



Transformative justice in action: Judicial enforcement of children's right to healthcare

Mvikweni Mlondoloz¹  & Paul S. Masumbe¹ 

¹ School of Law, Walter Sisulu University, South Africa.

ABSTRACT

This study critically examines the judicial interpretation and enforcement of children's healthcare rights in South Africa within the framework of transformative constitutionalism. Through an examination of seminal cases including *Soobramoney v Minister of Health, Government of the Republic of South Africa v Grootboom*, *Minister of Health v Treatment Action Campaign*, and *S v M*, the study traces the judiciary's evolution from initial caution and deference to a more interventionist stance that directly safeguards children's health and dignity. The discussion further engages with statutory frameworks, including the Children's Act 38 of 2005, and the judiciary's role as the "upper guardian" in overriding parental refusal of life-saving treatment. Employing doctrinal legal analysis of constitutional provisions, case law, legislation, and academic literature, the study demonstrates how courts have progressively shaped the scope and enforceability of children's rights to healthcare, while highlighting the persistent gap between aspirational law and practical implementation. The findings affirm that although challenges remain, the judiciary has been instrumental in entrenching the principle that no child should be denied essential healthcare necessary for survival, development, and dignity. This study contributes to scholarship by providing the first systematic mapping of this doctrinal evolution, identifying the "upper guardian" doctrine as a distinctive mechanism for circumventing resource limitations in children's cases, and advancing a normative framework for reconciling Sections 27(1) and 28(1)(c).

Keywords: Children's Rights, Healthcare Access, Judicial Enforcement, Socio-economic Rights, Transformative Constitutionalism.

INTRODUCTION

The Constitution of the Republic of South Africa, 1996, is a landmark document in the global discourse on transformative constitutionalism, uniquely embedding justiciable socio-economic rights within its Bill of Rights.¹ This deliberate inclusion was a direct response to the deep-seated injustices of colonialism and apartheid, which had systematically denied access to basic services, including healthcare, to the majority of the population.² The judicial branch, particularly the Constitutional Court,

¹ Constitution of the Republic of South Africa, 1996, s 27(1) (right of access to healthcare services); s 28(1)(c) (children's right to basic healthcare services); Karl E Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 146–88.

² Pius Langa, "The Role of the Constitution in the Struggle against Gender Violence in South Africa," *South African Journal on Human Rights* 23 (2007): 445–47; Sandra Liebenberg, "Socio-Economic Rights and the Judiciary's Role in a Post-Apartheid South Africa: A

was thus tasked with the momentous responsibility of not only interpreting these rights but also actively enforcing them, often with significant implications for government policy and resource allocation.³

This article examines how South African courts have shaped the constitutional landscape of children's healthcare rights through key decisions, setting boundaries for state obligations while simultaneously recognising the distinctiveness of children's claims. The analysis is structured around two central constitutional provisions and their interplay: the general right of everyone to have access to healthcare services under Section 27(1) and the specific right of every child to basic healthcare services under Section 28(1)(c).⁴ The presence of a separate, unqualified right for children has posed a unique challenge to the judiciary, which has had to navigate the tension between the state's obligation to progressively realise socio-economic rights within its available resources and the immediate, urgent needs of its most vulnerable citizens.⁵

The judicial journey has evolved from an initial posture of caution and deference to a more robust and interventionist stance, particularly in matters where children's lives and well-being are at immediate risk.⁶ The foundational jurisprudence in *Soobramoney v Minister of Health (KwaZulu-Natal)*⁷ and *Government of the Republic of South Africa v Grootboom*⁸ established the principles of "progressive realisation" and "reasonableness" in socio-economic rights adjudication.⁹ The discussion then turns to how these principles have been tested, expanded, and recalibrated in litigation directly concerning children's healthcare, including *Minister of Health v Treatment Action Campaign*¹⁰ and *S v M*,¹¹ where the Constitutional Court developed its "upper guardian" jurisdiction in relation to children's rights.

The objective is to demonstrate that while the courts have often walked a fine line between constitutional promise and pragmatic governance, they have, in crucial moments, acted as decisive protectors of children's health.¹² Through interpretive innovation and remedial creativity, the judiciary has not only enforced the state's duties but has also affirmed the moral and constitutional imperative that no child should be denied access to healthcare essential to their survival and dignity.¹³ The discussion further engages with statutory frameworks, including the Children's Act 38 of 2005, and draws on scholarly discourse and insights from Chapter 9 institutions, including the South African Human Rights Commission,¹⁴ as well as critical assessments such as Marius Pieterse's *Can Rights Cure?*, which interrogates the impact of rights-based litigation on the health system.¹⁵

Comparative Study of the Constitutions of South Africa," in *Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman, 2001.

³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 20; Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005*, vol. 6 (Cambridge University Press, 2013), 43–98.

⁴ Constitution of the Republic of South Africa, 1996, ss 27(1), 28(1)(c). On the relationship between these provisions, Julia Sloth-Nielsen, "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child," *Int'l J. Child. Rts.* 10 (2002): 137.

⁵ Liebenberg, "Socio-Economic Rights and the Judiciary's Role in a Post-Apartheid South Africa: A Comparative Study of the Constitutions of South Africa"; Danie Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa," *Theories of Social and Economic Justice*, 2005, 17–36.

⁶ *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (deferential approach); *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (interventionist approach).

⁷ *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). Marius Pieterse, *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System* (PULP, 2014).

⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa."

⁹ *Soobramoney* (n 7) paras 11–12 (progressive realisation); *Grootboom* (n 8) paras 32–33 (reasonableness review).

¹⁰ *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC); Mark Heywood, "Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health: Current Developments," *South African Journal on Human Rights* 19, no. 2 (2003): 278–315.

¹¹ *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); Ann Skelton, "Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence," *De Jure Law Journal* 52, no. SPE (2019): 557–79.

¹² Pieterse, *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System*, 115, 145–178.

¹³ *Treatment Action Campaign* (n 10) para 135; *S v M* (n 11) para 18.

¹⁴ Children's Act 38 of 2005, ss 6, 9, 28. Julia Sloth-Nielsen, "Realising Children's Rights to Legal Representation and to Be Heard in Judicial Proceedings: An Update," *South African Journal on Human Rights* 24, no. 3 (2008): 495–524.

¹⁵ South African Human Rights Commission, *Access to Health Care* (SAHRC 2013); South African Human Rights Commission, *Report on the Right to Access Health Care* (SAHRC 2017).

The article continues as follows. Part 2 examines the constitutional framework of Sections 27(1) and 28(1)(c), analysing the textual and jurisprudential relationship between the general socio-economic right and the specific children's right. Part 3 traces the evolution of judicial reasoning from *Soobramoney* through *Grootboom* to *Treatment Action Campaign*, identifying the shifting standards of review applied to state resource allocation. Part 4 analyses the distinctive jurisprudence of children's healthcare rights, including the "upper guardian" doctrine and its application in overriding parental refusal of life-saving treatment. Part 5 evaluates the role of the Children's Act and other statutory mechanisms in giving effect to constitutional rights. Part 6 engages with scholarly and institutional critiques of the judicial approach, assessing the gap between aspirational law and practical implementation. Part 7 concludes by affirming the judiciary's instrumental role in entrenching children's healthcare rights, while identifying persistent challenges that require ongoing legal and policy attention.

METHODOLOGY

This study used a qualitative desktop research design, grounded in doctrinal and normative legal analysis. The doctrinal approach was employed to interpret and critically examine the constitutional provisions most relevant to children's healthcare rights, particularly Sections 27(1), 27(3), and 28(1)(c) of the Constitution of the Republic of South Africa, 1996. Key case law was selected through purposive sampling to trace the judicial evolution from resource-sensitive restraint to interventionist enforcement of children's healthcare rights: *Soobramoney v Minister of Health (KwaZulu-Natal)* establishes the baseline of judicial deference to resource constraints under Section 27(2); *Government of the Republic of South Africa v Grootboom* introduces reasonableness review for socio-economic rights; *Minister of Health v Treatment Action Campaign* represents the interventionist turn in healthcare specifically; and *S v M* illustrates the application of the "upper guardian" doctrine to children's rights. These four Constitutional Court decisions constitute the primary judicial material, selected because they (a) interpret Sections 27 and/or 28 in healthcare or children's rights contexts, (b) are cited in academic literature as seminal, and (c) trace the judicial evolution from restraint to intervention. Lower court decisions are referenced illustratively where they develop constitutional principles.

Statutory frameworks such as the Children's Act 38 of 2005, Child Care Act 74 of 1983, and the Choice on Termination of Pregnancy Act 92 of 1996 are examined to assess the legislative consolidation of children's rights and the judiciary's role in operationalising these provisions. Academic literature, policy documents, and reports from Chapter 9 institutions supplement this analysis, providing scholarly critique and context for judicial pronouncements. Sources were identified through systematic searches of SAFLII, LexisNexis, Juta's Law journals, and the South African Human Rights Commission database, using search terms that included "children's healthcare rights," "Section 28(1)(c)," "upper guardian," and "medical treatment children."

The normative method is applied to evaluate whether judicial interventions have advanced the constitutional project of transformative constitutionalism, understood as the systematic use of law to overcome South Africa's history of exclusion and to affirm dignity, equality, and justice. This evaluative lens allows for critical reflection not only on the jurisprudence but also on the broader structural and policy consequences of judicial enforcement for healthcare delivery in practice.

This study is subject to inherent limitations of desktop legal research: it relies on reported judicial decisions and may not capture unreported lower court rulings or settled disputes; it cannot assess actual healthcare delivery, clinical outcomes, or provincial implementation variations; the normative evaluation reflects the author's interpretive framework and alternative theoretical approaches may yield different conclusions; and the study is confined to South African jurisprudence and does not engage comparative perspectives that might illuminate alternative approaches to children's healthcare rights.

DISCUSSION

The Principle of "Progressive Realisation" and the Limits of Judicial Intervention: *Soobramoney v Minister of Health*

The case of *Soobramoney v Minister of Health (KwaZulu-Natal)* stands as a pivotal early judgment that articulated the court's initial judicial philosophy.¹⁶ The applicant, Thiagraj Soobramoney, was a 41-year-old unemployed man and a terminally ill patient suffering from chronic renal failure who sought life-prolonging dialysis treatment from a state-funded hospital.¹⁷ The hospital, facing a severe shortage of dialysis machines, had adopted a policy that prioritised curable patients and those who were eligible for a kidney transplant, neither of which applied to Mr. Soobramoney.¹⁸ He based his legal challenge on his right to life (Section 11) and his right not to be refused emergency medical treatment (Section 27(3)).¹⁹

The Constitutional Court held that Mr. Soobramoney's chronic, irreversible condition did not constitute an "emergency" as contemplated by Section 27(3).²⁰

Paragraph 21 of the Constitutional Court's judgment in *Soobramoney v Minister of Health (KwaZulu-Natal)*:

"The applicant suffers from chronic renal failure. To be kept alive by dialysis, he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable. In my view section 27(3) does not apply to these facts."

The court interpreted the right to emergency medical care as a provision to ensure that accident and emergency departments are available to deal with "unforeseeable catastrophes," not to provide ongoing care for chronic illnesses.²¹ In its reasoning, the court affirmed that it was legitimate for the hospital to adopt guidelines for resource allocation, and that where such a decision was "rational and taken in good faith," the court would not intervene.²² The judgment spoke of the "agonizing decisions" the state had to make to stretch a limited budget and benefit the maximum number of patients.²³

The *Soobramoney* judgment is widely regarded as emblematic of the Constitutional Court's early judicial deference to the executive and legislative branches on matters of resource allocation. It established that the right to healthcare, as articulated in Section 27, was not an absolute, immediate entitlement that could be claimed by an individual "on demand."²⁴ The decision underscored a deep judicial reluctance to intervene in complex policy and budgetary matters, setting a precedent that the justiciability of socio-economic rights would be tempered by a recognition of resource constraints and the principle of progressive realisation.²⁵ This approach provided a crucial backdrop for understanding the court's later, more assertive stance in cases involving the specific rights of children.²⁶

The "Reasonableness" Test: The *Grootboom* Precedent and its Initial Pronouncements on Children

The Constitutional Court's approach was further refined in the seminal case of *Government of the Republic of South Africa v Grootboom*.²⁷ Although the case primarily concerned the right to housing

¹⁶ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

¹⁷ *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 12) paras 1-5.

¹⁸ *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 12) para 8.

¹⁹ The Constitution of the Republic of South Africa, 1996, secs 11 & 27(3). Section 11 (Right to life). "Everyone has the right to life." Section 27(3) (Emergency medical treatment): "No one may be refused emergency medical treatment."

²⁰ *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 18) para 21: "The applicant suffers from chronic renal failure. To be kept alive by dialysis, he would require such treatment two to three times a week. This is not an emergency that calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function, which is incurable. In my view, section 27(3) does not apply to these facts."

²¹ *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 18) para 20.

²² *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 18) para 28.

²³ *Soobramoney v Minister of Health (KwaZulu-Natal)* (n 18) para 26.

²⁴ Liebenberg, "Socio-Economic Rights and the Judiciary's Role in a Post-Apartheid South Africa: A Comparative Study of the Constitutions of South Africa"; Bilchitz, "The Right to Health in the South African Constitution: An Analysis of *Soobramoney* and *TAC*."

²⁵ The Constitution of the Republic of South Africa, 1996, sec 27(2).

²⁶ Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa, 124."

²⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

under Section 26, it had significant implications for the interpretation of children's rights under Section 28(1)(c).²⁸ The case was brought by a community of homeless people, including 510 children, who were living in deplorable conditions.²⁹ The group had illegally occupied private land and were then forcibly evicted in an inhumane manner, reminiscent of apartheid-era evictions.³⁰ The High Court had found that the children, and through them their parents, had a direct right to shelter under Section 28(1)(c).³¹ The Constitutional Court was tasked with determining the state's obligation to provide housing and, by extension, other socio-economic rights to those in desperate need.³²

The court, in its judgment, rejected the unqualified application of Section 28(1)(c) that the High Court had adopted, noting that it could lead to "absurd consequences" by prioritising parents with children over other vulnerable groups.³³ Instead, the court developed the "reasonableness" test, which holds that the state has an obligation to devise and implement a "coherent, coordinated program" to progressively realise socio-economic rights.³⁴ The court found the government's housing program to be unreasonable because it failed to make any provision for those in "desperate need" and did not adequately address the plight of communities in intolerable living conditions.³⁵ The court's order was programmatic, directing the state to devise a new plan, but it notably refused to order an individual remedy, such as providing immediate housing to the applicants.³⁶ Some scholars praised the judgment for steering a "middle course" between non-justiciability and creating an absolute duty on the state to provide services on demand.

According to Scott, the *Grootboom* judgment reveals a two-step approach to the interpretation of children's rights that was initially cautious. While the court acknowledged the importance of Section 28, it was hesitant to interpret it as creating an immediate, absolute entitlement, which would have bypassed the limitations of progressive realisation applicable to other socio-economic rights. This approach seemed to create a conceptual barrier to using Section 28 as a primary basis for judicial intervention in systemic policy failures. The judgment, therefore, provided a powerful, yet still constrained, framework for the enforcement of socio-economic rights. However, it underscored the need for a different kind of legal challenge to fully unleash the power of the unqualified rights contained in Section 28. This new approach would soon be tested and fully realised in the subsequent *Treatment Action Campaign* case.

Judicial Enforcement of Children's Direct Right to Healthcare: The *Treatment Action Campaign* Landmark Case

The jurisprudence on children's healthcare rights reached a decisive turning point with the landmark case of *Minister of Health v Treatment Action Campaign (TAC)*.³⁷ This case, more than any other, solidified the judiciary's role as a proactive enforcer of children's rights and provided a direct, mandatory remedy that fundamentally altered state policy.

From Deference to Mandate: A Shift in Judicial Posture

The *TAC* case challenged the government's policy of restricting the anti-retroviral drug Nevirapine which prevents mother-to-child HIV transmission to a limited number of pilot sites, even though the drug was being provided to the government free of charge.³⁸ The policy effectively denied a potentially

²⁸ *Government of the Republic of South Africa v Grootboom* (n 24) para 11.

²⁹ *Government of the Republic of South Africa v Grootboom* (n 24) para 2.

³⁰ *Government of the Republic of South Africa v Grootboom* (n 24) para 3.

³¹ *Government of the Republic of South Africa v Grootboom* (n 24) para 10.

³² *Government of the Republic of South Africa v Grootboom* (n 24) para 4.

³³ *Government of the Republic of South Africa v Grootboom* (n 24) para 77.

³⁴ *Government of the Republic of South Africa v Grootboom* (n 24) para 41.

³⁵ *Government of the Republic of South Africa v Grootboom* (n 24) para 69; Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa." 125.

³⁶ *Government of the Republic of South Africa v Grootboom* (n 24) para 95.

³⁷ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC). This case, more than any other, solidified the judiciary's role as a proactive enforcer of children's rights and provided a direct, mandatory remedy that fundamentally altered state policy.

³⁸ *Minister of Health v Treatment Action Campaign* (n 38) para 54.

life-saving medical intervention to a significant group of HIV-positive mothers and children who did not have access to these research sites.³⁹

The Constitutional Court's judgment in this case was a decisive departure from the judicial self-restraint seen in *Soobramoney* and the programmatic approach of *Grootboom*.⁴⁰ The court found the government's policy unconstitutional, arguing that conducting research did not justify delaying a comprehensive programme that would provide a life-saving intervention.⁴¹ The court was unequivocal in its finding, stating that the needs of children were "the most urgent" and that the state was obligated to ensure that children were accorded the protection contemplated by Section 28 of the Bill of Rights.⁴² The judgment was not merely a declaration of unconstitutionality; it was a clear and direct mandate for action. The court ordered the government to remove the restrictions on Nevirapine and to permit and facilitate its use where medically appropriate.⁴³ It also ordered the government to take reasonable steps to expand testing and counselling facilities and train counselors.⁴⁴

The *TAC* judgment is a powerful example of how the judiciary can directly and causally impact health policy. Unlike the broad, deferential orders in earlier cases, this judgment established a direct link between the court's intervention and a specific remedy: the provision of a particular life-saving drug.⁴⁵ It demonstrated that when a state's policy is demonstrably unreasonable, irrational, or fails to meet the urgent needs of a vulnerable group, the court will not shy away from issuing specific, mandatory, and enforceable orders.⁴⁶ This approach represents a fulfillment of the promise of transformative constitutionalism, where rights are not merely aspirational but are a tangible basis for legal action that can effect systemic change.⁴⁷

The Unqualified Nature of Section 28 and the "Best Interests of the Child" Principle

The *TAC* judgment was instrumental in providing legal and practical content to the "unqualified" nature of children's rights under Section 28. While the *Grootboom* judgment had initially been hesitant to interpret Section 28 as an absolute right to avoid creating a backdoor for adults, the *TAC* court's focus on the "urgent" and "most urgent" needs of children provided a powerful interpretive framework.⁴⁸ This interpretation solidified the notion that Section 28(1)(c) serves as a potent legal tool, capable of bypassing the "progressive realisation" limitation that often constrains the enforcement of other socio-economic rights.⁴⁹ Later jurisprudence has continued to affirm the "unqualified and immediate" nature of these rights, particularly for children in the care of the state.⁵⁰

Underpinning this jurisprudence is the foundational principle that a child's best interests are of "paramount importance in every matter concerning the child".⁵¹ This principle, enshrined in Section 28(2) of the Constitution, acts as a powerful interpretive lens through which courts scrutinise all state actions and inactions affecting children's health.⁵² In the *TAC* case, the court implicitly and explicitly used this principle to override the government's policy, determining that the children's right to life and

³⁹ Minister of Health v Treatment Action Campaign (n 38) para 55 and A Skelton & R Frank 'The TAC Case and the Future of Socio-Economic Rights' (2003) Law, Democracy & Development 1.

⁴⁰ Pieterse, *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System*, 15.

⁴¹ Minister of Health v Treatment Action Campaign (n 38) para 72.

⁴² Minister of Health v Treatment Action Campaign (n 38) para 78.

⁴³ Minister of Health v Treatment Action Campaign (n 38) para 127.

⁴⁴ Minister of Health v Treatment Action Campaign (n 38) para 128.

⁴⁵ Liebenberg, "Socio-Economic Rights and the Judiciary's Role in a Post-Apartheid South Africa: A Comparative Study of the Constitutions of South Africa," 150-152.

⁴⁶ Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa, 128."

⁴⁷ Langa, "The Role of the Constitution in the Struggle against Gender Violence in South Africa, 351-353."

⁴⁸ Brand, "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa, 129."

⁴⁹ Liebenberg, "Socio-Economic Rights and the Judiciary's Role in a Post-Apartheid South Africa: A Comparative Study of the Constitutions of South Africa, 155-157."

⁵⁰ See the case of *Centre for Child Law v Minister for Justice and Constitutional Development* (2009) (2) SA 392 (CC) addressed the rights of children in state care, particularly emphasizing the unqualified and immediate nature of certain constitutional rights. Subsequent jurisprudence has continued to affirm that these rights are both unqualified and immediate, especially for children in state care. This principle highlights the constitutional obligation of the state to uphold and protect children's rights without delay or conditions.

⁵¹ The Constitution of the Republic of South Africa, 1996, sec 28(2).

⁵² Sloth-Nielsen, "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child."

health superseded the state's administrative and research-based justifications.⁵³ This paramountcy of the child's best interests provides a clear constitutional basis for judicial intervention distinct from and often more effective than the more general rights in Section 27. It allows courts to act not just as arbiters of the law but as direct protectors of the most vulnerable members of society.⁵⁴

A New Frontier for the "Best Interests" Principle: Sentencing and the *S v M* Case

The principle of "the best interests of the child" was given a new and significant application in the 2007 case of *S v M*.⁵⁵ The Constitutional Court was tasked with deciding whether a sentencing court should consider the effect of a custodial sentence on a child when passing judgment on their primary caregiver.⁵⁶ The case involved a single mother, M, who was convicted of fraud and sentenced to imprisonment.⁵⁷ The majority judgment, written by Justice Albie Sachs, held that Section 28(2) of the Constitution, which makes a child's best interests paramount in all matters concerning them, applies to the sentencing process.⁵⁸

The Court clarified that this did not mean a child's interests would automatically override all other societal interests, such as the need to punish criminal misconduct.⁵⁹ Instead, the principle must be balanced on a case-by-case basis.⁶⁰ Justice Sachs provided a detailed framework for sentencing courts to use.⁶¹ He stated that the court should first determine if the convicted person is a primary caregiver and assess the potential impact of a prison sentence on the children.⁶² In cases where there is a range of appropriate sentences, the paramountcy of the child's best interests should serve as a crucial guide in selecting the sentence.⁶³ The majority found that the Regional Magistrate who sentenced M had not given "sufficient independent and informed attention" to the effect the sentence would have on her children.⁶⁴ Consequently, the Court set aside the prison sentence and instead imposed a non-custodial sentence of correctional supervision.⁶⁵

This judgment was widely praised for providing a clear and detailed explanation of the scope of children's rights under Section 28 and for significantly developing South African child law. However, a dissenting judgment by Justice Tholie Madala, while agreeing with the philosophical analysis, argued that based on the specific facts including the caregiver's motivation by greed rather than need and her recidivism the custodial sentence was still appropriate and served societal interests that outweighed the children's interests.⁶⁶ The *S v M* case thus stands as a powerful example of how the judiciary uses the paramountcy principle to compel state organs to protect children from "avoidable harm" and to promote their right to family care.⁶⁶

Navigating the Triad of Authority: The Child, Parents, and the State

Beyond the state's general obligation to provide healthcare, the courts have been called upon to resolve complex and deeply personal disputes over medical decision-making for children. These cases involve a unique triad of authority: the child's evolving autonomy, the parents' rights and responsibilities, and the state's role as the ultimate protector. The judiciary's handling of these disputes, both through common law and the application of new statutory frameworks, provides a crucial perspective on its direct protective function.⁶⁷

⁵³ *Minister of Health v Treatment Action Campaign* (n 38) para 82.

⁵⁴ Pieterse, *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System*, 10.

⁵⁵ *S v M* 2008 (3) SA 232 (CC).

⁵⁶ *S v M* (n 60) para 1.

⁵⁷ *S v M* (n 60) para 10.

⁵⁸ *S v M* (n 60) para 31.

⁵⁹ *S v M* (n 60) para 33.

⁶⁰ *S v M* (n 60) para 34.

⁶¹ *S v M* (n 60) para 44.

⁶² *S v M* (n 60) para 45.

⁶³ *S v M* (n 60) para 46.

⁶⁴ *S v M* (n 60) para 55.

⁶⁵ *S v M* (n 60) para 56.

⁶⁶ *S v M* (n 60) para 95.

⁶⁷ *Life Health Care Group (Pty) Ltd v JMS ZAGPJHC* 299 (20 October 2014).

The Statutory Framework for Consent: The Children's Act 38 of 2005

South African law has undergone a significant philosophical shift from a rigid, paternalistic approach to a more child-centric one.⁶⁸ This evolution is best demonstrated by the move from the Child Care Act 74 of 1983 to the Children's Act 38 of 2005.⁶⁹ The Child Care Act had a simple, age-based system for consent, requiring a child to be at least 14 years old to consent to medical treatment and 18 to consent to an operation, with no maturity assessment required.⁷⁰

The Children's Act introduced a more nuanced and progressive framework.⁷¹ It lowered the age at which a child can consent to their own medical treatment to 12 years, contingent on them being of "sufficient maturity" and having the "mental capacity to understand the benefits, risks, social and other implications of the treatment".⁷² For surgical operations, the same maturity requirement applies, but the child must be "duly assisted" by their parent or guardian.⁷³ This new approach moves away from a rigid age of majority and towards a more individualised, context-specific assessment of a child's capacity to make decisions about their own health. This legislative shift, influenced by the Constitution and a growing global children's rights movement, acknowledges the child as an independent legal actor with an evolving capacity for self-determination. The Children's Act also provides clear mechanisms for substitute consent by a hospital superintendent, the Minister, or a court in cases where a parent or guardian unreasonably refuses consent or is unavailable.⁷⁴ This legal provision reflects the judiciary's consistent upholding of children's rights and creates a statutory pathway to overcome parental barriers to care.

A significant example of this child-centric shift is the *Choice on Termination of Pregnancy Act 92 of 1996*, which allows a girl of any age to consent to the termination of her pregnancy, provided she has the "intellectual and emotional capacity for informed consent".⁷⁵ This provision grants a significant degree of autonomy to a child in a critical health decision, independent of parental involvement.

The "Upper Guardian" and the Sanctity of Life: Overriding Parental Refusal

South African High Courts have a powerful, inherent common law role as the "upper guardian of all children".⁷⁶ This authority allows the court to intervene directly to protect a child's welfare, particularly in life-threatening medical situations. The most common examples of this are cases where parents, for religious reasons, refuse to consent to life-saving medical treatment, such as blood transfusions.⁷⁷

Cases such as *S v L*, *Hay v B* and *Life Health Care Group (Pty) Ltd v JMS* provide clear examples of this judicial principle in action.⁷⁸ In these matters, the High Court has consistently held that a child's right to life and their best interests are of "paramount importance" and supersede the parents' rights to freedom of religion and belief.⁷⁹ For example, in the *Life Health Care Group* case, a paediatric lung specialist sought an urgent court order for a life-saving blood transfusion for an infant against the wishes of the parents, who objected for religious reasons.⁸⁰ The court found that the parents' refusal was unlawful under the Children's Act, which prohibits withholding consent solely for religious beliefs unless there is a medically accepted alternative.⁸¹ The court held that the child's right to life is an

⁶⁸ Sloth-Nielsen, "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child."

⁶⁹ Child Care Act 74 of 1983; Children's Act 38 of 2005.

⁷⁰ Hanneretha Kruger, "The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations," *Potchefstroom Electronic Law Journal* 21 (October 15, 2018): 1–34, <https://doi.org/10.17159/1727-3781/2018/v21i0a4609>.

⁷¹ S. Penna, "The Children Act 2004: Child Protection and Social Surveillance," *Journal of Social Welfare and Family Law* 27, no. 2 (2005): 143–57.

⁷² Children's Act 38 of 2005, sec 129(1).

⁷³ Children's Act 38 of 2005, sec 129(3).

⁷⁴ Children's Act 38 of 2005, sec 129(5).

⁷⁵ Choice on Termination of Pregnancy Act 92 of 1996, sec 5(1).

⁷⁶ Anne Louw, "Revisiting the Limping Parental Condition of Unmarried Fathers," *De Jure Law Journal* 49, no. 2 (2016): 193–212.

⁷⁷ *Hay v B* 2003 (3) SA 492 (W).

⁷⁸ *S v L* 1992 (3) SA 713 (E); *Hay v B* 2003 (3) SA 492 (W); *Life Health Care Group (Pty) Ltd v JMS* ZAGPJHC 299 (20 October 2014).

⁷⁹ *Hay v B* (n 82) 498–499.

⁸⁰ *Life Health Care Group (Pty) Ltd v JMS* (n 83) para 2.

⁸¹ Children's Act 38 of 2005, Section 129(5)(a).

"inviolable right" and that the parents' right to religion is not "unfettered".⁸² The judicial stance in these cases is consistently protective and unambiguous, demonstrating a clear commitment to safeguarding a child's right to life. One legal analysis even suggests that because the courts have so consistently and clearly held that a parental refusal on religious grounds is unlawful, doctors may no longer need to seek a court order in every instance to proceed with life-saving treatment.⁸³ This indicates a profound shift in the legal landscape, where the judiciary's firm stance has created a protective principle now embedded in standard medical practice.

The Child's Evolving Capacity and Right to Self-Determination

The Children's Act, by introducing the maturity assessment, has provided a statutory basis for a child's right to self-determination.⁸⁴ This right is also rooted in broader constitutional principles of human dignity, privacy, and personal autonomy, which apply to all citizens, including children.⁸⁵ The law's recognition of a child's evolving capacity is a critical development that moves beyond the older, more paternalistic legal framework.⁸⁶ A legal scholar has argued that to truly maximise a child's right to self-determination regarding surgical operations, the requirement for a child to be "duly assisted" by a parent or guardian should be changed to "duly directed and guided," to give more weight to the child's own wishes.⁸⁷ This critique highlights a broader point: the gap between aspirational law and practical reality. While the judiciary has created a robust legal framework, its full impact is contingent on the practical implementation of the law.⁸⁸ This includes the training of healthcare practitioners to effectively conduct maturity assessments and a broader societal shift in recognising children as rights-holders, a process that is still a work in progress.

RECOMMENDATION

1. **Legislative and Policy Reform:** Parliament should amend the National Health Act 61 of 2003 to explicitly incorporate Section 28(1)(c) obligations, ensuring that children's healthcare rights are prioritised in resource allocation and provincial health planning. The Department of Health should develop standardised guidelines for the implementation of Section 129 of the Children's Act 38 of 2005, clarifying the circumstances under which healthcare providers may override parental refusal of treatment without requiring judicial intervention in every case.
2. **Judicial Training and Guidelines:** The South African Judicial Education Institute should develop specialised training programmes on children's rights and healthcare ethics for judicial officers, particularly magistrates and High Court judges who preside over urgent medical treatment applications. The Office of the Chief Justice should issue practice directives to streamline and expedite "upper guardian" applications, reducing procedural delays that risk children's lives.
3. **Strengthening Chapter 9 Oversight:** The South African Human Rights Commission should establish a dedicated Children's Rights Unit with monitoring and investigative powers over

⁸² "A parenting plan that was made an order of court may be amended or terminated only by an order of court on application— (a) by the co-holders of parental responsibilities and rights who are parties to the plan;" 2. *Life Health Care Group (Pty) Ltd v JMS* (n 83) para 17. "In my view, the limitation imposed by section 129(10) on the parent's right to object to the medical treatment of a child for religious reasons reflects a balancing of the child's right to life and to have his best interests inform all decisions concerning the child against the parents' right to religion."

⁸³ *Life Health Care Group (Pty) Ltd v JMS* (n 83) para 18.

⁸⁴ Henry Lerm, "When the Inherent Authority of the High Court Trumps Parental Authority in Medical Decision-Making Involving the Withdrawal of Life Support Treatment Affecting Minor Children and Their Parents," *Potchefstroom Electronic Law Journal (PELJ)* 28, no. 1 (2025): 1–31. "One legal analysis even suggests that because the courts have so consistently and clearly held that a parental refusal on religious grounds is unlawful, doctors may no longer need to seek a court order in every instance to proceed with life-saving treatment"

⁸⁵ Children's Act 38 of 2005, sec 129.

⁸⁶ The Constitution of the Republic of South Africa, 1996, secs 10 & 14.

⁸⁷ Kolawole Kazeem Oyeyemi, "Implementation of the Right of the Child to Be Heard under Article 12 (1) of the Convention on the Rights of the Child in Nigeria: Lessons from South Africa," *African Human Rights Law Journal* 24, no. 2 (2024): 579–608.

⁸⁸ Kruger, "The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations."

⁸⁹ G. Maujean, "Too Much Process and Too Little Accountability: The Reality of Judicial Accountability in South Africa" (University of Cape Town, n.d.).

healthcare access in all provinces, publishing annual reports on the state of children's healthcare rights and identifying systemic failures requiring corrective action.

4. **Healthcare Professional Education:** Medical and nursing curricula should integrate comprehensive training on children's constitutional rights, the "best interests" standard, and the legal framework for overriding parental consent, ensuring that healthcare professionals understand their statutory duties under the Children's Act and their ethical obligations under the Constitution.
5. **Empirical Research and Data Collection:** Future research should employ empirical methodologies, including quantitative surveys of healthcare access in rural and underserved areas, qualitative interviews with children and families navigating the healthcare system, and comparative analysis with jurisdictions that have successfully implemented children's healthcare rights frameworks.
6. **Community Awareness and Legal Literacy:** The Department of Justice and Constitutional Development, in partnership with civil society organisations and law clinics, should develop community-based legal literacy programmes on children's healthcare rights, empowering families to assert their rights and hold the state accountable for service delivery failures.

CONCLUSION

The judicial journey in interpreting and enforcing children's healthcare rights in South Africa has been one of profound and sustained transformation. The courts have moved from a cautious, resource-focused approach, as seen in *Soooramoney*, to a more proactive and interventionist stance, particularly when a vulnerable group's rights are at stake. This evolution is most clearly demonstrated by the shift from the programmatic and deferential order in *Grootboom* to the direct, mandatory, and rights-enforcing order in *Minister of Health v Treatment Action Campaign*. The TAC judgment is not merely a legal victory; it is a clear example of how the judiciary, by focusing on the "urgent" needs of children, can directly catalyse systemic change in government health policy, thereby answering the question "Can rights cure?" with a qualified but resounding affirmation.

The analysis has highlighted the dual role of the judiciary. First, as the supreme interpreter and enforcer of the state's obligations under the Constitution, the courts have leveraged the unqualified nature of Section 28(1)(c) and the paramountcy of the "best interests of the child" principle to overcome the limitations of progressive realisation that have constrained the enforcement of other socio-economic rights. Second, through their common law role as "upper guardian," the High Courts have consistently acted as a direct and unambiguous protector of children's right to life in medical disputes, overriding parental authority in matters of life-saving care.

Furthermore, the statutory framework, particularly the Children's Act of 2005, has codified the judiciary's child-centric approach by moving away from a rigid, age-based system of consent to a more individualised, maturity-based one. While this represents a significant legal and philosophical shift towards recognising the child as a rights-holder with evolving autonomy, the analysis also reveals a persistent gap between aspirational law and practical implementation. The full realisation of children's healthcare rights requires not only a robust legal framework but also a systemic commitment from healthcare professionals, policymakers, and society at large to give effect to these rights in practice. The judiciary has provided the foundation, and the continued scholarly and legal discourse will be crucial in ensuring that the promise of a child's right to health is fully realised for all.

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ABOUT AUTHORS

Mr. Mlondolozhi Mvikweni is a Junior Lecturer in the School of Law at iYunivesithi Walter Sisulu, with research interests anchored in Transformative Constitutionalism, Private Law, and the intersection of law, governance, and emerging technologies. His scholarship explores how constitutional values reshape traditional private law doctrines and how legal frameworks can be reimagined to address systemic inequality and promote social justice. His work spans procedural fairness in administrative and constitutional litigation, the regulation of artificial intelligence in research and governance, corporate governance in emerging markets, and the legal implications of technological advancements in healthcare and local government. He has presented his research at national and international conferences, contributing to academic discourse on the transformative potential of law in South Africa and beyond.

Professor Paul Masumbe is the Head of the School of Law at iYunivesithi Walter Sisulu. He is a dedicated, focused, and accomplished legal scholar with expertise in International Criminal Law, Human Rights Law, Labour Law with emphasis on dismissal, and selected areas of Private Law. He earned his LLD from the Nelson Mandela School of Law at the University of Fort Hare, an LLM from the University of the Western Cape, and an LLB from the University of Yaoundé. Before his appointment as Head of the School of Law, Professor Masumbe had served as a Postdoctoral Research Fellow, Senior Lecturer, and Chairperson of the Faculty Research and Higher Degrees Committee. He has taught, examined, and supervised at LLB and LLM levels, and is an examiner for LLD/PhD degrees. Besides serving as an external examiner for universities, he is a member of learned societies in Africa, Europe, and Asia, a reviewer for journals in South Africa, Europe, and the United States, and an Editorial Board Member of Journals. Professor Paul S. Masumbe is a member of the University Senate and the South African Law Deans' Association (SALDA).