than the deprivation of a child’s liberty in a criminal matter. Yet in a criminal matter art 37(d) CRC comes to the child’s rescue with prompt access to legal assistance. However, in children’s court proceedings the presiding officer decides, in terms of s 55 Children’s Act, if it would be in the best interests of the child to have legal representation and then refers the matter to Legal Aid South Africa who uses the substantial injustice criterion.
- 94 A similar provision is found with the words “[i]n all judicial or administrative proceedings affecting a child ... opportunity shall be provided for the ... child to be heard ... as a party to the proceedings”. Kassan 22 agrees that allowing the child as a party to the proceedings “creates the basis for the child to be included as third parties (with representation) in divorce proceedings in addition to their parents being parties”. The application goes further than divorce proceedings and indeed includes all proceedings where the child has a major interest as a party, eg application for protection by a parent in domestic violence, maintenance and care and contact disputes. S 4(4) Domestic Violence Act 116 of 1998 provides that “[n]otwithstanding the provisions of any other law, any minor ... may apply to the court for a protection order without the assistance of a parent, guardian or any other person”. Therefore, any child who is of such age, maturity and stage of development may apply for a protection order and has the right to legal representation at state expense if substantial injustice would otherwise result.
- 95 See *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) par 56 (494 D/E-G). This is in line with the provisions of art 12(2) CRC and especially art 4(2) ACRWC, both of which emphasise the participation through a representative, which may be a legal representative. Art 4(2) ACRWC creates a platform for children to be granted legal representation as a party to proceedings instituted by their parents such as divorce proceedings (Kassan 22). Davel (2007) 2-23 indicates that the word “assisted” in s 14 Children’s Act has a more extensive application than “representation” as found in s 28(1)(h) Constitution. Sloth-Nielsen 2008 *SAJHR* 500 draws an important distinction between the appointment of a *curator ad litem* representing the interests of the child as opposed to the views of the child himself or herself.
- 96 S 14 refers to “every child” and places no limitation on the right of access to court.

is linked to section 28(1)(h) of the Constitution⁹⁷ and extends beyond the reach of section 10 which limits participation to those children who are “of such age, maturity and stage of development” as to be able to participate and express their views in an appropriate way.⁹⁸

The Children's Act extends the jurisdiction in matters in which a children's court may adjudicate.⁹⁹ The provision allowing an application for the care of and contact with a child to be considered by the children's court¹⁰⁰ ensures that more children may have a say as to their right to be cared for and to have contact with their parents.¹⁰¹ The child's right to access a court and to be assisted in doing so enhances the child's participatory right even further.¹⁰²

Recent case law has confirmed that a child may apply directly to the Legal Aid Board for a legal representative to be appointed in terms of section 28(1)(h) of the Constitution: In *Legal Aid Board v R*¹⁰³ a twelve-year-old girl approached Childline for assistance in a divorce dispute where custody was in dispute. The court appointed a legal practitioner in terms of section 28(1)(h) based on its finding that substantial injustice would likely result if a separate legal representative was not appointed for the child.¹⁰⁴ The court held that the Legal Aid Board was entitled at the state's expense to render assistance to a minor in the discharge of the

97 S 28(1)(h) Constitution provides that “[e]very child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”. This is the view of Davel (2007) 2-20. However, Heaton 89 does not agree and argues that assistance does not necessarily mean that the child is entitled to legal representation. She takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 Children's Act links up with s 28(1)(h) Constitution. Assistance is a different concept from legal representation and refers to the conduct that is needed to supplement the minor's limited capacity to act or to litigate. This argument is difficult to implement when a child's guardian is withholding assistance from the child and the child wants to approach the court for a remedy. Eg the child wants to enforce his or her right to maintenance against the child's parents and not one of the parents is willing to assist in bringing the matter to court.

98 See Feldhaus *Kinders se Konstitusionele Reg op Regsverteenwoordiging in Siviele Sake* (LLM dissertation 2010 NWU) 79 for the view that s 14 is broad enough to include assistance by a social worker. See also n 106 below.

99 S 45(1) Children's Act.

100 S 45(1)(b) Children's Act.

101 *B v S* 1995 3 SA 571 (A) 5811-582A/B where the court held that “[i]t is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted”.

102 S 14 Children's Act. See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 30.

103 2009 2 SA 262 (D).

104 Par 20 (269G-H). This validates the view of Davel (2007) 2-24 that it should be possible for a child to apply directly to the Legal Aid Board for a legal representative in terms of s 14 Children's Act. The limitation found in s 28(1)(h) of “substantial injustice” does not apply in s 14. It would thus be possible for the child to be “assisted” by a *curator ad litem* if one of the established grounds in the South African law for the appointment of a

state's obligation in terms of section 28(1)(h) of the Constitution if the failure to do so would otherwise result in substantial injustice.¹⁰⁵ The court further held that the Legal Aid Board was not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court.¹⁰⁶ It is submitted that the Legal Aid Board could also have applied to the court for the appointment of a *curator ad litem* in terms of section 14 of the Children's Act.

Children are guaranteed the right to legal representation in criminal matters.¹⁰⁷ The right to legal representation provided for in section 28(1)(h) of the Constitution extended the scope of legal representation to civil matters and has broadened the range of proceedings affecting children.¹⁰⁸ The provision of section 14 of the Children's Act allows the broadest possible platform of access for children to the court, and the guarantee of legal representation entrenched in section 28(1)(h) of the Constitution ensures that where the assistance for children is required it may best be met by making provision for legal representation.

6 The Effect of Section 28(1)(h) of the Constitution

The paramountcy of the best interests of the child is entrenched in the Constitution¹⁰⁹ However, the Constitution does not directly address

curator ad litem are present. Du Toit 106 shares this view where she comments that it is implicit that in order to bring a matter to court a child will need the assistance of legal practitioners. See fn 43 above.

105 Par 3 (264E/F-F/G).

106 Par 4 (264F/G-G/H).

107 S 35(3) Constitution provides the right of every accused person (and this includes a child) to a fair trial and in par (g) the right to have a legal practitioner assigned to the accused person by the state at state expense, if substantial injustice would otherwise result. Compare further Bekink & Brand in *Introduction to Child Law in South Africa* (2000) 193 that s 28(1)(h) Constitution is an extension of s 35(3). See also Zaal & Skelton "Providing effective representation for children in a new Constitutional Era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 541; De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 466; Kassan 36; Davel (2007) 2-20; Sloth-Nielsen 2008 *SAJHR* 500.

108 Eg *Soller v G* 2003 5 SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); *Legal Aid Board v R* 2009 2 SA 262 (D). Compare Kassan 36-37 who draws a comparison between s 28(1)(h) Constitution, art 12(2) CRC and art 4(2) ACRWC commenting that art 12(2) does not refer to a "legal representative" but a "representative" and art 4(2) an "impartial representative" whereas s 28(1)(h) Constitution refers to a "legal representative". However, the application is broader in s 28(1)(h) with reference to "every child" irrespective of the ability of the child to communicate his or her views. See further Davel (2007); Sloth-Nielsen 2008 *SAJHR* 495-496.

109 S 28(2) providing that "[a] child's best interests are of paramount importance in every matter concerning the child".

participation of children in legal matters.¹¹⁰ The inclusion therefore of section 10¹¹¹ and section 14¹¹² in the Children's Act has bridged this gap. The Constitution does provide for the child's right to legal representation.¹¹³ The nexus between section 14 of the Children's Act and section 28(1)(h)¹¹⁴ of the Constitution has already been referred to.¹¹⁵ The application of section 28(1)(h) has elicited concerns regarding procedural problems that may present themselves.¹¹⁶ However, case law has alleviated some of the procedural problems envisaged. Some of these cases are discussed below.

*Soller v G*¹¹⁷ is the first reported case¹¹⁸ that fully deals with the interpretation and application of section 28(1)(h).¹¹⁹ The matter to be

110 Similar to art 12 CRC or art 4(2) ACRWC.

111 Which prescribes that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

112 Prescribing that "[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court".

113 The interim Constitution of the Republic of South Africa, 1993 did not contain a section granting children a right to legal representation in civil matters.

114 "Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."

115 Par 3 above.

116 Davel (2006) 21 refers to the following issues that need to be addressed: What is the correct procedure relating to the assignment of a legal representative; who should make the assignment, for instance, is it the State Attorney or the Legal Aid Board; can a legal representative be assigned by the High Court; what constitutes "substantial injustice"; who decides whether "substantial injustice" will otherwise result; and according to which principles will this decision be made? Du Toit 101-102 also alludes to practical issues regarding the assigning of a legal representative for a child. She identifies three main issues that need to be considered, namely circumstances under which a child is entitled to a legal representative in terms of s 28(1)(h) Constitution, the implementation of the rights envisaged in terms of s 28(1)(h) and the scope and functions of the legal representative appointed in terms of s 28(1)(h) Constitution.

117 2003 5 SA 430 (W). This case is referred to for its impact on the assignment of a legal representative to a child in terms of s 28(1)(h) Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 Children's Act as it applies to every child and not only those children who are of such age, maturity and stage of development as to be able to participate in an appropriate way.

118 The question of assigning a legal representative in terms of s 28(1)(h) was previously considered in the matter of *Fitschen v Fitschen* [1997] JOL 1612 (C). The application failed due to the court finding that substantial injustice would not result because the children's views were taken into consideration in reports of the psychologists and Family Advocate.

119 Par 3 (434B/C-D); Davel (2007) 2-20; Du Toit "Children" 2009 (1) *Juta Quarterly Review* 2 1, Du Toit 103-104, 107. In *Ex parte Van Niekerk*; *In re*

considered involved an application by a fifteen-year-old boy, K, for the variation of a custody (now care) order in which his custody was allocated to his mother. The court granted K the right to express his views¹²⁰ and in doing so to obtain legal representation in terms of section 28(1)(h) of the Constitution.¹²¹ After the court ascertained that the attorney who brought the application had been struck off the roll of attorneys, Satchwell J decided that the matter warranted the assignment of a legal practitioner in terms of section 28(1)(h) and assigned an attorney on a *pro bono* basis.¹²² The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate¹²³ and elaborated on this distinction.¹²⁴ The Family Advocate is not a legal representative.

119 *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court granted an application assigning a legal representative in terms of s 28(1)(h) without discussing the application in detail, but in *Soller's* case s 28(1)(h) as well as the aim of the section was discussed in greater depth.

120 Par 7 (434G-H) where Satchwell J mentions that “few proceedings [are] of greater import to a child/young adult of K’s age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling”. See also pars 44-48 (443A/B-444B/C).

Par 26 (438A/B-D/E) referring to s 28(1)(h) the court held that what is envisaged is “a ‘legal practitioner’ who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client [the child], present them with logic eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1)(h) ... [requires that] a child in civil proceedings may ... where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner”.

122 Parr 1-17.

123 The referral of a dispute between the two unmarried parents of the child regarding paternity for mediation in terms of 21(3) Children's Act; the registration of a parental responsibilities and rights agreement; input in terms of s 23(3)(a) Children's Act in the application for an order granting care of and contact with the child; an application in terms of s 28(3)(e) Children's Act for the termination, extension, suspension or restriction of parental responsibilities and rights; the preparation of a report and recommendations in terms of s 29(5)(a) Children's Act as juxtaposed with s 29(6) Children's Act regarding the appointment of a legal practitioner; involvement in major decisions involving the child in terms of s 31(1) Children's Act; involvement in terms of s 33(5)(a) Children's Act in the formulation of a parenting plan; involvement in the formalities of the family plan in terms of s 34(3)(b)(ii)(aa) Children's Act.

124 Par 20 (437B-C). From parr 20-29 (437B-438I/J) the court distinguishes between the functions of the Family Advocate and the s 28(1)(h) legal practitioner to represent the child. Davel (2007) 2-21 n 7 briefly refers to a number of articles that have been written on the role of the office of the Family Advocate since its establishment in 1990 in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and explains the functions of the Family Advocate (2-21/2-22). See also De Ru “The value of recommendations made by the Family Advocate and expert witnesses in determining the best interests of the child: P v P 2007 5 SA 94 (SCA)” 2008

The court, while referring to the Convention on the Rights of the Child observed that the significance of section 28(1)(h)¹²⁵ lies in the recognition found in the Convention on the Rights of the Child¹²⁶ that the child's interests and the adult's interests will not always intersect and therefore a need exists for separate representation of the child's views.¹²⁷ K in this case wished to reside with his father and was adamant about his decision. Normally the expressed wishes of the child would only be a persuasive factor in determining the best interests of the child.¹²⁸ With *Soller v G* the court emphasised the importance of giving a child the opportunity to express his or her views and to be assisted in doing so by a legal practitioner assigned in terms of section 28(1)(h).¹²⁹

Following on the decision in the *Van Niekerk* case, the court in *Centre for Child Law v Minister of Home Affairs* drew a distinction between a *curator ad litem* and a legal representative appointed in terms of section 28(1)(h) of the Constitution.¹³⁰ The matter concerned the placement of unaccompanied foreign children¹³¹ with adults in the Lindela Repatriation Centre and the failure to ensure that the children were brought before a children's court as required by the Child Care Act 74 of

THRHR 698-705. De Ru concludes (705) that the importance of the decision is to be found in alerting the courts to the dangers of allowing Family Advocates and expert witnesses to take over the function of the court and the duty of the presiding officer. It may be added that the task of the court would be much easier when the child is also legally represented and the court is allowed to receive the views of the child objectively.

- 125 Par 8. The provision regarding "substantial injustice" in s 28(1)(h) Constitution is not mentioned in the corresponding art 12 CRC.
- 126 Art 12(2) CRC provides that the child be given the opportunity to be heard in any judicial and/or administrative proceedings affecting the child, either directly or through a representative or an appropriate body.
- 127 Par 8-10 (434-435) where Satchwell J discusses the significance of s 28(1)(h) with reference to substantial injustice and refers to Sloth-Nielsen & Van Heerden (1996 *SAJHR* 250) who voiced their concern over the lack of accommodating the child's views when a conflict of interests arises between parents and children in matters affecting children. This question has to a large degree been resolved with the provisions of ss 10 & 14 Children's Act.
- 128 Par 54 where the court observed that it is trite in family law that the best interests of each child is paramount in the custody and access arrangements of such child (now "care" and "contact" in terms of the Children's Act, s 1(1) definition of "care" and "contact" and subs (2). This section became operative from 2007-07-01). The wishes of the child, in the particular circumstances of the family had become the determining factor: par 56. See *McCall v McCall* 1994 3 SA 201 (C) regarding the suggested list of factors to determine the best interests of the child. S 7 Children's Act (in operation since 2007-07-01) has introduced the best interests of the child standard which is applicable in all matters covered by the Children's Act.
- 129 Furthermore, the importance of having a legal practitioner assisting the child highlights the need for legal assistance when the child is involved in civil litigation. This echoes the reason why s 14 needs to be linked to s 28(1)(h) Constitution.
- 130 2005 6 SA 50 (T).
- 131 See further Swart "Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law" 2009 *AHRLJ* 103-128 for insight into the practical treatment of unaccompanied minor refugees in Ghana and South Africa.

1983. The court was concerned about the imminent and unlawful deportation of such children. It appeared that the children who were deported from Lindela back to their countries of origin were loaded into trucks and taken to the train station. There they were transferred onto a train, transported to their country's border, loaded back onto a truck and taken to the nearest police station in that country.¹³² The court held that the way the children were treated resulted in serious infringements of the children's fundamental rights.¹³³

The court at first appointed a *curator ad litem* to represent the unaccompanied foreign children. The powers and duties of the *curator ad litem* for the children were *inter alia* to investigate the circumstances and make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.¹³⁴ The *curator ad litem* subsequently, while reporting back to the court, successfully applied for an order in terms of section 28(1)(h) whereby the commissioner of child welfare in Krugersdorp was instructed to appoint a legal practitioner for each of the thirteen children at Dyambo Youth Centre. The legal practitioner was ordered to appear before the children's court within five days from the date of the order.¹³⁵ The court clearly distinguished between the role of a *curator ad litem* and that of a legal representative appointed in terms of s 28(1)(h).¹³⁶

The appointment of a legal representative for the child concerned was raised *mero motu* by the court in *R v H*.¹³⁷ The mother brought an application for variation of her custody (now care) order with a view to awarding her sole custody and guardianship of the child. Judge Moosa appointed a legal representative, who was subsequently joined as second defendant, for the child after referring to the application of section

132 Par 5 (54B-C).

133 Protected in terms of ss 12, 28(1)(c), 28(1)(g), 28(2), 33, 34, 35 Constitution.

134 Par 6 (54C-E).

135 Par 13 (60I-J) where De Vos J specifically ordered in point 10 of the order that "the ninth respondent [commissioner of child welfare Krugersdorp] appoint a legal practitioner for each of the 13 foreign children presently detained at Dyambo, in terms of s 28(1)(h) of the Constitution of South Africa, 1996, if it appears that substantial injustice would otherwise result".

136 Par 23 (58B/C-C/D) where the court was informed of the children's plight and the ongoing admission of children in the repatriation centre with the appointment of a *curator ad litem*. The court (par 27 (58I)) appointed the *curator ad litem* as the children's legal representative in terms of s 28(1)(h), referring to *Soller v G* 2003 5 SA 430 (W) 438 where the task of a legal practitioner in terms of s 28(1)(h) is set out, and added that all unaccompanied children that find themselves in South Africa illegally should have a legal representative appointed to them by the State (par 29 (59C-D)). See *Martin v Road Accident Fund* 2000 2 SA 1023 (W) 1034B-C that it is sometimes undesirable for a person to be both curator and legal representative.

137 2005 6 SA 535 (C) par 6 (539G/H). The court came to this decision after reading and considering the pleadings. Also cited as *Rosen v Havenga* 2006 4 All SA 199 (C).

28(1)(h) of the Constitution and article 12 of the Convention on the Rights of the Child.¹³⁸

7 Conclusion

Section 14 of the Children's Act entrenches the child's right to bring, and to be assisted in bringing, a matter to a court that has jurisdiction. This right referred to in section 14 is of general application and not limited to the Children's Act only. It opens the door for every child to bring a matter to a court that has jurisdiction.

It is concluded that section 14 did not remove the common law restrictions imposed on a child's capacity to litigate. A recent decision of the High Court and later the Supreme Court of Appeal¹³⁹ left the issue undecided: Four children brought an application to the High Court to protect their interests in a dispute between their parents. They were assisted by the Legal Aid Board. In the court *a quo* Schoeman J dismissed the application and the Legal Aid Board took the matter on appeal. The Supreme Court of Appeal decided that what has been placed before it is no appeal although it was presented as such. The Legal Aid Board was actually applying for a declaratory order and as the Supreme Court of Appeal has no original jurisdiction it could not hear the application.¹⁴⁰ In *casu* the children, aged eleven¹⁴¹ and fourteen, were caught up in a dispute between their divorced parents: At first the parents lived in the same city and were able to manage their joint custody (now care) rights harmoniously. At some stage the mother wanted to relocate to another city and the children approached a Justice Centre¹⁴² for assistance.¹⁴³ The Justice Centre brought an application for the appointment of a legal practitioner under section 28(1)(h) of the Constitution. This application was dismissed¹⁴⁴ and prompted the "appeal". The Supreme Court of Appeal made no order. The *obiter* remarks made no mention of section 14 of the Children's Act or the effect thereof but instead reverted to the

138 Par 6 (5391J-540A/B) citing a number of reasons for considering such an appointment for the child: In the first place, the applicant was seeking drastic relief in the existing access arrangement, which could have serious implications for the child and her father. Secondly, the interests of the child may not be compatible with those of the custodian parent. Thirdly, there may be the need to articulate the views of the child in the proceeding in the interests of justice. Finally, separate legal representation may be in the best interests of the child.

139 *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (2011-03-29).

140 Par 1.

141 Three of the children were eleven years old.

142 The name under which the Legal Aid Board performs its functions in some regions.

143 Their mother previously considered moving abroad but abandoned those plans after an unsuccessful application to the High Court: par 9.

144 "It was taken further off course" per Nugent JA par 20. The court of first instance held the view that the duty of a legal practitioner in terms of s 28(1)(h) would have been "to advance the case of the children" while "independent judgment" was necessary.

existing "ready and simple mechanism"¹⁴⁵ of common law, namely a *curator ad litem*, to overcome the hurdle that "a minor is not generally competent to engage in litigation without the assistance of his or her guardian".¹⁴⁶

The conclusion is reached that the effect is that the common-law rules relating to the child's capacity to litigate have not been amended. It is convincingly argued by some analysts that it could not have been the intention of legislature to amend the common-law rules relating to the *infans'* (or minor's) capacity to litigate.¹⁴⁷ It is suggested that section 14 was not intended to deal with the formal requirements applying to litigation by or on behalf of a child. A minor has a right of access to a court in a matter affecting the minor and children are entitled to be assisted in bringing legal matters to court.¹⁴⁸ However, the means through which they are to present the case are still regulated by the common law.

145 Par 12.

146 Par 11.

147 Heaton 92.

148 Bosman-Sadie & Corrie 30.