WOMEN IN LAW IN SOUTHERN AFRICA, TALENT FORGET
versus
MINISTER OF HEALTH AND CHILD CARE
and
THE PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
AND
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 28 February & 22 November 2024

Court Application

T Biti, for the applicants
J Shumba, for the 1st & 3rd respondents
S Hoko, for the 2nd respondent

TAKUVA J:

INTRODUCTION

Termination of pregnancy in Zimbabwe is controlled by statute. This is a constitutional application in respect of which the applicants seek to persuade the court to outlaw or read in to the definition of "unlawful intercourse" contained in s 2(1) of the Termination of Pregnancy Act [*Chapter 15:10*] hereinafter referred to as the "Act" to allow children below the age of 18 and married women, who are victims of marital rape to have access to legal abortion as provided for in terms of s 4 of the Act.

The application is significant in light of the massive instances of teenage pregnancies in Zimbabwe, and consequently illegal teen abortions and teenage mortalities. In that regard, this application is a sequel to the protection of children granted in the child marriage case of *M & Anor* v *Minister of Justice Legal & Parliamentary Affairs & Ors* 2016(2) ZLR 45 (CC) and the age of sexual consent case of *Diana Eunice Kawenda* v *Minister of Justice Legal and Parliamentary Affairs & Ors* CCZ 3/22.

Further, the application embraces the fact that marital rape having been criminalized, victims of marital rape should also have access to legal abortion.

Critical to note is that first, second and third respondents are not opposed to this application.

The position of children in our jurisprudence

Children hold a special and decisive place in the jurisprudence of Zimbabwe. The constitution of Zimbabwe, in s 81 protects the rights of children. The section reads as follows:-

"81. RIGHTS OF CHILDREN.

(1) Every child that is to say every boy and girl under the age of eighteen years has the right-

(a) To equal treatment before the law, including the right to be heard;

(b) To be given a name and family name;

(c) In the case of a child who is-

(i) Born in Zimbabwe or

(ii) Born outside Zimbabwe and is a Zimbabwe citizen by descent; to the prompt provision of a birth certificate,

(d) To family or parental care, or to appropriate care when removed from the family environment;

(e) To be protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuses;

(f) To education, health care services, nutrition and shelter;

(g) Not to be recruited into a militia force or take part in armed conflict or hostilities;

(h) Not to be compelled to take part in any political activity, and

(i) Not to be detained except as a measure of last resort and, if detained

(i) to be detained for the shortest appropriate period,

(ii) to be kept separately from detained persons over the age of eighteen years; and

(iii) to be treated in a manner, and kept in conditions that take account of the child's age.

(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts in particular by the High Court as their upper guardian.

Cause of action

Legal abortion in Zimbabwe is governed by the Act. Section 4 thereof provides that the termination of a pregnancy shall be on the following basis;

(i) Where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of physical health that the termination of pregnancy is necessary to ensure her life or physical health, as the case may be, or

(ii) Where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be seriously handicapped or;

(iii) Where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse.

On the other hand, s (2)(1) of the Act defines unlawful intercourse as; "rape other than rape within a marriage and sexual intercourse within a prohibitory degree or relationship other than sexual intercourse with the persons referred to in s 71(1)(i) or (f) of the Criminal Code.

The definition of unlawful intercourse excludes unlawful and unconstitutional intercourse giving rise to pregnancy of a child below the age of 18. To the extent that the age of sexual consent is 18, it therefore means that any intercourse with a child is unlawful and must be included as unlawful intercourse for the purposes of s 2(1) of the Act. Also, unlawful intercourse must include marital rape or rape within a marriage.

The failure to include in the definition of unlawful intercourse pregnancy of a minor, amounts to a breach of ss 81(1)(e)(f) and 18(2) of the Constitution which protect the rights of children. Allowing children to have pregnancies without an option of safe legal abortion also amounts to torture, cruel and degrading treatment in breach s 53 of the Constitution of Zimbabwe. Teenage pregnancies and failure to allow the legal safe abortions, is a breach of the right to human dignity protected under s 51 of the Constitution of Zimbabwe.

Quite clearly s 2(1) of the Act is also in breach of s 56(1) of the Constitution in that it unlawfully discriminates between different categories of unlawful intercourse by omitting illegal

and unlawful intercourse with a minor and rape within a marriage. In a nutshell this constitutional application challenges the constitutional validity of s 2(1) of the Act on the basis that it is in breach of ss 81, 51, 53 and s 56(1) of the Constitution of Zimbabwe.

THE DUTY TO PROTECT CHILDREN

Children are humanity's most important creation and invention. They constitute the core essence of humanity. They protect the past and the future. It is beyond doubt that nationally and Internationally their interests are paramount and sacrosanct. In the Zimbabwean Constitution, children enjoy the most concrete forms of protection, while in international law, they also enjoy massive protection. See the 1959 Declaration of the Rights of the Child. Also, the 1990 Convention on the Rights of the Child has been ratified by Zimbabwe and Article 2 requires third parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment.

Article 3 of the Convention makes it clear that in all actions concerning children whether undertaken by public or private social welfare institutions courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Locally s 19 of the Zimbabwean Constitution provides;

"19 CHILDREN

1. The State must adopt policies and measures to ensure that in matters relating to children, the best interest of the children concerned are paramount.
2. The State must adopt reasonable policies, within the limits of the resources available to it, to ensure that children-
   (a) Enjoy family or parental care, or appropriate care when removed from the family environment,
   (b) Have shelter and basic nutrition, health care and social services;
   (c) Are protected from maltreatment, neglect or any form of abuse; and
   (d) Have access to appropriate education and training.
3. The State must take appropriate legislative and other measures-
   a. To protect children from exploitative labour practices and
   b. To ensure that children are required or permitted to perform work or provide services that,
   (i) Are inappropriate for the children's age; or
   (ii) Place at risk the children's well being, education, physical or mental health or spiritual, moral or social development."

See s 81 of the Constitution. See also *M & another* v *Minister of Justice Legal & Parliamentary Affairs N.O & Ors* 2016(2) ZLR 45, where the Chief Justice stated;

"Children fall into the category of weak vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress

of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty and socially and economically disadvantaged positions. The law recognizes the interests of such vulnerable persons in society as constituting public interest."

Specifically, s 81(1)(e) protects children from sexual exploitation including any form of sex with children. Clearly, teenage pregnancies are a form of abuse crying out for protection. Availing children the right to abort is a form of protecting children consistent with the constitution. The right of children to education is protected in s 21(1) of the Constitution. Teenage pregnancies and child marriages break the cycle of education and sentences children, particularly girls to a cyclical life of poverty. The girl -child's right to dignity is adversely affected by teenage pregnancy.

In my view teenage pregnancies are not in the best interests of children, therefore the law as it stands in the Termination of Pregnancy Act [*Chapter 15:10*] which demies children who are pregnant the right to abortion is not in the children's best interest and therefore it is an infringement of s 81(2) of the Constitution of Zimbabwe. Consistent with its tradition of protecting children, the constitutional court in *Diana Eunice Kawenda v Ministry of Justice, Legal & Parliamentary Affairs & Others* CCZ 3/22, set aside s 70 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] which placed the age of sexual consent at 16. The court accepted the abhorrence and unlawfulness of any form of sex with a minor. This is because young persons lack understanding of sexual behaviour, the context of normal sexual relationship and knowledge of the consequences of sexual intercourse.

In view of this, any sex with a minor, is therefore unconstitutional and therefore any Pregnancy arising from such sex has to be treated as unlawful intercourse for the purpose of s 2(1) of the Act. Once it is accepted that the age of sexual consent consistent with s 81 of the Constitution is 18 it becomes clear that any sexual act with a minor and indeed any pregnancy arising thereto, is unlawful and illegal. Subjecting children to child pregnancies without a right to safe abortion is abuse and torture in violation of s 53 of the Constitution of Zimbabwe.

Child sex exposes children to the risk of HIV Aids and cervical cancer. Being young is a protected human right on its own. The challenge of children delivering children is a major human rights issue. According to Dr Nour; "The problem with children delivering children is that the young mothers are at a significantly higher risk than older women for debilitating illness and even

death. Compared with women above 20 years of age, girls 10 – 14 years of age are 5 – 7 times more likely to die from child birth, and girls 15 – 19 years of age are twice as likely. For example, in Mali, the mortality rate for girls aged 15 – 19 is 178 per 100 000 live births and for women aged 20-34, only 32 per 100 000."

In Zimbabwe, it is well accepted that teenage pregnancies are largely as a result of poverty. Poverty is at the epicentre of causing early child marriages because girls from indigent backgrounds are more vulnerable to pregnancies and child marriages. It becomes a vicious cycle in that the young girls who get pregnant and often in poor families are then forced to produce young children in a sea of poverty and the cycle begins again. Simply put teenage pregnancies foster poverty and cyclical reproduction of poverty as girls who marry young or are pregnant in an uneducated environment with few opportunities continue reproducing the same.

OTHER DRIVERS OF TEENAGE PREGNANCIES IN ZIMBABWE

(a) Limited access to information and services by sexually active adolescent girls.
(b) Lack of knowledge on the link between sexual activity and pregnancy.
(c) Limited enrolment of girls in schools.
(d) The beliefs of certain churches in particular the Apostolic sect.
(e) Substance and drug abuse.
(f) Exposure to pornography.

CONSEQUENCES OF ADOLESCENT PREGNANCIES

Adolescent pregnancies; adolescent births and the foreseeable adolescent abortions in Zimbabwe, breach the rights of children protected by s 81(e) and (f) of the Constitution of Zimbabwe. Section 81(e) demands that children should be protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse.

In *Diana Eunice Kawenda* v *Minister of Justice* supra, the Constitutional Court accepted that set on its own amounts sexual exploitation even if it was consensual. In other words, there can be no doubt that adolescent sex, adolescent pregnancy, adolescent births, adolescent abortions are a form of abuse that is prescribed by s 81(e) of the Constitutional of Zimbabwe. Such conduct go beyond abuse as they also breach the right to human dignity of children protected by s 81, and

more importantly they breach the right of children not to be subjected to torture, cruel and degrading treatment.

There is no doubt that it is torture, cruel and degrading treatment for a child to carry another child, for a child to give birth to another child or for a child to be forced to illegally abort because of cruel circumstances. Child sex exposes children to pregnancy and the risk of contracting HIV AIDS.

Section (2)(1) of THE ACT BREACHES THE RIGHT TO DIGNITY PROTECTED UNDER SECTION 51 OF THE CONSTITUTION.

In my view, the dignity of adolescent children who are impregnated, the dignity of married women who are raped is adversely affected by the provisions of s 2(1) of the Act. The Zimbabwean Constitutional protects the right of every person to the entitlement of inherent dignity in their private and public life and the right to have that dignity respected and protected. The right to dignity is foundational and has been equated with the right to life. See *Carmichele v Minister of Security* 2001(4) SA 938 (CC). *S* v *Makuvanyane* 1995(3) SA 391 (CC) at 144 and *State v C (juvenile)* 2019 (2) ZLR 12(CC).

Section 2 of the Act falls away immediately as a consequence of Constitutional Court judgments. Firstly, once the Constitutional Court had outlawed child marriages as it did in the Mudzuri case *supra* and once the court outlawed and raised the age of sexual consent to 18 years as it did in the Diana Eunise Kamwenda case, it means that sexual intercourse with a minor is unlawful. Consequently, this type of unlawful intercourse should be included in the definition of "unlawful intercourse" in s 2(1). In the same vein, once the legislature has outlawed marital rape as it did with the amendments to the law, it follows then that s (2)(1) should be set aside.

Under s 175(6) of the Constitution, a Constitutional Court has wide powers that include reading in and reading out of a statutory provision. What this means is that a Constitutional Court has got the power of severing certain words from a statutory clause in as much as it has powers of reading in words into a particular statutory provision.

See *Kotzee* v *Govt of the Republic of SA* 1995(4) SA 631 (CC), where KRIEGLER J described the approach to severance as follows;

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied, if the good is not dependent on bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute."

See also *National Coalition for Gays and Lesbians Equality* v *Minister of Home Affairs* 2000(2) SA 1(CC).

In *casu*, I was urged to order that s 2(1) of the Termination of Pregnancy Act [*Chapter 15:10*] must be read in and severed such that it reads as follows;

> "Unlawful intercourse means rape including marital rape, sexual intercourse with a minor and sexual intercourse within a prohibited relationship other than sexual intercourse with the persons here to para i or j of subsection 75 of the Criminal Code."

Alternatively, I was urged to simply issue an order declaring s 2(1) of the Termination of the Pregnancy Act unconstitutional and invalid.

In my view what is appropriate is to adopt latter option and leave it to the respondents to propose an alternative.

Disposition

It is ordered that;

1. Section 2(1) of the Termination of Pregnancy Act [Chapter 15:10] be and is here by declared unconstitutional and invalid.
2. There is no order as to costs.

TAKUVA J:……