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DIANA EUNICE KAWENDA
v
(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (2) MINISTER OF HEALTH AND CHILD CARE (3) THE ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, HLATSHWAYO JCC & PATEL JCC
HARARE: 16 NOVEMBER 2021 & 24 MAY 2022

T. Biti for the appellant

T. Magwaliba for the respondents

MAKARAU JCC: On 20 January 2020, the High Court dismissed with costs, an application to that court by the appellant and another who is not before us, challenging the constitutional validity of the law that governs the age at which children can consent to sexual activities.

This is an appeal against that order.

Background

The appellant and another champion of women and children's causes and rights approached the High Court seeking in the public interest, an order the main thrust of which was to declare the criminal law which governs the age of consent to sexual activities unconstitutional.

The second applicant *a quo* did not apply for condonation for the late filing of this appeal, which the appellant successfully did. Whilst the second applicant *a quo* is not before us, where relevant and unavoidable, reference shall be made to the averments that she made. Further and for convenience, where reference is made to the proceedings *a quo*, the parties thereto shall be referred to as "the applicants" and "the respondents", respectively".

The *locus standi* of the applicants to bring the application *a quo* was not in dispute. It was accepted by all the respondents and the court *a quo* that the applicants could bring, in the public interest, a challenge to the constitutionality of sections of Part III of Chapter V of the Criminal Law (Reform and Codification) Act [*Chapter 9.23*], "the Code".

Creating criminal offences punishable at law, the Code, in its language, prohibits extra-marital sexual intercourse and the performing of indecent acts with a young person, who it defines in s 61(1), as a boy or girl under the age of sixteen years. This of course must be read in the context of the decision of this Court in the mater of *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs* 2016 (2) ZLR 45 (CC) in which child marriages were outlawed. I return to this point in detail later.

The Code also penalizes owners or occupiers of property who knowingly permit another person or persons to commit the offences on their property or, detain a young person with the intention that such offences be committed against the young person. The Code further prohibits the procuring of young persons for the purposes of prostitution in addition to prohibiting property

owners from allowing young persons to remain on one's property for the purposes of sexual activities.

The above constitutes the content of the impugned law.

Whilst bringing the application *a quo* in the public interest and therefore not alleging that the impugned law infringes their personal rights, both applicants, now adults, narrated in their founding affidavits their personal experiences which they argued could have been avoided had the protection afforded to children under sixteen years of age been extended to all children. They were both child-brides and the second applicant was a mother of two by the age of nineteen.

Having noted the disparity between the definition of a "young person" in the impugned law and of a "child" in the Constitution, the applicants approached the court *a quo* seeking an order in the following terms:

"It is declared that:

1. The definition of "young person" and reference to "below the age of sixteen years" in the below sections of the Criminal Code [*Chapter 9.23*] are unconstitutional to the extent that they do not include all children under the age of 18 in violation of s 81 of the Constitution.
2. The Sections of the Criminal Code [*Chapter 9.23*] which fail to protect all children under the age of 18, are inconsistent with s 81 of the Constitution and are thus unconstitutional to the extent of the inconsistency.
3. The current age of sexual consent set at 16 by S 70 of the Criminal Code [*Chapter 9.23*] is inconsistent with s 81(1)(e) of the Constitution of Zimbabwe.
4. The current age of consent set at 16 years old violates the rights and protection for girls including human dignity under s 51, equality and non-discrimination under s 53, right to education under s 81(1)(c), healthcare under s 81(1)(f) and best interests under s 81(2) of the Constitution of Zimbabwe.
5. The respondents pay the costs of suit."

In seeking the above order, the applicants relied on the findings of this Court in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs (supra)* on the harmful effects of marriage on children, especially on girls. They incorporated into their application these findings and the scientific evidence referred to in that judgment.

The application *a quo* was opposed.

In addition to placing his views before the court in an opposing affidavit, the second respondent was content to abide by the decision of the court.

The parties made lengthy and detailed arguments *a quo*. It is not necessary that I burden this judgment with these. Despite the lengthy and detailed arguments that the parties advanced *a quo*, the sole issue that fell for determination before that court was whether the impugned law is unconstitutional on any one or more of the grounds advanced by the applicants. With respect, the issue was not, as consumed the court *a quo*, a determination of the age at which children should have their first sexual experiences.

The decision *a quo*

As indicated above, the court *a quo* dismissed the application with costs. In dismissing the application, the court made a number of findings. It is necessary that I set out some of these in detail.

Right from the outset, the court *a quo* set out "to examine trends (world-wide) on age of sexual consent, age of marriage, child development and the effect of raising to 18 years the age on sexual consent on child protection and whether s 70 (of the Code) and related sections are unconstitutional".

Whilst there was nothing intrinsically wrong in setting the inquiry this wide, the court *a quo* thereafter disproportionately devoted its time and industry to the introductory issues at the expense of the primary issue that was before it. It thereafter largely focused on whether the age of consent in Zimbabwe should be raised from sixteen to eighteen, in itself an important debate but one that was not before it. Scant regard it paid to the question whether or not the impugned law is inconsistent with the Constitution.

For instance, citing a report by UNICEF, UNESCO, UNWOMEN, UNPFA and UNDP 2019, on Adolescent Consent to Marriages and Sexual Activity and Access to Sexual Reproductive Health Services in Light of the Zimbabwe Marriages Bill 2019, the court found that it is a notorious fact that children in Zimbabwe are indulging in sexual activities from an early age. Forty per cent of girls and twenty-four percent of boys are sexually active before they reach the age of eighteen.

In view of the issue that was before the court, the finding by the court in this regard did not add any colour or flavour to the constitutional question that was before it.

Further, this finding was made on evidence procured through the court's own industry. The various United Nations Agencies reports that the court relied upon in making this finding were not tendered as evidence by any of the parties. I return to this point later in the judgment.

It appears that the court *a quo* made the finding that children are engaging in sexual activities from early ages to buttress its next finding that although children need to be protected from sexual abuse and exploitation, it needs to be equally acknowledged that adolescents naturally start exploring their sexuality and engaging in consensual sexual activity with their peers. The court then accepted wholesale the arguments of the first and third respondents that raising the age of consent from sixteen to eighteen does not *per se* prevent adolescents from engaging in sexual activity with their peers but leads to the criminalization of adolescents as sex offenders. This in turn creates barriers for the adolescents against accessing sexual and reproductive health care services. It was thus the conclusion of the court *a quo* that laws on their own cannot prevent children from engaging in sexual activities and, in particular, that raising the age of consent from sixteen to eighteen cannot *per se* prevent children from having sexual intercourse.

Quite clearly, the court *a quo* was concerned with the need to allow children, particularly adolescents, "legal" space within which to explore their sexuality with their peers. With respect, this was not the constitutional issue that the applicants had raised. As indicated above, the application before the court did not require the court to make a finding on the appropriate age at which children should be allowed to have their first sexual experiences. The application challenged the constitutional validity of the law that seeks to protect children from sexual exploitation.

I also note in passing that in the context of our law where children under the age of sixteen are not automatically prosecuted for having sexual intercourse with a peer, the finding by the court *a quo* that affording protection to all children from sexual exploitation will lead to children being criminalized as sex offenders is somewhat startling. It is not based on a correct interpretation of the law and, more importantly, it was not directly relevant to the issue that was before the court.

In finding that the raising of the age of consent to afford protection to all children will create barriers for the adolescents in accessing sexual and reproductive health services, the court *a quo* was persuaded by the observations by the UN Agencies reports that setting the age of sexual consent for children higher than the impugned law allows would result in caregivers and institutions being disempowered from responding to adolescents sexual and reproductive health issues because they would fear being in conflict with the law that criminalizes such behaviour. It accepted this observation as the basis of its decision.

Later on in the judgment the court *a quo* expanded on its views in this regard by expressing unfavourable views against laws that seek to set "a high age of consent" as such laws are often used to curb adolescent and women's agency. It reiterated its earlier finding that adolescents have to be equipped with the necessary information that empowers them to protect themselves from the risks of early sexual activities for when left to deal with these issues on their own, they tend to engage in more risky behavior and exhibit poor decision making skills. It was thus its view that equipping children with the necessary information would strike a fine balance

between their best interests and their enhanced protection. In this regard, the court adopted wholesale the submissions by the first respondent on adolescent sexuality and that affording them adequate and appropriate sexual and reproductive health information was adequate protection for them against sexual exploitation.

The need to enable and allow adolescents to make choices as to when and with whom to have sexual relations dominated the reasoning of the court *a quo* to the exclusion of the real issue. As indicated above, and respectfully so, the court *a quo* set its inquiry too widely and, in the process, its compass would most of the time veer from directing it to the real issue that was before it. Because it had set out to examine world-wide trends in settling the age of marriage, an issue that was clearly not before it, the court *a quo* saw the applicants' case as seeking to conflate the age of marriage with the age of consent to sexual activities and held thus:

> "..... efforts to conflate the age of marriage with the age of sexual consent can be particularly harmful for girls as they can deny them the right to make decisions about whether, when and with whom to have sex. They can also stigmatize as criminals individuals who have sex before marriage and increase barriers to accessing sexual and reproductive health services."

The court *a quo* however accepted that "there should be penal provisions in our statutes to deal with adults who have consensual sexual activity with children aged between 16 and 18 years." This finding by the court *a quo* was apparently made oblivious to the fact that this in essence was at the heart of the application which the court went on to dismiss.

In answer to the question whether the impugned law was in violation of the constitution or *ultra vires* the Constitution as the court *a quo* put it, the court referred to the many findings it

had made and which I have detailed above. It specifically found that the Code does not in any way violate children's rights to dignity and that the relevant law was meant to fulfil children's rights to health care as guaranteed in the Constitution.

As its *ratio decidendi* perhaps, and in dismissing the application, the court *a quo* expressed itself thus:

> "In this case, the applicants are targeting the provisions of the Criminal Law (Codification and Reform) Act as being unconstitutional in its interpretation of child or young person. They forget that there are a plethora of other Acts that define child that is a boy/girl and young person in the same manner that is not consistent with the definition given in the Constitution. Even if this court is to declare the definition in s 61 or 70 of the Code unconstitutional, what is going to happen to the definitions in other statutes?.....
>
> Therefore, the mischief which the applicants want to be corrected cannot be corrected by merely declaring ss 61 and 70 of the Code as unconstitutional. It will only amount to a patching exercise. A wholesome approach is required. The solution lies in harmonizing the current statutes with the Constitution. Even after harmonization it is my considered view that this will not *per se* protect the adolescents. What is required is a strong multi-sectorial approach in educating the girl or boy child of the evils of indulging in early sexual activities without the necessary precaution. For the above reasons I will dismiss the application with costs."

It thus found that the impugned law was not unconstitutional because it was not the only law that violated the Constitution. It also found that the impugned law was not unconstitutional as declaring it so would not in itself afford effective protection to children against the risks of indulging early in sexual activities.

Being seized with a constitutional issue, the court *a quo* did not at any point in its judgment attempt to interpret the relevant constitutional provisions and establish what the law on the rights of children provides.

The appeal

Dissatisfied with the order dismissing the application with costs, the appellant noted this appeal.

In the notice of appeal, the appellant raised three grounds of appeal as follows:

1. The court *a quo* grossly erred and misdirected itself in failing to hold that the age of sexual consent in Zimbabwe should be eighteen given the provisions of s 81(1) of the Constitution.
2. Put differently, the court *a quo* erred in failing to hold that the current age of sexual consent set at sixteen by s 70 of the Criminal Code, [*Chapter 9.23*] was inconsistent with s 81 (1) (e) ; 81 (1) (f) 81 (2) and ss 51 and 53 of the Constitution of Zimbabwe.
3. The court *a quo* erred in awarding costs against the applicants in a constitutional matter of public importance.

The first and second grounds of appeal raise the same issue. It is a very narrow issue. It is whether the impugned law is inconsistent with the provisions of the Constitution as alleged by the appellant or at all. The issue is neither a debate on whether the age of consent to sexual activities should be raised from 16 to 18, a question that consumed the court *a quo*, nor the complex and broader biological-social-moral issue that questions the age at which children should be allowed to have sexual relationships with each other and/or with adults. The third ground of appeal is clear and straightforward. It challenges the award of costs *a quo*.

Oral arguments

Mr *Biti* for the appellant raised one simple argument. After correctly identifying the issue before the Court as the constitutionality or otherwise of s 70 and other related sections of the Code that prohibit sexual relations with young persons, he argued that the definition of young person in the Code is in conflict with the provisions of s 81 (1) (e) of the Constitution which fixes the age of protection from sexual exploitation for all children at eighteen.

In attacking the correctness of the decision *a quo*, Mr *Biti* pointed out that the court made findings of fact in favour of the respondents on evidence that the respondents had not placed before it. I have referred to this observation above, expressing my view that the findings of fact, even if they had been made on evidence properly before the court, did not colour or flavour the issue that was before the court one way or the other. For the avoidance of doubt, however, I do not place any weight on such findings as they were made in an irregular fashion.

Responding to interjections by the Court, Mr *Biti* accepted that the development of children is evolutionary and that, as they grow older, they interact and respond to the world around them. He further accepted that later, during adolescence, children should be able to explore and understand their bodies. He however maintained his argument that the Constitution has pre-set the age at which children should be protected from harmful sexual activities.

In further engagement with the court, Mr *Biti* submitted that s 81(1) of the Constitution protects all children from all sexual activities. To hold that it only protected children from sexual exploitation would, in his view, be a narrow construction of the provisions of the Constitution.

In apparent reference to the issue of children engaging in sexual activities with their peers from an early age, Mr *Biti* submitted that the legislature must deal with the issue of children having sexual relations with other children and other related issues, such as child pornography and access to harmful sexual content by children on the internet, for example, by enacting a Children's Protection Act.

It was Mr *Biti's* further submission that expert evidence is necessary before the law can strike a fine balance between the rights of children to dignity on the one hand and benevolent paternalism on the other which is necessary to protect them from making choices that may be harmful to their interests due to immaturity and youthfulness. In addition to expert evidence, he submitted that the widest stakeholder input must be sought during the crafting of a law that seeks to strike this balance. His suggestion was that churches, traditional leaders and a wide spectrum of societal representatives be engaged to input into such a law.

In defending the correctness of the decision *a quo*, Mr *Magwaliba* argued that the matter that was before the court *a quo* and is before us is sociological in nature and required the applicants to have placed expert evidence before the court which evidence the appellant did not tender. In the absence of such evidence, it was his submission that the court *a quo* correctly researched on its own to enable it to come to the correct decision. In this regard, he referred the court to *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others* CCT 12/13 [2013] ZACC 35, in which the appellants

therein had led *a quo* expert evidence from a child psychiatrist and a clinical psychologist specializing in child mental health on the sexual development of children.

Mr *Magwaliba* further submitted that the matter raised by the application was not for the Court to draw the line and determine the appropriate age at which children should be allowed to engage in sexual activities with their peers and/or with adults, but was a matter for the whole community of Zimbabweans to debate and agree upon. It was his further view that placing that age below eighteen would not be inconsistent with the Constitution as it is within the competence of the legislature to identify groups of children that are especially vulnerable and deserve protection.

In defending the impugned law, Mr *Magwaliba* submitted that children above the age of sixteen are capable of meaningfully consenting to sexual conduct. The law allows them to make choices and therein lies their protection. Thus, his argument continued, the difference in the definition of young person in the law to exclude children between sixteen and eighteen is by design. It is meant to afford such children a measure of choice and thereby uphold their right to personal dignity.

Upon the interjection of the court, Mr *Magwaliba* conceded that the impugned law pre-dates the adoption of the Constitution and so does the Children's Act referred to in the judgment *a quo*. He further conceded that the Children's Act defines a child as a boy or girl under the age of sixteen and that this could possibly have informed the definition of young person in the

impugned law. As such, what was required was a simple exercise of aligning the impugned law to the Constitution.

Again, in an engagement with the court, Mr *Magwaliba* argued that the alleged discrimination of children by age in the impugned law, if the court was inclined to make that finding, is permissible by virtue of s 86 of the Constitution which allows discrimination in terms of a law of general application that is necessary in a democratic society based on openness, justice, human dignity, equality and freedom. When it was brought to his attention that the impugned law, as read with the decision of this Court outlawing child marriages, meant that children in the sixteen to eighteen year bracket were not only left without legal protection against sexual abuse and exploitation but could not lawfully marry if the girl child fell pregnant, *Mr Magwaliba*, could only submit that there was adequate protection for all children in the current law without elaborating further.

In apparent response to the argument by Mr *Biti* that child sexual activity of all colour and shades should be outlawed following the outlawing of child marriages, Mr *Magwaliba* argued that there is no basis in our law for holding that sexual activities belong to marriages only.

Regarding the argument that the impugned law violated the rights of children to access health care services, Mr *Magwaliba* submitted that the fixing of the age of consent to sexual activities does not in any way affect the rights of children to access health care services as guaranteed by the Constitution. This was his position notwithstanding the observations that care givers are reluctant to offer their services to children below the age of consent for fear of violating

the law and, conversely, that children below the age of consent are scared to seek such services for fear of being labelled "too young" to need such services.

It was Mr *Magwaliba's* final argument that the fixing of the age of consent at sixteen was in the best interests of the children as it afforded children above that age the opportunity to make choices and to explore their sexuality.

The law

The issue that is before this Court is whether the law in s 70 and other related sections of the Code which create offences prohibiting extra marital sexual intercourse and the performing of indecent acts with young persons, as read with s 61, are in conflict with s 81 (1) and (2), s 70, s 56 and s 53 of the Constitution. Put differently, the issue is whether the impugned law is inconsistent with the Constitution as alleged or at all.

The issue is neither novel nor complex. It is an issue that involves an interpretation of the relevant provisions of the Constitution and comparing the effect of the impugned law on such provisions, properly construed.

There is an expansive body of jurisprudence from this jurisdiction and beyond on the approach that a court must take when determining whether a statute or other law is in conflict with the Constitution. One begins with an interpretation of the relevant provisions of the Constitution. The purpose of interpreting the Constitution first is to set the framework, the backdrop, or the yardstick against which the impugned law will then be examined or measured. One starts with a

discernment of the law. (See *Zimbabwe Township Developers (Pvt) Ltd v Lous' Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 383 F; and *Democratic Assembly for Restoration and Empowerment & Ors v Suanyama* CCZ 9/18).

In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The Constitution is but a statute. It is however settled that in interpreting constitutional provisions, the preferred construction "is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose". (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope.

After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within.

The presumption in favour of constitutionality is entrenched in our law.

As the next and final logical step, the Court must then examine the effect of the impugned law on the fundamental right or freedom in question. If the effect of the impugned law is to abridge a fundamental right or freedom or is inconsistent with the provisions of the Constitution providing for the right or freedom, the object or subject matter of the impugned law will be less important or irrelevant. (See *In re Mhunhumeso* 1994 (1) ZLR 49 (S)).

If the court finds the impugned law to infringe upon a fundamental right or freedom or to be inconsistent with the provisions of the Constitution on a fundamental right or freedom, the court must proceed to determine whether the infringement or inconsistency is permissible in terms of s 86 (2) of the Constitution.

The step by step approach that I have laid out above is to be found in a line of cases that includes *Zimbabwe Township Developers (Pvt) Ltd v Lous' Shoes (supra); In re Mhunumeso (Supra) James v Zimbabwe Electoral Commission and Others* 2013 (2) ZLR 659 (CC) and *Democratic Assembly for Restoration and Empowerment & Ors v Saunyama (supra).*

Analysis

The court *a quo* did not at any stage advert to or take the approach set out above. It did not seek guidance from any of the many cases in which the approach has been discussed. In particular, the court *a quo* did not seek to interpret s 81 (1) of the Constitution to give it its true meaning before upholding the constitutional validity of the impugned law. Thus, there was no debate in the judgment of the content of the fundamental right or freedom that was allegedly infringed and the extent of the infringement if any. How the court, in the circumstances, proceeded

to uphold the constitutional validity of the impugned law without first interpreting the Constitution becomes incomprehensible. As this court stated in *Democratic Assembly for Restoration and Empowerment & Ors v Saunyama (supra)*:

> "The Constitution is properly interpreted first to get its true meaning. Only thereafter is the challenged legislation held against the properly constructed provision of the Constitution to test its validity"

Having erroneously overlooked the supremacy of the Constitution and the need to interpret it first in the matter that was before it, the court *a quo*, somewhat convolutedly reasoned in the concluding paragraph of its judgment:

> "... the mischief which the applicants want to be corrected cannot be corrected by merely declaring ss 61 and 70 of the Code as unconstitutional."

It erroneously gave supremacy to the provisions of the Code and the object and subject matter of the impugned law.

The court thus shied away from its primary role of declaring itself on the constitutionality or otherwise of the impugned law. This was the sole issue that was squarely before it and, by deliberately avoiding it, the court *a quo* fell into a grave error. It ended up on a frolic of its own, deciding on whether or not laws alone can stop adolescents from engaging in sexual activities.

Thereafter, the court sought to justify the continued sufferance of the impugned law on the basis that the solution to the many issues raised in the application was to be found possibly

in harmonizing with the Constitution all the current statutes that defined a child as a boy or girl under the age of sixteen.

In holding that the impugned law was justifiable, the court *a quo* did not go anywhere near invoking the provisions of s 86(2) of the Constitution or the common law principles enunciated in the long list of cases that I have referred to above.

Section 86(2) of the Constitution, which embodies the common law, provides for the limitation of fundamental rights in terms of laws of general application and to the extent that the limitation is fair , reasonable and necessary in a democratic society.

In the absence of a prior finding that the impugned law did in fact infringe children's fundamental rights as alleged by the applicants, a justification of the impugned law on any basis was idle.

Curiously, the court *a quo* justified the current law on the basis that it was similar to other laws that also contradicted the Constitution and held that a wholesale alignment of all such laws was the answer to the mischief that the applicants sought to cure. The court *a quo* even doubted the efficacy of the constitutional alignment exercise as, in its view, this would not stop adolescents from engaging in sexual conduct.

On the basis of the above, the decision *a quo* cannot stand.

I accordingly set it aside.

Having set aside the decision of the court *a quo* it remains for me to determine the matter in accordance with the settled approach, which I proceed to do hereunder.

The constitutional provision.

Section 81 (1) of the Constitution provides that:

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

(a) .....
(b) .....
(c) .....
(d) .....
(e) to be protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse."
(f) .....
(g) .....
(h) .....
(i) .....

(The other rights provided for under the section are not material in the determination of this appeal and have been excluded for that reason.)

There is no ambiguity in the language that has been employed in the drafting of the section which is an amalgam of the age of majority provision in this jurisdiction and the rights that are guaranteed specifically to children. Without specifically defining the term "child", the section provides by way of reiteration, that a child is a boy or girl below the age of eighteen.

The significance of the first part of the provision is the fact that it settles the definition of the term "child" for any other law or practice in the jurisdiction as a boy or girl under the age

of eighteen, and any law, practice, custom or conduct, that defines a child differently becomes *ipso facto* inconsistent with the Constitution in that regard and to that extent.

The second import of the section is that it bundles together a number of rights that attach specifically to children. These are in addition to the rights in *Chapter 4* of the Constitution that are guaranteed to all persons, children included, unless such are lawfully limited and are specifically derogated from by the status of children as minors or non-adults. Children are in most instances independent right-bearers.

Section 81(1) sets out a number of rights that attach to children without giving much content to the rights so set out. Whilst the section does not proceed to provide that the rights so provided will be fleshed out in an Act of Parliament, practically, this is the common law route and practice of giving life to the Constitution which this jurisdiction has invariably followed in respect of a number of broad constitutional provisions. It is however common cause that currently there is no single Act of Parliament that downloads the provisions of s 81(1) of the Constitution and one has to look at a number of Acts to find the law that gives effect to these rights. One such Act that gives effect to a part of the provisions of s 81(1) (e) of the Constitution is the Code, which in its ss 61, 70 and other related sections, criminalizes certain sexual activities with children under the age of sixteen.

The Constitution provides in the relevant part of s 81 (1) that every child must be protected from sexual exploitation among other forms of abuse.

The content of the right

As indicated above, the court *a quo* did not at any stage debate the content of the right that is granted to all children by s 80(1)(e) of the Constitution.

The term "sexual exploitation" has not been defined for the purposes of the relevant section.

The ordinary meaning of the word "exploitation" is "taking advantage of." In its widest sense therefore, sexual exploitation is taking advantage of a child's consent to sexual conduct. Whilst no expert evidence was placed before the court *a quo* in this regard, I will accept the views expressed by the respondents before that court to the effect that "young persons lack understanding of sexual behaviour, the context of normal sexual relationships and knowledge of the consequences of sexual intercourse". The appellant did not challenge this assertion and the views expressed by the respondents in this regard appear to me to aptly define the rationale behind the purpose of the impugned law.

The Code provides in section 70 that:

"(1) Subject to subs (2), any person who—

(a) has extra-marital sexual intercourse with a young person; or

(b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or

(c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act; shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be,....."

Whilst s 76 provides:

"**Complicity in sexual crimes**

For the avoidance of doubt it is declared that any person who

(*a*) being the owner or occupier of any premises, knowingly permits another person on the premises to commit rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person, sodomy, bestiality or sexual intercourse within a prohibited degree of relationship; or

(*b*) detains a person with the intention that a crime referred to in para (*a*) should be committed by another person against the person so detained; may be charged with being an accomplice or accessory to the commission of the crime concerned, or with kidnapping or unlawful detention, or both."

I also include in this debate the provisions of s 83 which make it an offence for any person to procure children below the age of sixteen for the purposes of prostitution and the provisions of s 86 which make it an offence for any person to permit children under the age of sixteen to remain on his or her premises for the purposes of sexual activities.

I repeat once again that the provisions of s 70 (1) (a) must always be read as amended by the decision of this Court in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs (supra)*.

Without therefore in any way attempting to exhaustively define the content of the fundamental right that is granted to all children by the relevant part of s 81(1)(e), it suffices for the purposes of this judgment to accept that the crimes or conduct that are described in ss 70, 76, 83 and 86 of the Code afford examples of the conduct that amounts to the sexual exploitation of children and from which children should be protected.

The infringement

The impugned law is undoubtedly the only law that purports to protect children from sexual exploitation in this jurisdiction. The respondents, as custodians and administrators of a number of laws dealing with children's rights, did not point us to any other law or additional laws enacted for the same purpose. It was not their argument that children may have recourse to another law that protects them from sexual exploitation as demanded by the Constitution.

The appellant argues in the main that the constitutional imperative in s 81 (1) (e) is that every child must be protected from sexual exploitation. The Code, in the impugned sections, protects some and not every child. It leaves out the sixteen to eighteen year old children. In this regard, it is inconsistent with the provisions of the Constitution and infringes the rights of the children left out of the protective ambit of the law.

I agree.

The effect of the impugned law is not only to fail to protect those children that are between sixteen and eighteen, it particularly fails to protect all children in child marriages. The impugned law denies some children the protection that the Constitution demands. It cannot therefore "disobey" the Constitution and hope to remain constitutional. As was stated in *In re Mhunhumeso* (*supra*):

> "The test in determining whether an enactment infringes a fundamental freedom is to examine its **effect** and not its object or subject matter. If the **effect** of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant." (The emphasis is not mine).

This is why I had difficulties in appreciating the argument by *Mr Magwalaiba* that:

> "..... the placing of that age (the age of consent) below 18 would not be inconsistent with the Constitution as it is within the competence of the legislature to identify groups of children that are especially vulnerable and deserve protection."

The Constitution has already spoken and has supremely demanded that every child be protected. There is therefore no room to leave some children out of the protective tent.

In holding as I do, it is not being suggested for a moment that children of all ages are entitled to the same protection. The criminal law has for ages differentiated children by age for the purpose of ascribing criminal intention to children in conflict with the law. Similarly, the criminal law has differentiated the gravity of sexual offences committed upon and with the consent of children, using the age of the child to define the offence.

The point made by the application *a quo*, which I fully agree with, is that all children must be protected from sexual exploitation as demanded by the Constitution. This is supremely imperative even if the levels of protection may decrease with age to recognize that the development of a child is evolutionary and, as he or she grows older, a child interacts and responds to the world around him or her such that later, during adolescence, he or she should be able to explore and understand his or her body.

The impugned law does not offer any protection whatsoever to children between sixteen and eighteen, even in an attenuated form. It does not acknowledge them at all. More importantly in my view, the impugned law does not offer any protection to children in child marriages. It remains a complete defence under the impugned law that the accused is married to the child.

Whilst it cannot be denied that raising the age of consent in such a way that it protects all children will have serious impact on the "Romeo and Juliet" relationships, fear of that impact cannot derogate from the need to protect all children from sexual exploitation in obedience to the constitutional imperative in s 81(1)(e). Child –upon- child sexual exploitation must be dealt with in accordance with a law that recognizes the rights of all children as set out in the Constitution. This may entail the enactment of a comprehensive Children's Act as suggested by *Mr Biti* in his submissions.

Further, it cannot also be denied that there is some confusion around the age of consent and the rights of children to health care services regarding their reproductive health. The paradox is that whilst it is highly desirable that children should stay away from sex until they are adults, the lived reality may be otherwise. Children who have sexual relations still have the right to health care services notwithstanding their youthfulness. Efforts to accommodate their health care services needs must be scaled up at the same time that laws to protect them from sexual exploitation are made to comply with the Constitution. Health care providers need to be empowered by the law to provide sexual and reproductive health services to children in need of such services without regarding them as being too young to need such services. This is an issue of law development generally with which I will not further burden this judgment.

Returning to the issue before us, I also note that we were not directly addressed on the presumed constitutionality of the impugned law. Nevertheless, I have examined the law as I am enjoined to, to establish if it can be read in a manner that is consistent with the Constitution.

I have not succeeded.

As stated elsewhere above, not only does the impugned law fail to protect all children. it particularly fails to protect children who are in child marriages notwithstanding the age of the child concerned. In view of the decision of this Court in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs (supra)*, the entire law becomes inconsistent with the Constitution and cannot be saved.

Having found that the impugned law is inconsistent with the provisions of s 81 (1)(e) of the Constitution and infringes the rights to protection from sexual exploitation of children between sixteen and eighteen years and of all children in child marriages, it is not necessary that I proceed to determine whether the law violates any other right guaranteed to children by the Constitution. Similarly, it is not necessary that I determine whether the impugned law is in the best interests of children. It clearly cannot be.

I now turn to examine whether the denial of the right to protection to some of the children is justifiable in terms of the Constitution or at common law.

Is the infringement fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom?

As stated above, the infringement *in casu is* a complete denial of the right of protection from sexual exploitation to children aged between sixteen and eighteen and to all children in child marriages.

In my view, where the infringement of a fundamental right is a complete negation of the right, there hardly exists any scope for arguing that such complete negation of the right is a justifiable limitation of the right under the common law and/or s 86 (2) of the Constitution.

Although this is not clearly articulated as such in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs (supra)*, this Court did not seek justification of the law on child marriages under s 86(2) because the law permitting such marriages was in direct conflict with the provisions of the Constitution on the issue. It completely obliterated the rights of children to be protected from any form of marriage. In consequence whereof the Court held that:

> "The effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. **There are no provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the ACRWC. The prohibition affects any kind of marriage whether based on civil, customary or religious law. The purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage**". (The emphasis is mine).

It was thus the view of the Court further in the judgment that:

> "....section 78(1) of the Constitution abolishes all types of child marriage and brooks no exception or dispensation as to age based on special circumstances of the child."

No argument was pressed on us that there is a basis for justifying the complete denial of protection to children above sixteen years and to children in child marriages the protection that is demanded by s 81 (1) (e) of the Constitution. There can be no such justification in the face of the clear provisions of the Constitution that demands that every child be protected from sexual exploitation.

Disposition

Before disposing of this matter, there is one issue that I must advert to. It is the issue of the jurisdiction of this Court.

This Court sat as a three-member panel. The issue of the jurisdiction of the court so composed did not arise. It does not arise. I merely raise it to put it beyond doubt that this Court was imbued with the relevant jurisdiction to hear and determine the appeal.

Section 166(3) (a) of the Constitution provides that cases concerning the alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 must be heard by all the judges of the Court.

The application *a quo*, whilst brought in terms of s 85 (1) of the Constitution, which is essentially a provision for the enforcement of fundamental rights and freedoms, was not an brought primarily as an application alleging the violation of the fundamental rights and freedoms of children between the ages of sixteen and eighteen and neither was the appeal. The main thrust of the application was to challenge the definition of "child" in the impugned law as being

unconstitutional. The appeal was also argued on the narrow basis that had been taken *a quo*. In writing out this judgment, it became necessary to pronounce on the rights of children as guaranteed by s 81 (1) (e) as a way of demonstrating how that the impugned law falls short of the constitutional imperatives on the rights of all children. The provisions of s 166 (3) (a) of the Constitution, which the Court was keenly aware of, were thus not overlooked.

On the whole, this appeal must succeed.

Regarding costs, there is no justification that we depart from the general rule against awarding costs in a constitutional matter. None was argued before us.

Whilst it presents itself clearly to me that the impugned law is inconsistent with the Constitution, in that it fails to afford any protective cover from sexual exploitation as demanded by s 81(1)(e) of the Constitution to children between sixteen and eighteen and to children in child marriages, the appropriate relief to grant in this appeal has caused me some anxious moments.

The protection that is afforded to all children below sixteen, whilst it can be improved upon, is not unconstitutional. It must be saved in any new law that the respondents will have to put in place to obey the demands of the Constitution.

On the other hand, the law that affords a defence to persons accused of having sexual intercourse with children on the basis that they are married to such children is unconstitutional and

unconscionable and must be struck down immediately. It cannot be saved even if the respondents are given time before the order of constitutional invalidity takes effect.

I cannot have my cake and eat it. I cannot save and preserve one part of the law and at the same time declare part of the same law immediately invalid. It is not severable.

The essence of the order that I make in this matter was aptly summarized by this Court in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs (supra)* as follows:

> "The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that, absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or child bearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible without such people being called upon to take responsibility and immediately marry them. **Thus, there is an urgent need, while respecting children's sexual rights especially as between age- mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions".** (The emphasis is mine.)

The adjustments required to align the provisions of the Code with s81 (1) (e) of the Constitution appear to be fairly straight forward. They would entail firstly, the amendments of the definition of "young person" in s61 of the Code to include all children as defined in the Constitution and secondly, the deletion of the word "extra-marital" in s70 (1) (a) of the Code.

I accordingly make the following order:

1. The appeal is allowed with no order as to costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

"(1) The application is allowed with no order as to costs.

(2) The definition of "young person" in s 61 of the Criminal Law Codification and Reform Act [*Chapter 9.23*] is unconstitutional and is hereby set aside.

(3) Sections 70, 76, 83 and 86 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] are declared unconstitutional and are hereby set aside.

(4) The orders of constitutional invalidity made in paras (2) and (3) above are hereby suspended for 12 months from the date of this order to enable the respondents to enact a law that protects **all children** from sexual exploitation in accordance with the provisions of s 81 (1) (e) of the Constitution of Zimbabwe."

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

Tendai Biti Law, appellant's legal practitioners

The Attorney-General's Office, respondents' legal practitioners