

PROCUREMENT ADJUDICATION AND THE RIGHTS OF CHILDREN: *FREEDOM STATIONERY (PTY) LTD V MEC FOR EDUCATION, EASTERN CAPE* 2011 JOL 26927 (E)

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1 Introduction

In the last few years there has been increasing interest in the process of public procurement. The emphasis is often on the flaws of the tender processes, such as corruption and disregard for the rule of law, and there is seldom sufficient attention paid to the consequences of the flawed tenders on the rights of the beneficiaries of procured services. The case of *Freedom Stationery (Pty) Ltd v The Member of the Executive Council for Education, Eastern Cape*¹ (the "Freedom Stationery" case) is an exception to this lack, largely due to the intervention of the Centre for Child Law as an *amicus*. Acknowledging that the realisation of the rights of children was affected by the irregular tender process, the court considered the children's education rights when deciding on whether or not to grant the interim interdict in favour of the applicants. The case illustrates how the constitutional rights of children provide the courts with the tools to consider the impact on children's rights and interests of the irregular tender processes regarding services for children. The decision of the court to consider the impact on children of an alleged irregular tender indicates an acceptance by the court that the rights of children may shape the rights (and responsibilities) of those directly involved in the tender process: the state and the bidders respectively.

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¹ *Freedom Stationery (Pty) Ltd v The Member of the Executive Council for Education, Eastern Cape* 2011 JOL 26927 (E) (the *Freedom Stationery* case).

2 Case summary

In 2010 the Department of Education of the Eastern Cape ("the Department") advertised a tender for the manufacturing and supply of stationery for various schools (Grades R-12) in the Eastern Cape. The two applicants, Freedom Stationery Pty Ltd and Afropulse 46 Pty t/a Power Stationery, submitted applications and were notified by the Department that an official recommendation was made that they, together with other suppliers, be awarded the tender.² In January 2011, shortly before the start of the new school year, the Department published a notice in which it cancelled the tender process. Shortly thereafter, and without a new tender process being entered into and followed, the contracts were awarded to the third and fourth respondents (two other companies which had applied for the same tender as the applicants).³ Freedom Stationery (Pty) Ltd requested reasons for the Department's decision to award the contracts to the third and fourth respondents in the absence of a regular tender process, but no reasons were furnished.⁴ The applicants therefore sought review of the decisions. The applicants also sought either fresh adjudication on the tender or the re-advertising of the tender.⁵ In addition, the applicants applied for an interim interdict seeking an order prohibiting the Department from concluding any agreements with the third and fourth respondents for performing the tender contracts.⁶ It is the interim interdict which forms the subject of the judgment indicated above.

The applicants contended that the Department had not complied with section 10(4) of the *Preferential Procurement Policy Framework Act 5 of 2000* and its regulations. These provisions permit the cancellation of tenders only if the goods initially required are no longer needed; or there is a lack of available funds; or a lack of acceptable tenders.⁷ To justify the cancellation of the tender, the Department argued that no acceptable tender was received, as the applicants and the other bidders were disqualified for not having valid tax certificates.⁸ The cancellation of the tender took

² *Freedom Stationery* case para 11.

³ *Freedom Stationery* case para 14.

⁴ *Freedom Stationery* case para 15.

⁵ *Freedom Stationery* case para 1.

⁶ *Freedom Stationery* case para 3.

⁷ *Freedom Stationery* case para 16.

⁸ *Freedom Stationery* case para 17.

place without the applicants being informed about their alleged tax unworthiness and without their being given an opportunity to respond to this allegation.⁹ The applicants were for the first time informed of the reason for their disqualification during the process of the litigation presently under discussion.¹⁰ On being so informed, the applicants then contacted the South African Revenue Services, who established that the tax certificate of the applicants had been erroneously withdrawn; and issued a new tax compliance certificate which was attached to the documentation submitted by the applicants.¹¹

The Centre for Child Law was admitted as *amicus curiae* and raised concerns that the interim relief sought by the applicants – the prohibition of the Department from concluding any agreements with the third and fourth respondents for performing the tender contracts – might violate the constitutional rights of children.¹² The *amicus* put forward two arguments: first, that the Court had an obligation to consider the interests of the learners in balancing the rights of the parties to the dispute;¹³ second, that the access to stationery is an essential part of the right to basic education protected in section 29(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter "the *Constitution*"). The *amicus* also relied, as being paramount, on the consideration of the best interests of the child as protected in section 28(2) of the *Constitution*.¹⁴

The Centre indicated that the schools potentially affected were amongst the poorest in the province, and that 688 482 children would be deprived of stationery pending the finalisation of the litigation.¹⁵ It argued that ordering the Department not to enter into a contract with the third and fourth respondents would result in a delay of the supply of stationery to the schools. This would constitute a severe prejudice to the right to education of the children concerned, as protected by section 29 of the *Constitution*.¹⁶ The *amicus* therefore sought either the dismissal of the urgent

⁹ *Freedom Stationary* case para 19.

¹⁰ *Freedom Stationary* case para 17.

¹¹ *Freedom Stationary* case para 18.

¹² *Freedom Stationary* case paras 6 and 8.

¹³ *Freedom Stationary* case para 31.

¹⁴ *Freedom Stationary* case para 31.

¹⁵ *Freedom Stationary* case para 7.

¹⁶ *Freedom Stationary* case para 8.

application or an order compelling the Department to appoint any of the bidders to deliver stationery to schools in terms of the contract/tender.¹⁷

The interim interdict was granted.¹⁸ In making the decision, the Court had to balance the children's right to education against the applicants' right to just administrative action; and the need to protect those contracting with the government, in order to ensure that the process is 'fair, equitable, transparent, competitive and cost effective', as required by section 217(1) of the *Constitution*.¹⁹ The Court indicated that in order for the rights of the applicants to be given priority over the right to education in this urgent application, their prospect of success in the review application had to be strong.²⁰

Reviewing the relevant authorities, the Court decided that the applicants should have been granted the opportunity to advise the Department on their tax-compliance,²¹ so as to avoid disqualification from the tender contracts. In addition to being procedurally flawed, the tender process was also substantially unfair. Although the Department claimed that no acceptable tender was received because the applicants had not been tax compliant, the Department subsequently granted the contract, or at least a part thereof, to the third respondent, which was one of the short-listed bidders whose tax affairs were not in order. Further, the Department granted the contract, or at least a part thereof, thereof to the fourth respondent, who was not even amongst those initially short-listed in the tender process.²² For these reasons, the Court found the tender process to be irrational and unreasonable.²³

The Court then turned to analysing the arguments of the *amicus*. The position of the *amicus* was that the children's right of access to education was so important that a speedy delivery of stationery was necessary despite the procedural defects in the process. The *amicus* requested that the application for an interim interdict be rejected; alternatively, that the Department appoint any of the bidders to provide the

¹⁷ *Freedom Stationary* case para 33.

¹⁸ *Freedom Stationary* case para 2.

¹⁹ *Freedom Stationary* case para 9.

²⁰ *Freedom Stationary* case para 10.

²¹ *Freedom Stationary* case para 27.

²² *Freedom Stationary* case para 28.

²³ *Freedom Stationary* case para 28.

stationery to the schools in terms of the contract.²⁴ It was thus implied in the submission of the *amicus* that the right to education (as a right of the children *in casu*) trumps the constitutional rights of the applicants.

The Court rejected the arguments of the *amicus*, and stated that "[t]o do so [ie: to accede to the requests of the *amicus*] would unduly benefit some parties at the expense of others"; and that:²⁵

[t]o compel performance by the first and second respondent to appoint either of the competing bidders or a third party to perform in terms of the tender, offends one of the most logical and basic principles in our law, namely that courts should not write contracts for the parties before it.

The Court indicated that in order to secure the rights of the learners it was not necessary to disregard the rights of the applicants. The Court admonished the government for creating a situation characterised by the lack of stationery, transport and food in the Eastern Cape schools, and rejected the contention that the litigation which was commenced by the applicants was the cause of the potential violation of children's right to education.²⁶ The Court indicated that interim plans could be made for the learners to be provided with stationery, such as appealing to charities for support or by searching the government depots for stationery stock.²⁷

In granting the interdict, the Court stated that it would not be possible fully to protect the rights of all of those involved. Granting the interim order would give satisfaction to the applicants' rights, whilst the learners would need to wait a little longer for their stationery. Setting a very near date for dealing with the review application would, however, ensure that no undue delay in the provision of stationery would occur, and the tender could be granted after being properly organised.²⁸ The respondents would then be in a position to award the tender contract lawfully.²⁹

²⁴ *Freedom Stationery* case para 33.

²⁵ *Freedom Stationery* case para 33.

²⁶ *Freedom Stationery* case para 34.

²⁷ *Freedom Stationery* case para 35.

²⁸ *Freedom Stationery* case para 36.

²⁹ *Freedom Stationery* case para 36.

3 Comment

The comments which follow are made mainly from a children's rights-oriented perspective, and the importance of the judgment is considered in the light of enhancing the protection of children's rights.

There are a few issues which give this case significance. The case shows that the constitutional rights of children may have an impact on the rights of tender applicants and on the obligations of the state department involved in the irregular tender. The judgment is pioneering in that the intervention of the *amicus* prompted the court to consider the impact of irregular tender processes on the rights of those who depend on the delivery of services procured by the state. The case reinforces the importance of civil society organisations in promoting and protecting the rights of children through holding the state to account and providing services. These issues are further discussed below.

3.1 *The right to education*

As indicated above, the *amicus* requested the court to consider children's right to education and their best interests in deciding on whether to grant the interim interdict in favour of the applicants. The Court acknowledged that the realisation of the right to education was dependent on the execution of the contractual obligations arising from the tender contract. The Court had to consider children's right to education and balance it against the constitutional rights of the applicants. In this process, the Court referred to a few factors which have had a negative impact on the realisation of children's right to education in the Eastern Cape. The Court remarked that the school transport and feeding schemes have collapsed and that many schools have no teachers.³⁰ The Court seems to have endorsed the argument of the *amicus* that the lack of stationery in the poorest schools in the province would be an obstacle to the realisation of children's right to education. Although the Court did not engage in an extensive analysis of the legal content of the right to basic education, the reasoning of the Court implies that the state has the positive obligations to hire a sufficient

³⁰ *Freedom Stationary* case para 32.

number of teachers, and to provide food, transport to/from school and stationery, where such support is necessary for children to access education.

Although the Constitutional Court is still to pronounce on the nature and the scope of the right to basic education,³¹ this judgment contributes towards crystallising the legal content of the right to basic education provided for in section 29(1)(a) of the Constitution. It is implied in the judgment that the obligations of the state extend beyond providing the physical infrastructure and qualified teachers, to cover the obligation to enable the children to access education facilities by providing them with transport, stationery and the food necessary to sustain learning.

The realisation of the right to education, as a social right, is inevitably dependent on there being available resources. However, unlike the rights to access to adequate housing³² and the rights to have access to health care, food, water and social security,³³ the right to basic education contains no "internal qualifiers or limitations [which] suggests that the right to basic education in section 29(1)(a) requires direct realisation".³⁴ The superior protection afforded to the right to education emphasises the importance of education as a tool for achieving optimal personal and social development.³⁵ In defending its failure to fulfill the right to basic education as a result of a lack of resources, the state will have the difficult task of showing that section 36 of the *Constitution* (the limitation clause) is complied with.³⁶ Although the scarcity of state resources may affect the realisation of the right to basic education, it is not an issue raised by the *Freedom Stationery* case. Rather, the origins of the Department's inability to perform its obligations were of the Department's "own making",³⁷ arising, in this case, from irregular tender processes. This adds, perhaps, a new dimension to the states' obligations arising from section 29(1)(a) – the obligation to engage in good governance practices when administering public resources designed to fulfill the right to education.

³¹ Liebenberg *Socio-Economic Rights* 242. See also Davis "Education".

³² Section 26(2) of the *Constitution*.

³³ Section 27(2) of the *Constitution*.

³⁴ Liebenberg *Socio-Economic Rights* 244. For the same position, see Davis "Education".

³⁵ Liebenberg *Socio-Economic Rights* 244.

³⁶ Liebenberg *Socio-Economic Rights* 244.

³⁷ *Freedom Stationery* case para 34.

3.2 *The best interests of the child*

A further issue in respect of which the case deserves attention relates to the Court's reluctance to use the best interests of the child provision in section 28(2) of the *Constitution*. Section 28(2) of the *Constitution* states that "[a] child's best interests are of paramount importance in every matter concerning the child". Section 28(2) of the *Constitution* plays three functions: it is a tool for the interpretation of section 28(1) of the *Constitution*; a tool for establishing the scope of other constitutional rights and their potential limitations; and a self-standing right.³⁸ The consideration of the best interests of the child has traditionally been applied as a principle in private law matters such as custody, maintenance and adoption. The constitutionalisation of the best interests of the child has, however, extended its application to all areas of law which affect children,³⁹ including public law matters. This is reflected in the more recent jurisprudence, which shows that the best interests of the child have been considered in matters such as juvenile justice,⁴⁰ the sentencing of children's primary caregivers,⁴¹ education,⁴² and refugee protection.⁴³

A question often raised by the application of the best interests provision is whether giving paramount importance to children's interests results in the rights of others being trumped in all circumstances when a conflict of rights arises. According to Skelton,⁴⁴

³⁸ Friedman, Pantazis and Skelton "Children's Rights" 47-40 to 47-41. The development of the consideration of the best interests of the child as a self-standing right started with *Minister for Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17, where the court indicated that "[t]he 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)". Section 7 of the *Children's Act* 38 of 2005, titled "the best interests of the child standard", approaches the best interests of the child as a standard and lists a series of factors to be taken into consideration when assessing a child's best interests. See also Skelton "Constitutional Protection of Children's Rights" 280.

³⁹ Skelton "Constitutional Protection of Children's Rights" 280.

⁴⁰ For child offenders, see Preamble of the *Child Justice Act* 75 of 2008; for child victims see *DPP Transvaal v Minister for Justice and Constitutional Development* CCT 36/08 [2009] ZACC 8.

⁴¹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

⁴² *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (SCA).

⁴³ *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T).

⁴⁴ Skelton "Constitutional Protection of Children's Rights" 280.

[d]espite the emphatic words of "paramount importance", it [section 28(2)] does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited.

South African jurisprudence reflects the approach that section 28(2) is capable of being limited according to section 36 of the *Constitution* (the limitation clause).⁴⁵ Using the limitations clause to attenuate the impact of the requirement to give paramount importance to children's interests in all matters concerning the child can be attributed to courts' view that the consideration of the best interests of the child is not just a principle, but also a self-standing right. Thus, although the approach of the South African courts is slightly different from the international position, which refers to the best interests of the child as a standard or principle,⁴⁶ it offers the certainty of a test to be applied when the best interests of the child come into conflict with the rights of others.

It is regrettable that the Court did not consider it necessary to address the application of the best interests of the child in the current case, despite section 28(2) being relied on by the *amicus*.⁴⁷ In an attempt to prevent any further delays in the provision of stationery to schools, the *amicus* solicited the Court to issue an order enabling the Department to execute the tender contracts, despite of and without rectifying the procedural irregularities in the tender process. No doubt such an order would have been in the best interests of the children, as their needs would have been satisfied immediately and thus placed above all else. Although the Court considered the rights of the children, it decided to limit them temporarily so as to allow the applicants' rights to just administrative action⁴⁸ and to a system of state procurement which is fair, equitable, transparent, competitive and cost-effective⁴⁹ to prevail in this case. The judgment indicates, in line with earlier jurisprudence, that children's rights and their interests are capable of limitation.⁵⁰

⁴⁵ *Sonderup v Tondelli* 2001 1 SA 1171 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

⁴⁶ See for example Alston 1994 *IJLPF* 14; Parker 1994 *IJLPF* 26; Freeman "Article 3"; Committee of the Rights of the Child 1991 www2.ohchr.org.

⁴⁷ *Freedom Stationary* case para 31.

⁴⁸ Section 33 of the *Constitution*.

⁴⁹ Section 217(1) of the *Constitution*.

⁵⁰ *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 26 and jurisprudence cited therein.

In reaching its conclusion the Court preferred to rely exclusively on the right to education. Had the court given attention to section 28(2) it would have enriched the South African jurisprudence on the application of the principle of the best interests of the child in public law matters. The balancing exercise between the rights of children and the rights of others differs markedly in private and public law disputes respectively. In private law disputes, most often "the rights of others" refer to the rights of those who have some form of responsibility towards an individual child or a defined number of children. In public law disputes, quite often, the rights of children are balanced against the rights of persons without special responsibilities towards them (like the applicants in the current case) or against the rights of the general public (see, for example, decisions concerning juvenile offenders). Had sufficient attention been given to the application of the best interests of children, this case could have been a first in discussing the role of the best interests of the child, or children more generally, in tender processes which concern children.

More clarity on the role of the best interests of the child provision would have also enriched the jurisprudence pertaining to the application of the best interests to matters concerning children generally (as opposed to individual children). As discussed elsewhere, the collective application of the best interests of the child raises various challenges.⁵¹ For example, it is sometimes difficult to establish to what types of decisions the best interests provision should apply: does section 28(2) apply only to decisions pertaining to the individual child; or does it also apply to decisions pertaining to children as a class?⁵² If the best interests of the child provision applies to children as a class, what are the criteria for establishing what is in the collective best interests of children? Should the best interests of children as a class be given paramount importance when courts engage in the balancing of rights? What is the weight, if any, of the significant number of children (688 482 children in the case under consideration) whose access to education was threatened? Although it cannot be expected that the Court should have dealt with all of these complex questions in this matter, engagement with the best interests of the child provision might have

⁵¹ Couzens 2010 *THRHR* 266.

⁵² Note the use of the singular "child" in s 28(2) of the *Constitution*. This can be contrasted with the use of plural "children" in art 3(1) of the *United Nations Convention on the Rights of the Child* (1989) which has been interpreted so as to apply to children generally, or as a class (see Alston 1994 *IJLPF* 14; Parker 1994 *IJLPF* 28).

influenced the remedy, if not necessarily the order. The Court was perhaps in a fortunate situation because, as important as stationery might be for accessing education, its absence does not completely deprive children of benefiting from education. The task of the Court would have been much more difficult had the Court been called on to issue a similar interim order pertaining to the acquisition of essential medical equipment or medication.

It might be too pedantic to criticise the Court's lack of attention to the application of the best interests of the child provision in the current case, considering that the judgment pertains only to an application for an urgent interim order. However, had the court considered the role of the best interests of the child in the current dispute, more clarity would have ensued in terms of the scope and the application of the best interests of the child. This case is a first to consider the rights of children in procurement adjudication, and it gave the court the opportunity, which opportunity was not taken, to engage with the role of the best interests of children to receive the services necessary for the fulfillment of their rights when such services, essential as they might be, are procured unlawfully by the state. Children are major consumers of state services – health, education, housing, social assistance – and often the state procures goods which allow it to deliver these services from private entities through tender processes. The irregularity of such processes affects children greatly and using the best interests provision might have given the Court ammunition to be firmer with the Department when granting the interim interdict.

Although this note is critical of the Court for not engaging with the best interests of the child provision, it is not argued here that the Court has acted contrary to the best interests of the child. Although the short-term interests of children were affected by granting the interim interdict, it can be argued that the approach taken by the *amicus* could have led to unwanted consequences for children's long-term interests and for the respect for the rule of law. It would have created a precedent open to abuse, whereby the rules of procurement could be bent in knowledge of the fact that the courts would be slow to upset the *status quo* out of concern that their order would interfere with the realisation of the rights of children. The Court indicated that the prioritisation of children's rights has its limits and the Court was not prepared,

regardless of the importance of the right to education, to breach the rule of law and the basic legal principles of the South African law.⁵³

The Court should be commended for the fact that, without resorting to a formal application of section 28(2), its judgment reflects an approach similar to that in *S v M (Centre for Child Law as Amicus Curiae)* (hereafter "*S v M*").⁵⁴ In that case the Constitutional Court took cognizance of the fact that the right to family care and the best interests of the child cannot always trump the rights of other members of society to be protected against crime. The Court acknowledged that the sentencing officers will not always be able to protect children against the negative consequences brought about by the sentencing of their primary caregivers, and in some cases the incarceration of the primary caregivers cannot be avoided. Notwithstanding this, the courts have an obligation to pay appropriate attention to children's interests and to take reasonable steps to minimise the damage arising from imposing a custodial sentence on the primary caregivers.⁵⁵ This principle, formulated in *S v M*, has a sufficient degree of generality to apply to other situations where a legitimate intervention by the state (including its judicial branch), directed at protecting the rights of others, has the potential to undermine the rights of children. Further support for the application of this principle beyond the sentencing of primary caregivers can be drawn from section 8(1) of the Constitution, which states that the Bill of Rights (which includes the rights of children) binds the judiciary in its exercise of its adjudicatory functions.

Arguably, of course, the Court in the *Freedom Stationery* case did pay some attention to the rights and interests of children, having been prompted to do so by the *amicus*. The Court considered the impact of the lack of stationery on the realisation of the right to education of the children concerned. The Court also attempted to minimise the potential damage to the children's right to education arising from granting the urgent interim interdict: it set up an expedited date for the hearing of the review application and suggested that interim plans be made so that access to

⁵³ *Freedom Stationery* case para 33.

⁵⁴ *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) (*S v M*).

⁵⁵ *S v M* para 42.

stationery was secured pending the Department's entering into a lawful contract for the provision of stationery.⁵⁶

When dealing with a Department whose inefficiency was known to the Court, perhaps a firmer approach was called for to ensure that stationery was provided to children on an interim basis. It took the Department from the beginning of September 2010 until mid-January 2011 to advertise the tender and to make the selection of the successful bidders.⁵⁷ At the time of disposing of the urgent interim it was not known whether the Court would order the Department to adjudicate afresh on the tender or order it to advertise the tender afresh.⁵⁸ It could have been reasonably expected that delays of up to 5-6 months might occur in the finalisation of the tender, judging by the facts of this case. On foreseeing the possibility of 688 482 children being left with no stationery for a lengthy period of time in the middle of their school year, the Court ought to have been firmer and more creative in fashioning the remedy. In constitutional matters, such as the current dispute, the courts have wide powers in selecting the remedy or even creating new remedies.⁵⁹ The remedies used by the courts must be appropriate,⁶⁰ just and equitable,⁶¹ and must be fair to all of those who might be affected by the relief.⁶² Relying on the best interests of the child provision, the Court might have been able to design a remedy more responsive to children's educational needs.

3.3 The role of non-governmental organisations in the realisation of the rights of children

Another aspect of significance which arose from this case is the importance of civil society organisations in promoting and protecting the rights of children. The contribution of non-governmental organisations reflected in this case is two-fold: holding the government to account and contributing to the delivery of essential

⁵⁶ The Court suggested, for example, that charities could be approached for assistance or that the Department checks its depots for available stationery. See *Freedom Stationery case* para 35.

⁵⁷ *Freedom Stationery case* paras 11-14.

⁵⁸ *Freedom Stationery case* para 1 for the applicants' plea.

⁵⁹ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) para 19.

⁶⁰ Section 38(1) of the *Constitution*.

⁶¹ Section 172(1)(b) of the *Constitution*.

⁶² *Hoffmann v South African Airways* 2000 11 BCLR 1211 (CC) para 45.

services. The words of the Constitutional Court in *Mazibuko v City of Johannesburg*⁶³ are of relevance here:⁶⁴

South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans.

The Court viewed the intervention of the *amicus* in the *Freedom Stationery* case as "hardly surprising", given the failure of the Department to secure many of the essential services such as feeding schemes, transport, and even teachers on which the delivery of education was dependent.⁶⁵ Although ultimately the views of the *amicus* were not shared by the Court, the intervention of the Centre for Child Law ensured that the rights and interests of children were not overlooked by the Court in dealing with the dispute between the parties. The public interest litigation in which the *amicus* engages contributes to promoting and protecting the rights of children, and promotes good governance and state accountability for the realisation of children's rights.

The important role which civil society plays in realising the rights of children is further reflected in the suggestions made by the Court to ensure that children are provided with stationery pending the finalisation of the litigation. In para 35 the Court suggested that, amongst other options, appeal be made to charities to provide stationery before the tender process was legally organised by the Department. Although the partnership with civil society is of a great importance in realising the rights of children, there is a clear indication in the judgment (implied in the Court's approach to charities' intervention on an interim basis) that the Department is the main body responsible for realising the children's rights protected in the Constitution. It is deplorable that the Department does not take this important function seriously.

Recent case law indicates that the state relies to a great extent on the non-governmental sector for providing services essential for the realisation of the

⁶³ *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC).

⁶⁴ *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 165.

⁶⁵ *Freedom Stationery* case para 32.

constitutional rights of children.⁶⁶ Whilst partnerships between the state and the private sector are to be welcomed,⁶⁷ the state cannot place over-reliance on the contribution of the private sector for the purpose of fulfilling its constitutional obligations. As Murphy J stated in *Centre for Child Law v MEC for Education, Gauteng*, in the context of the state's obligations under section 28(1)(b),⁶⁸

[t]he duty to provide care and social services to children removed from the family environment rests upon the State. The government must provide appropriate facilities and meet the children's basic needs. The duty cannot be restricted to pleading, on behalf of children, with private interests to furnish it with resources.

The same can be said to apply in the context of the right to basic education in section 29(1)(a). The state has the main obligation to ensure the fulfillment of the right. The appeal to charities' contribution cannot constitute a long-term strategy, but rather, as suggested by the Court, a contingency intervention designed to respond to emergency situations, or an intervention which supplements the efforts of the state.

A further concern is raised by this case. The indirect beneficiaries of the tender process in this case – the children – were fortunate to have a public interest litigation organisation intervene on their behalf, in order to bring to the attention of the Court the impact on the rights of children of an order which would delay the provision of needed goods. Such an intervention is not likely to be the norm in all cases in which a tender process is contested and in which the realisation of the rights in the Bill of Rights depends on the provisions of services procured by the state. It is submitted that the answer is to be found in section 8(1) of the *Constitution*, which states that the Bill of Rights "applies to all law, and binds the legislature, the executive, *the judiciary* [emphasis added] and all organs of state". In configuring the appropriate relief the courts should be mindful of the impact of their orders on the constitutional rights of those who are not parties to the litigation. In difficult situations, where constitutional rights might conflict with each other as in the current case, the courts

⁶⁶ *National Association of Welfare Organisations & Non-Governmental Organisations v MEC for Social Development, Free State* 2010 JOL 26056 (FB); *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T).

⁶⁷ See the position of the Court in *National Association of Welfare Organisations & Non-Governmental Organisations v MEC for Social Development, Free State* 2010 JOL 26056 (FB) paras 47-48.

⁶⁸ *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 229G.

should try to reduce the potentially negative impact of their orders,⁶⁹ such as was attempted by the Court in this case.⁷⁰

4 Conclusion

This case confirms that the constitutional rights of children have penetrated into public law adjudication. The participants in the procurement adjudication can expect that their rights might be balanced against the constitutional rights of the beneficiaries of the services or goods to which the tenders refer. An essential role in this process has been played by public interest litigation organisations, who in the case under discussion, joining as *amicus*, brought children's rights and interests into discussion in this case. Arguably the Court should have considered the impact of its order on the constitutional rights of children even independently of an *amicus* intervention, giving effect to section 8(1) of the *Constitution*.

The Court contributed to the developing legal content of the right to basic education by acknowledging that the state may have the obligation to provide stationery to children in need in order to facilitate access to education. The judgment clearly indicates that good public governance is a condition for realising the rights in the Bill of Rights.

More clarity would have been welcome on the role of the consideration of the best interests of the child in the present dispute. However, some clarity is provided in that the judgment suggests that despite the importance of the rights of children, these rights will not be given priority at all costs. Respect for the rule of law and the basic legal principles are justifiable limitations on children's rights and interests. In other words, prioritisation of the rights of children cannot be used as a justification for breaking the law or for maintaining a *status quo* created as a result of breaking the law.

⁶⁹ As indicated above, this would be in compliance with the principle arising from *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

⁷⁰ See part 3.2 above.

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List of abbreviations

IJLPF International Journal of Law, Policy and the Family
THRHR Tydskrif vir Hedendaagse Romeinse-Hollandse Reg