

SEVERING THE UMBILICAL CORD: A  
SUBTLE JURISPRUDENTIAL SHIFT  
REGARDING CHILDREN AND THEIR  
PRIMARY CAREGIVERS

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## 1 Introduction

In *S v M (Centre for Child Law as Amicus Curiae)*<sup>1</sup> the Constitutional Court overturned a High Court judgment in which a primary caregiver of children had been sentenced to correctional supervision, including a brief period of imprisonment. The appellant had been convicted on multiple counts of fraud in the Regional Court. The sentence handed down by the High Court on appeal required her to undergo imprisonment prior to possible release on correctional supervision. Her further appeal to the Constitutional Court focused on the duties of a court when sentencing a primary caregiver, given the constitutional injunction that a child's best interests are of paramount importance in all matters concerning the child. The Constitutional Court's judgment subtly adjusts the balancing exercise at sentencing, as governed by the so-called 'triad of *Zinn*' principles. The judgment also provides an endorsement of the usefulness of correctional supervision, one of the benefits of which is the scope that it allows for the application of restorative justice.

The more profound aspect of the judgment in *S v M*, however, lies in its development of child law, and in particular in what the Constitutional Court adds to its previous pronouncements on section 28 of the Constitution<sup>2</sup> – that the section is a statement of realisable and enforceable rights. In *S v M*, the Court pays more detailed attention than previously to the 'best interests of the child' principle. The Court also expands for the first time on what the Constitution means when it says that the best interests of the child are of paramount importance in all matters concerning the child. This case note examines the focus in the judgment on the child's rights as

<sup>1</sup> 2008 3 SA 232; 2007 12 BCLR 1312 (CC); 2007 2 SACR 539 (CC) (*S v M*).  
<sup>2</sup> Constitution of the Republic of South Africa, 1996 (the Constitution).

distinct from the rights of their caregivers. It is argued that this distinction presents a new development in the Court's child rights jurisprudence, and that some of the Constitutional Court's earlier pronouncements on children in relation to their caregivers should be re-examined in the light of *S v M*.

What are the duties of a sentencing court in the light of section 28(2) of the Constitution when the person being sentenced is the primary caregiver of minor children? This question was the central pivot of the arguments and judgment in *S v M*. The case wound its way up to the Constitutional Court by means of a long journey that began in the Wynberg Regional Court. The applicant in the case was M,<sup>3</sup> the mother of three minor children. She was the sole caregiver of the children, and was also the main provider of financial support for their care. She had raised a bond on a modest home in which the family lived on the income she derived from two small businesses. She was convicted on various counts of fraud and theft and was sentenced initially by the Regional Court to four years imprisonment.<sup>4</sup> On appeal, the High Court confirmed her conviction on 38 counts of fraud and three of theft amounting to a total value of just over R19 000. The High Court set aside her sentence and replaced it with a sentence of four years in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, a sentence which incorporates correctional supervision, subject to an initial portion of the sentence being served in prison. The High Court refused the applicant leave to appeal to the Supreme Court of Appeal, and that Court itself turned down a petition for leave to appeal.<sup>5</sup>

The effect of the High Court sentence was that the applicant would have had to serve no less than a total of eight months imprisonment before the Commissioner of Correctional Services could have considered releasing her on correctional supervision. When the applicant noted an appeal in the Regional Court against her sentence, that court denied her bail pending the determination of her appeal. Consequently, the applicant began serving her sentence on 29 May 2003. The High Court granted the applicant appeal bail on 25 July 2003, after she had served just under two months of her sentence. She remained on bail at the time when the matter was heard in the Constitutional Court. The fact that she had served two months in 2003 meant that she was in effect facing a period of no less than six months of further imprisonment in terms of the sentence imposed by the High Court.

<sup>3</sup> The Constitutional Court issued an order on the day of hearing that the citation of the case name should include only the initial of the applicant's surname, in order to protect the identity of her children.

<sup>4</sup> *S v M* (n 1 above) para 3.

<sup>5</sup> *S v M* (n 1 above) para 4.

The Constitutional Court decided to enrol her application for leave to appeal. The Chief Justice issued directions in which he posed three questions,<sup>6</sup> and required that the parties should confine the scope of their submissions to answering these. In addition to the central question of defining the role of a sentencing court when sentencing a primary caregiver of minor children, the Chief Justice also directed that once the duties had been identified, there should be consideration of whether the duties were observed in this case. The final question posed was that if the Court were to find that the duties were not observed, what order (if any) should the Court make?

The Court had asked the Cape Bar to appoint a curator *ad litem* for the children, and the curator compiled a comprehensive report for the Court, in addition to making oral submissions. The Centre for Child Law, which had been granted leave to enter the case as *amicus curiae*, also presented 'wide ranging written and oral submissions on the constitutional, statutory and social context in which the matter fell to be decided'.<sup>7</sup>

The applicant, the curator and the amicus all contended that the sentencing court had a duty to give specific and independent consideration to the effect that sentencing a caregiver to imprisonment would have on minor children.<sup>8</sup> It was conceded that there would be cases where the best interests of the child would be outweighed by the imperative to sentence a caregiver to imprisonment where considerations of proportionality required that. On the facts of M's case, however, it was argued that due consideration of the best interests of the children led to the conclusion that the appropriate sentence would be one that did not require M to spend any further time in prison. It was proposed that conditions could be added to the sentence of correctional supervision to redress the impact of the crime on the victims and to recognise the interests of society.

<sup>6</sup> S v M (n 1 above) para 5.

<sup>7</sup> S v M (n 1 above) para 6.

<sup>8</sup> S v M was not the first case to find that a sentencing court had such a duty. In S v Kika 1998 2 SACR 428 (W) the High Court set aside a sentence of a fine which resulted in imprisonment of a primary caregiver, finding that the magistrate had not considered the impact that the sentence might have on the children. The judge caused the circumstances to be investigated, and sent the matter back to the court a quo for the setting of a fresh sentence, pointing out a court must, when sentencing a primary caregiver, be satisfied that the welfare needs of the children will be met. The direct link with section 28(1)(b) and section 28(2) of the Constitution was first articulated in S v Howells 1999 1 SACR 675 (C); 1999 2 All SA 233 (C) affirmed on appeal by the Supreme Court of Appeal in Howells v S 2000 JOL 6577 (SCA). In that case the court considered the effect that imprisonment of a primary caregiver convicted of fraud would have on the children, but nevertheless decided to set a sentence of imprisonment, whilst making ancillary orders to ensure the children would be adequately cared for.

The response of the National Director of Public Prosecutions, supported in the main by the Department of Social Development and the Department of Justice and Constitutional Development, was that the current operation of the general principles of sentencing provided sufficient room for the consideration of the best interests of the primary caregiver's children. Their submissions were that the courts a quo in this matter had given adequate consideration to the situation of the children, and that the sentence should not be interfered with.

The majority judgment of the Court was written by Sachs J. Characterised by ringing language and memorable passages, the judgment is the Court's clearest and most detailed explanation to date of the content and scope of children's rights as set out in section 28 of the Constitution. The judgment also makes some interesting observations about recent developments in the principles of sentencing, such as the growing recognition of restorative justice,<sup>9</sup> and re-affirms the importance and usefulness of correctional supervision as a form of sentence.<sup>10</sup> For the sake of completeness, this case note will provide an overview of the judgment, including a brief consideration of the Court's findings and observations on sentencing. The major part of the note will expand on the Court's pronouncements on children's rights, and in particular the Court's interpretation of the paramount importance of the best interests of the child as stated in section 28(2) of the Constitution.

## 2 Overview of the judgment

The majority judgment proceeds by delivering responses to the key questions that had been posed by the Court. Expounding on the duties of the sentencing court in the light of section 28(2) of the Constitution when the person being sentenced is the primary caregiver of minor children, the Court begins by considering the current approach to sentencing. Sachs J finds that the *Zinn*<sup>11</sup> triad still retains the status of the 'sentencing north star'.<sup>12</sup> However, this departure point must now be considered in the light of the Constitution, which has transformed the traditional aims of sentencing.<sup>13</sup> In the view of the

<sup>9</sup> *S v M* (n 1 above) para 55.

<sup>10</sup> *S v M* (n 1 above) para 58-59.

<sup>11</sup> In *S v Zinn* 1969 2 SA 537 (A) at 540G-H the appellate division described what has to be considered at sentencing as 'the triad consisting of the crime, the offender and the interests of society'.

<sup>12</sup> *S v M* (n 1 above) para 10 fn 4.

<sup>13</sup> *S v M* (n 1 above) para 10. The court makes reference to the case of *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 3 SA 515 (SCA); 2006 1 All SA 446 (SCA); 2006 1 SACR 243 (SCA); and *Brandt v S* 2005 2 All SA 1 (SCA); *S v B* 2006 1 SACR 311 (SCA). These cases deal with the way in which the Constitution has changed the approach to sentencing of offenders who were below the age of 18 years at the time of the commission of the offence.

Court, the question to be asked was whether the rights of children as set out in section 28 of the Constitution ‘add an extra element’,<sup>14</sup> to the responsibilities of a sentencing court over and above those imposed by the *Zinn* triad, and if so, how are those responsibilities to be fulfilled? In order to examine this question properly, the Court turned its attention to the significance of section 28(2) of the Constitution, namely the ‘best interests of the child’ provision.<sup>15</sup> The detail of this aspect of the judgment will be discussed below. For the moment it is sufficient to note that the Court reiterates that section 28(2) is a self-standing right, as well as being a guideline for the balancing of other rights. The question is not whether section 28 creates enforceable rights – which clearly it does – but rather ‘what reasonable limits can be placed on their application’?<sup>16</sup> In exploring this, the court tackles the issue of what is meant by ‘paramount’. The judgment strives to establish how the paramountcy principle operates in practice, particularly when the child’s rights are being weighed against other important competing rights. The weighing exercise in *M*’s case was that between the rights of the children not to be separated from parental or family care and to have their best interests considered, and the rights of society to be protected by the punishment of criminal misconduct.

Having established the scope and significance of section 28, the inquiry shifted to what the proper approach of a sentencing court should be where the convicted person is the primary caregiver of minor children. Is it enough to consider the plight of the children as part of the *Zinn* triad – that part of the triangle dealing with the criminal and his or her circumstances? Counsel for the Director of Public Prosecutions had argued that the principles of sentencing provided sufficient scope to consider the situation of the children, and that the law needed no development. The Court took a different approach, favouring the view of the *amicus* that a child of a primary caregiver is not a ‘circumstance’ but an individual whose interests needed independent consideration.<sup>17</sup> The weight that would be accorded to those interests would depend on the facts of each case, but the Court determined that there was a duty on any court sentencing a primary caregiver to give separate and specific consideration to the impact that the intended sentence would have on the children. The Court took cognisance of information that had been placed before it about the effects on children of the imprisonment of their primary caregivers. Also considered was the international legal framework, the UN Convention on the Rights of the

<sup>14</sup> *S v M* (n 1 above) para 11.

<sup>15</sup> Section 28(2) reads as follows: ‘A child’s best interests are of paramount importance in every matter concerning the child’.

<sup>16</sup> *S v M* (n 1 above) para 14.

<sup>17</sup> *S v M* (n 1 above) para 30.

Child, and in particular the African Charter on the Rights and Welfare of the Child. Article 30(1) of that Charter contains a unique provision dealing expressly with ‘Children of Imprisoned Mothers’. Of particular relevance were clauses calling on states parties to ‘ensure that a non-custodial sentence will always be first considered when sentencing such mothers’; and to ‘establish and promote measures alternative to institutional confinement of such mothers’. Article 30(1) concludes by reminding the states parties that ‘the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation’.

The Court held as follows:

[F]ocused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts.<sup>18</sup>

The result of the judgment in *S v M*, therefore, is that in each case the sentencing court must give specific attention to the impact the sentence will have on the child or children of a primary caregiver. This does not mean that a primary caregiver will never, henceforth, be given a custodial sentence. The judgment explains quite clearly that the choice of the sentencing option least damaging to the interests of the children is made ‘within the legitimate range of choices in the circumstances available to the court’.<sup>19</sup> In other words, if a non-custodial option is clearly appropriate, the court must impose such a sentence, bearing in mind the interests of the children. If there is a range of appropriate sentences under consideration, the likely negative impact of imprisonment on the children of the primary caregiver will generally tip the balance in favour of a community-based sentence.

If the court cannot reasonably consider a non-custodial sentence in the circumstances, the court’s responsibilities do not end there. The judgment gives step-by-step guidelines indicating that

if, on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.<sup>20</sup>

<sup>18</sup> *S v M* (n 1 above) para 33.

<sup>19</sup> As above.

<sup>20</sup> *S v M* (n 1 above) para 36.

Having enumerated the duties, the majority then applied them to the facts of M's case and decided to overturn the High Court sentence. It was replaced with a sentence that allowed her to serve no further time in prison. The remainder of the sentence was suspended, on various conditions, including correctional supervision for a period of three years, and repayment to the victims of the crime of the monies of which they had been defrauded. In addition to the need to protect the children's best interests, the fact that M had not committed offences for a long time, and had made demonstrable efforts to be a contributing member of society were strong factors influencing the choice of sentence. The Court pondered whether it should, having decided to set aside the order of the High Court, replace the sentence or refer the matter back for the court *a quo* to reconsider. It decided to set a new sentence itself, due to the fact that a significant amount of up-to-date and good quality information had been placed before it.

The Court made several interesting observations regarding sentence. The judgment weighs up the advantages of correctional supervision versus a custodial sentence.<sup>21</sup> Correctional supervision is described as 'a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice.'<sup>22</sup> It is also a sentence that, if applied to those who are likely to respond positively, can protect society without the destructive impact that imprisonment can have on innocent family members. The Court remarked on prison overcrowding, pointing out that rehabilitation is difficult to achieve under such circumstances, and that therefore correctional supervision is a sentence which is more likely to result in rehabilitation.<sup>23</sup> The Court went on to say that '[a]nother advantage of correctional supervision is that it keeps open the option of restorative justice in a way that imprisonment cannot do'. The court

<sup>21</sup> The judgment recalls the Court's earlier judgment in *S v Williams and Others* 1995 3 SA (CC), per Langa J as he then was: 'The development of this process [of correctional supervision] must not be seen as a weakness, as the justice system having "gone soft."'

<sup>22</sup> *S v M* (n 1 above) para 59. The Court refers to the following judgments regarding correctional supervision: *S v R* 1993 1 SA 476 (A); *S v Siebert* 1998 1 SACR 554 (SCA); *S v Ingram* 1995 1 SACR 1 (SCA).

<sup>23</sup> *S v M* (n 1 above) para 61. The Court cites *S v Lebuku* 2006 JOL 17622 (T) para 13 - 15 with approval, where Webster J refers to the 2003/2004 Annual Report of the Inspecting Judge of Prisons in which Judge Fagan recommended the use of non-custodial sentences in appropriate cases, in order to avoid further over-crowding.

explained that central to the notion of restorative justice<sup>24</sup> is the recognition that the community, and not the criminal justice system, that is the site of crime control. The sentence handed down by the Court demonstrates a restorative justice lens, as in addition to being confined to her home when not working, and being required to do 10 hours of community service per week, M was required to pay back her victims, which she had offered to do. With regard to this, a particular point is made:

It would have special significance if she is required to make the repayments on a face-to-face basis. This could be hard for her, but restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.<sup>25</sup>

Writing for the minority,<sup>26</sup> Madala J confirmed the principles decided upon by the majority. He fully agreed that the sentencing court does have a duty to consider the rights of the children when sentencing a primary caregiver. However, applying that approach, Madala J came to a different conclusion. The fact that M was a repeat offender, and that she had committed further offences whilst on bail were factors that, according to the minority, outweighed the children's interests. The overall judgment is not weaker for the minority judgment. The principles are common to both, although the judges differed on the outcome after all the relevant factors had been considered.

### 3 Development of Child Law

*S v M* has developed child law significantly, through its detailed enunciation of the scope and application of section 28. The concept of best interests is put under the spotlight, and the Court spells out the way in which 'paramountcy' referred to in section 28(2) should be

<sup>24</sup> The court cites the following sources on restorative justice: D Pinnock 'What kind of justice?' University of Cape Town, Institute of Criminology Occasional Paper Series 4-95 (1995) available at <http://web.uct.ac.za/depts/sjrp/publicat/whatkind.htm>, accessed on 16 August 2007; and M Batley in Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* Institute for Security Studies, Monograph 111 'Restorative justice in the South African context' 21 <http://www.iss.co.za/pubs/Monographs/No111/Chap2.htm> (*S v M* (n 1 above) n 67). See also A M Skelton 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' unpublished LL.D thesis, University of Pretoria, 2005; A Skelton & M Batley 'Charting progress, mapping the future: Restorative justice in South Africa' Institute for Security Studies and Restorative Justice Centre (2006).

<sup>25</sup> In *Dikoko v Mokhatla* 2006 6 SA 235 (CC), in the dissenting judgment of Sachs J, at para 114, the key elements of restorative justice are listed as encounter, reparation, reintegration and participation. See also the dissenting judgment of Mokgoro J, particularly at para 68. Since *S v M* was heard there have been three other judgments reported which expound upon restorative justice, see *S v Maluleke* 2008 1 SACR 49 (T); *S v Shilubane* 2008 1 SACR 295 (T); *S v Saayman* 2008 1 SACR 393 (E).

<sup>26</sup> Nkabinde J and Navsa AJ concurred with the dissenting judgment.

understood and applied. The Court acknowledges that the concept of best interests is not new to South African courts, as it has long been used as the applicable standard in matters such as care, contact or maintenance. In the family law field it is everyday currency, its most common application being where adult parties are in dispute about the care of or contact with a child. In such cases, the decisions will always be guided fundamentally by what is in the child's best interests.

However, in the new constitutional order, 'the scope of best interests has been greatly enlarged'.<sup>27</sup> Section 28(2) declares the best interests of the child to be of paramount importance, not just in family matters, but in all matters concerning the child. At first blush this formulation seems to have such an all-encompassing reach that questions should be asked about how it can be effectively used in practice. To illustrate this, Sachs J quoted from the judgment of *Jooste v Botha*<sup>28</sup> in which Van Dijkhorst J was so concerned that section 28(2) would over-ride all other legitimate interests, that he felt constrained to interpret the provision only as a general guideline and not as a rule of law of horizontal application. Sachs J points out that Van Dijkhorst J was wrong about this. He explains that while section 28 undoubtedly serves as a general guideline to the courts, its 'normative force' does not stop there.<sup>29</sup> In fact, the Constitutional Court has previously described section 28(2) as an independent, self-standing right,<sup>30</sup> and as 'an expansive guarantee'.<sup>31</sup> Sachs J sums up the unequivocal position of the Court: section 28 establishes a set of children's rights that courts are obliged to enforce.<sup>32</sup>

This leads to another question: If the ambit of children's rights is so wide, in what circumstances can such rights be limited? It is a question that has been pondered by academics for a number of years.

<sup>27</sup> *S v M* (n 1 above) para 12.

<sup>28</sup> 2000 2 SA 199 (T).

<sup>29</sup> *S v M* (n 1 above) para 14.

<sup>30</sup> *In Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC); 2000 3 BCLR 713 (CC) per Goldstone J: 'The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).'

<sup>31</sup> *Sonderup v Tondelli* 2001 1 SA 2001 (CC); 2001 2 BCLR 152 (CC) (*Sonderup*) para 29.

<sup>32</sup> *S v M* (n 1 above) para 14.

Clark,<sup>33</sup> writing in 1998, took the view that children's rights would trump opposing rights. However, her comments related to family law, where the best interests principle is considered the determining factor. Bekink and Bekink considered the matter more broadly, arguing that 'paramount' means that in weighing up competing interests, the scales must tip in favour of the child.<sup>34</sup>

In the case of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*<sup>35</sup> the Constitutional Court provided some clarity on the issue. In the High Court decision in the same matter, the Court had found that children's best interests can never be trumped by the rights of others.<sup>36</sup> The Constitutional Court disagreed, reiterating its approach that constitutional rights are mutually interrelated and interdependent, forming a single constitutional value system. Citing its earlier judgment in *Sonderup*,<sup>37</sup> the Constitutional Court held that section 28(2), like other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in accordance with section 36.

#### 4 What is the meaning of 'paramount importance' of children's best interests?

The question that remained hovering in the air even after the Constitutional Court had ruled in *De Reuck* was: What is to be understood by the phrase 'paramount importance'? Friedman and Pantazis<sup>38</sup> posed the question thus: 'Indeed, if a child's best interests are not always supreme, what is the point of section 28(2)?'

The authors went on to observe that section 28(2) is highly unusual, because it is the only section in the Constitution that applies to a group of people in relation to all aspects of their lives. In their view the section appears to be aimed at creating a right for children

<sup>33</sup> B Clark 'Competing custody rights: New concepts of family and the best interests of the child' (1998) 35 *Comparative and International Law Journal of South Africa* 288 290. See further J Heaton 'Some general remarks on the concept "best interests of the child"' (1990) 53 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 96; B Clark 'A golden thread? Some aspects of the application of the standards of the best interests of the child in South African family law' (2000) *Stellenbosch Law Review* 3; F Mahlobogwane 'South African courts and the "best interests of the child" in custody disputes' (2005) 38 *Comparative and International Law Journal of South Africa* 246.

<sup>34</sup> B Bekink & M Bekink 'Defining the standard of the best interest of the child: Modern South African perspectives' (2004) 37 *De Jure* 21 26.

<sup>35</sup> 2004 1 SA 406 (CC); 2003 12 BCLR 1333 (CC) para 55.

<sup>36</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 3 SA 389 (W) (*De Reuck*) para 45.

<sup>37</sup> 2001 1 SA 1171 (CC); 2001 2 BCLR 152 para 27-30.

<sup>38</sup> A Friedman & A Pantazis 'Children's rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2006) 47-34 - 47-35.

as children – addressing the vulnerability of children, and ensuring that their rights do not, as in the pre-constitutional era, frequently have to give way to the rights of others. Friedman and Pantazis concluded that section 28(2) implies that in every matter where a child's rights are (substantially) involved, those interests must be taken into account. In addition, they said that a child's interests have a leg up *vis-à-vis* other rights and values, though this does not amount to these rights necessarily acting as trumps.<sup>39</sup> The judgment in *S v M* seems to have proved them right.

Sachs J states that what lies at the heart of section 28 is the right of the child to be a child and enjoy special care. In a poetic passage of the judgment, he explains what he means by this:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children. Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.<sup>40</sup>

This forms the crux of the Court's decision that sentencing courts do have a duty to consider the rights of the children when sentencing the primary caregiver. The state's action – imprisonment of an adult – causes the removal of the caregiver from the family home. This directly impacts on the child's right to family and parental care. The Court went on to say that although no constitutional injunction can completely protect children from life's hard knocks, the law can create conditions to protect them from abuse or neglect. In *S v M*, the Court defined the legal duty as ensuring that the best interests of the child are considered by the sentencing court wherever there is a likelihood that the primary caregiver will be removed from the family through imprisonment. The likely effect, where the range of available sentencing options permits it, is to give children's rights 'a leg up' by keeping the caregiver in the family. Where a custodial option is considered by the sentencing court to be the only legitimate course,

<sup>39</sup> Friedman & Pantazis (n 38 above) 47-35.

<sup>40</sup> *S v M* (n 1 above) para 18.

then the court must nevertheless be satisfied that the children will be properly cared for and may make orders to minimise the negative effects on the children.

If children's rights do not always win out over other rights, what is the meaning of 'paramount importance?' The judgment embarks on an exploration of this thorny question. Sachs J comments that the very expansiveness of the paramountcy principle appears to promise everything but deliver little in particular.<sup>41</sup> The best interests concept is indeterminate, resulting in differing views about its meaning by professionals and judges. These problems accepted, the Court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. The determination will depend on the circumstances of each case, and this is not a weakness, but a strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.<sup>42</sup>

The exercise of weighing up the best interests of the child has been clearly articulated by the Court. *S v M* has built on the Court's previous jurisprudence,<sup>43</sup> creating a nuanced model that can be applied in a range of different legal and factual contexts. A more difficult question, concedes Sachs J, is to 'establish an operational thrust for the paramountcy principle'. *S v M* goes further than any previous judgment, though it still defines the principle more by stating what it is not, than by saying what it is. It is not an 'overbearing and unrealistic trump',<sup>44</sup> it cannot be interpreted 'to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations.' Sachs J concludes that 'the fact that the best interests of the child

<sup>41</sup> *S v M* (n 1 above) para 23. See also H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267; D Matlala 'The law reports: Parent and child – paramountcy of a child's best interests' (2006) June *De Rebus* 41.

<sup>42</sup> The Court has re-stated this position in the subsequent judgment of *AD and Another v DW and Others* (*Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party*) 2008 3 SA 183 (CC), per Sachs J para 55: 'Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case ... This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters, such as who bears the burden for proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.'

<sup>43</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC); *De Reuck* (n 35 above); *Sonderup* (n 30 above).

<sup>44</sup> n 1 above, para 25.

are paramount does not mean that they are absolute.<sup>45</sup> To acknowledge all of these realities is important because if the best interests principle is spread ‘too thin’ it risks becoming devoid of meaning, instead of promoting the rights of children as it was intended to do.<sup>46</sup>

Later in the judgment the operation of the principle is explained in a more positive manner. The judgment states that sentencing officers should pay appropriate attention to the children of a primary caregiver and take reasonable steps to minimise damage. It continues thus:

The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.<sup>47</sup>

## **5 The child’s rights separate from adult’s rights: a subtle shift**

A further important feature of the majority judgment in *S v M* is the fact that it carefully focuses on the best interests of the child, and does not get entangled in a debate about the issues relating to the rights of the primary caregiver. The discourse centres on children’s rights to family and parental care, and their right to have their best interests given appropriate weight. Counsel for the National Director of Public Prosecutions attempted to argue that if the sentencing court considers children’s rights, then primary caregivers will gain an unfair advantage in the sentencing process. The majority of the Court rejected this out of hand, saying that ‘the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct.’<sup>48</sup> That, said the Court, would be a mischaracterisation of the interests at stake. The purpose of emphasising the duty of the sentencing court to consider the best interests of the child is not to allow errant parents to escape punishment, but rather to protect innocent children from avoidable harm.

<sup>45</sup> *S v M* (n 1 above) para 26.

<sup>46</sup> *S v M* (n 1 above) para 25.

<sup>47</sup> *S v M* (n 1 above) para 42.

<sup>48</sup> *S v M* (n 1 above) para 35. See, however, Madala J’s dissenting judgment at para 117, where he states that the Court must guard against creating a perception that encourages offenders to use the interests of children as ‘a tool in the judicial process’.

This focus on the child's rights separate from the rights of their caregivers heralds a subtle but significant shift in the Constitutional Court's child rights jurisprudence. Read together with the strong statements earlier in the judgment about children being possessed of their own dignity, and being separate beings who are not merely destined to sink or swim with their parents, the Court's 'new' enunciation of children's rights calls for a re-examination of some of its earlier pronouncements.

The High Court decision in *Grootboom v Oostenberg Municipality & Others*<sup>49</sup> concerned an application brought by a group of 390 adults and 510 children (all of whom were living with their parents) who had not been provided with adequate housing and who, at the time of the initial application, were living on a sports field, following their eviction from land destined for low-cost housing. The applicants succeeded in their argument that because children have an unqualified right to shelter in terms of section 28(1)(c), coupled with the fact that they have a right to be cared for by their families or parents, children had the right to be provided with shelter (together with their parents) until such time as their parents could provide them with shelter. Davis J was careful to point out that the children were the bearers of the right. The fact that they should not be separated from their parents in order to access their rights did not amount to a derivative right for the parents (as had been argued by the applicants), but rather that 'an order that enforces a right to shelter should take account of the need of the child to be accompanied by his or parent'.<sup>50</sup>

The approach of the majority in *S v M* is reminiscent of this way of thinking. The similarities are that in both cases the judgments make it clear that the rights accrue to the child, but because of the imperative to keep children in their families wherever possible, the adult caregiver might also benefit from the required order.

However, the Constitutional Court did not uphold the judgment of Davis J. In *Government of the Republic of South Africa & Others v Grootboom & Others*,<sup>51</sup> the Court found that section 28(1)(c) did not create any primary obligations on the State to provide shelter on demand to children and their parents, but rather that the primary obligation to care for children lay with their parents, and that the state only has the obligation in the alternative to provide shelter

<sup>49</sup> 2000 3 BCLR 277 (C) (*Grootboom 1*).

<sup>50</sup> *Grootboom 1* (n 48 above) 289D.

<sup>51</sup> 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) (*Grootboom 2*).

when, for example, children are removed from their families.<sup>52</sup> The Court found that responsibilities of the state to children in the care of their families extended to providing the legal and administrative infrastructure to ensure that children are protected in terms of section 28(1). Section 28(1)(c), although it contains no internal qualifier suggesting that it is subject to progressive realisation, does not, according to *Grootboom*, provide children with a direct and immediately enforceable right to housing.<sup>53</sup> The Court was concerned that '[c]hildren could become stepping stones to housing for their parents instead of being valued for who they are'. This statement jars with the fact that children in South Africa receive other poverty or care-related benefits, such as child support grants,<sup>54</sup> and there is no serious suggestion that this might lead to them being valued for the money that their presence brings into the household rather than for who they are.<sup>55</sup>

In *S v M* the majority of the Court does not get distracted by any ideas that primary caregivers might use their children as 'stepping stones' to avoid imprisonment, although this kind of argument was advanced by counsel for the National Director of Public Prosecutions. The minority judgment in *S v M* does, however, get mired in this way of thinking. Although Madala J agrees with the majority on the principle that the children of primary caregivers should have their best interests considered and protected, he is concerned about children being 'used' by adults seeking to avoid imprisonment. He cautions that '[t]his Court should be wary of setting a precedent that creates a perception that courts will give primary caregivers a sentence that is disproportionate to what they deserve and which encourages them to use the interests of children as a tool in the judicial process.'<sup>56</sup> These remarks, in contrast to the explanation in the majority judgment that the children are the bearers of the rights

<sup>52</sup> *Grootboom 2* (n 51 above) para 77. The judgment did not state clearly that children living with their parents will not have a claim for the enforcement of their rights in terms of section 28(1)(c), as it uses the term 'for example' when referring to children removed from their primary caregivers.

<sup>53</sup> The Court came to the puzzling conclusion that there was no difference between the right to 'adequate housing' provided for in section 26 and 'shelter' in section 28. Friedman & Pantazis ('Children's Rights' in Woolman *et al* (n 37 above) 46-8) have criticised this interpretation by the court, firstly because it ignores the plain meaning in the two different phrases, and also because the Constitutional drafters' choice of different terminology suggests different conceptual extensions.

<sup>54</sup> In the case of *Khoza and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 6 BCLR 569 (CC) the Court recognised that denial of support to South African born children of foreign permanent residents in South Africa was not only discrimination on the grounds of the parents' nationality, but also trenches on the rights that children have under section 28(1)(c).

<sup>55</sup> Friedman & Pantazis (n 38 above) 47-6 n 2: 'In any case, the state is committed to providing all needy children with child care grants.'

<sup>56</sup> *S v M* (n 1 above) para 117.

and to suggest otherwise is a mischaracterisation, strike a chord that is an echo of children being used as ‘stepping stones’.

Much disappointment has been expressed with regard to the Constitutional Court’s decision in *Grootboom*, viewed from a children’s rights perspective.<sup>57</sup> However, it has also been acknowledged by several writers<sup>58</sup> that the effect of the decision in *Grootboom* – vis-à-vis children’s rights – underwent some adjustment in the case of *Minister of Health & Others v Treatment Action Campaign & Others*.<sup>59</sup> In that case, which dealt with access to treatment to avoid mother-to-child transmission of HIV/AIDS, the Court held as follows:

The state is obliged to ensure that children are accorded the protection contemplated by s 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means.<sup>60</sup>

So the approach adopted in *Grootboom* to the effect that children living with their parents will have to look to their parents, rather than the state, for the fulfilment of their section 28(1)(c) rights was ameliorated.<sup>61</sup> Although the two cases are clearly distinguishable by the fact that shelter is arguably easier for parents to provide than a specialised form of health care, it was significant that the TAC Court

<sup>57</sup> J Sloth-Nielsen ‘The child’s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*’ (2001) 17 *South African Journal on Human Rights* 210; E Bonthuys ‘The South African bill of rights and the development of family law’ (2002) 119 *South African Law Journal* 748; M Pieterse ‘Reconstructing the private/public dichotomy? The enforcement of children’s constitutional social rights and care entitlements’ (2003) *Tydskrif vir Suid-Afrikaanse Reg* 1; S Liebenberg ‘Taking stock: The jurisprudence of children’s socio-economic rights and its implications for government policy’ (2004) 5:4 *ESR Review* 2; and K McLean ‘Housing’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2006) 55.51 - 55.54.

<sup>58</sup> J Sloth-Nielsen ‘Children’ in D Davis & H Cheadle (eds) *The South African constitution: The bill of rights* (2nd ed [date]) 421; Friedman & Pantazis (n 38 above) 47-13; E Bonthuys ‘Children’ in I Currie & J de Waal (eds) *The bill of rights handbook* (5th edition [date]) 613.

<sup>59</sup> 2002 1 BCLR 1033 (CC) (TAC).

<sup>60</sup> TAC (n 59 above) para 79.

<sup>61</sup> S Liebenberg (‘The judicial enforcement of social security rights in South Africa’ in E Riedel *Social Security as a Human Right* (2007) 69) points out that the Court did not conclude that children enjoyed an unqualified, direct claim to the provision of basic health care services, but rather based their finding on the fact that the government’s policy was unreasonable because it excluded a particularly vulnerable group.

gave clarity that section 28(1)(c) rights do not only set an obligation for the state where the child is separated from the parent.<sup>62</sup>

## 6 Conclusion

*S v M* appears to herald a new era in which the fear of children being used as instruments by their parents to advance their parents' rights have been supplanted by a clear recognition of children as rights bearers. Comparisons have been adduced in this article to show that this approach may indicate a subtle shift by the Court to see children as separate from their parents and therefore not 'umbilically destined to sink or swim with them'.

There are, of course, significant differences between cases such as *Grootboom* and *TAC* on the one hand, and *S v M* on the other. The first-mentioned cases deal with socio-economic rights of children. This means that the orders given in those matters potentially had significant cost implications. *S v M* does not create major cost implications, it requires only an investment of time and care on the part of state officials already employed. In such cases it is clearly easier for the Court to make the kind of pronouncements that it has made in *S v M*. *Grootboom* and *TAC* can themselves be separated out from one another. Health care is not something that parents can ever fully provide unless assisted either by private health care providers, or if the parents are poor, by the state. Although the judgments do not fully explain the difference, commentators have mentioned that nutrition and shelter are more likely to be within the scope of what parents can be expected to deliver, whilst health care and social services are more likely to require input by the state.<sup>63</sup>

Children of primary caregivers who are due to be sentenced pose an interesting counter-point. They are still living with their parents, but are at risk of being separated from them. *S v M* found that the state has a duty to create a positive legal environment, and thus sentencing courts now have clear duties that have been articulated by the Court. These arise from the rights of the children, and the majority judgment had no difficulty in dispelling any concerns about

<sup>62</sup> The jurisprudence related to the socio-economic rights of children who are separated from their parents has gradually developed, with the courts finding that such children do have an immediate and directly enforceable claim against the state for the rights included in section 28(1)(h): see *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50, which dealt with the rights of unaccompanied foreign children to receive social services, and *Centre for Child Law and Others v MEC for Education, Gauteng and Others* 2007 1 SA 223 (T), which dealt with children who had been removed from state care and placed in a school of industries where they were living in extremely poor conditions, without adequate social services.

<sup>63</sup> Friedman & Pantazis (n 38 above) 47-12; J Sloth-Nielsen (n 56 above) 225.

the primary caregivers reaping unfair advantages from the fact that they had children. The only distinction that can be made is that *S v M* deals with the right to family or parental care, and does not deal directly with socio-economic rights of the children.

The effect of *S v M* is ultimately to force the state to create a legal environment to facilitate children's rights being recognised and their best interests being met as far as possible through the orders of sentencing courts. To that extent, the judgment accords with the role of the state as outlined in *Grootboom*, which was to create the regulatory environment for the achievement of children's rights. However, in the way that it 'constitutionally imagine[s]'<sup>64</sup> children as separate rights bearers with separately identifiable and enforceable rights, *S v M* takes children's rights a jurisprudential step forward.

<sup>64</sup> *S v M* (n 1 above) para 18.